WRIT PETITION

Before Mr. A.K. Patnaik Chief Justice and Mr. Justice J.K. Maheshwari

11 May, 2007

S.P. ANAND ....Petitioner*

v.

STATE OF M.P. & anr. .... Respondents

A. Constitution of India, Article 21, Prisons Rules, M.P., 1968, Rule 30(1)–Overcrowding of Jails–Rule 30(1) provides that 41.80 meters should be taken as standard meter space per prisoner–Convict lodged in jail is not denude of all his fundamental rights but also doesnot enjoy all his fundamental rights like other persons–State Govt. in its reply admitted that jails are overcrowded and standard meter space per prisoner cannot be provided–However new jails are under construction to meet such situation–State Govt. to continue with construction and expansion of jails to discharge its obligation under Article 21 of Constitution of India.

B. Constitution of India, Articles 14, 21 and 23, Prisons (Madhya Pradesh Amendment) Act, 1999, Sections 35, 36 and 36-A, Prisons Rules, M.P., 1968, Rules 2(J), 647 and 647-B–Equitable Wages payable to prisoners–Payment of Rs. 8/- and Rs. 10/- per day to unskilled and skilled labour–Stand of State Govt. is that since work available in jail is not enough to provide more than four hours, therefore, wages fixed are for four hours work–Equitable wages should be paid to prisoners for the work done by them–Labour exacted from prisoners is classified as hard, medium or light–Task cannot be reduced without sanction of Inspector General–Time of nine hours of steady work fixed by State Govt. cannot be reduced to four hours without sanction of Inspector General–Prisoners undergoing rigorous imprisonment have to be given priority for employment over prisoners undergoing simple imprisonment–Contention of respondent that enough work is not available in jail to provide employment for more than four hours a day cannot be accepted–Equitable wages can be worked out after deducting expenses incurred on food, clothing and other amenities–Rates of wages fixed by order datd 30.6.1999 was prior to prison (Madhya Pradesh Amendment) Act and amendment in rules–State Govt. to notify wages afresh in accordance with section 36-A of Act and 647-B and 2(J) of Rules.

C. Constitution of India, Articles 14, 21 and 23, Prisons Rules, M.P., 1968, Rule 2(J)–Wages–Wages for the services or tasks performed by

* W.P. No. 811/1999 (I)

prisoners must have some rational basis–Minimum wages fixed for similar task/service can constitute rational basis for determination of wages–Deductions to be made towards food, clothing and other amenities excluding medical facility as it is the obligation of the State–Equitable wages can be fixed after making such deductions and be notified by State Govt. under 647-B(1) of Rules from time to time–Wages should be reasonable as they are not only to take care of expenses of prisoners in jail but to provide for future rehabilitation and compensation to victims.

D. Constitution of India, Articles 14, 21 and 23, Prisons (Madhya Pradesh Amendment) Act, 1999, Section 36-A, Prisons Rules, M.P., 1968, Rule 647-B–Compensation payable to Victims–50% of the wages earned by prisoner in a month to be deposited in common fund for payment of compensation to deserving victim–Object to compensate the victim or his family out of common fund is not being effectively achieved as affidavit filed by State shows a very meager amount has been disbursed to victims–Deserving Victim to be determined in consultation with Court in which prisoner is being tried and a human right activist in the area to be nominated by State Govt.–Deserving victim can be paid compensation from common fund whether deductions from the wages of prisoner who has committed the offence have been made or not–Identification of victim and payment of compensation need not await the conclusion of the Trial–Directions issued.

A reading of the rules quoted above would show that in every sleeping ward a certain amount of superficial area, cubic space and lateral ventilation must be allowed for each prison and the minimum allowances have been indicated in the chart below Rule 22. Rule 29 further provides that cells for separate cellular and judicial solitary confinement as per standard plan shall be provided in all jails and each cell shall have a yard attached to it where the prisoner can have the benefit of fresh air without having the means of communication with any other prisoner. Rule 30 contains the instructions to be followed in designing jail buildings and one of the instructions in Rule 30 is that 41.80 square meters should be taken as the standard meter space per prisoner. Other details regarding designing of jail building have also been mentioned in Rule 30. The respondent No. 3 in his affidavit filed pursuant to order dated 20.2.2007 has stated that new jails at various places in the State are being made so that the instructions in Rule 30 of the Rules are followed. In para 6 of the affidavit, the respondent No. 3 has fairly conceded that at the moment the prisoners cannot be provided with the space of 41.80 square meters per prisoner and in para 8 of the affidavit, the respondent No. 3 has stated that the State Government has visualized

this position and prisoners in the overcrowded jails are being transferred to other jails were they can be accommodated in a better manner. In para 9 of the affidavit, the respondent No. 3 has stated that in the existing jails some additional new barracks have been constructed with a view to provide requisite space for the prisoners and in order to accelerate the construction work, the State Government in the Jail Department has already issued instructions to the Executive Engineers (PWD). The State Government will have to continue with the construction and expansion of jails to discharge its obligation under Article 21 of the Constitution and under the Act and the Rules towards the prisoners lodged in the jails of Madhya Pradesh.

We further find that Rule 2(J) defines "wages" to mean the amount of money earned by a prisoner in a day in lieu of the task or the service assigned to him/her in the jail by the Superintendent of Jail. Sub-rule (1) of Rule 647-A introduced by the notification dated 19.4.2001 further provides that wages for the task as provided in Rule 647 and for rendering services as provided in these rules shall be fixed and notified by the State Government from time to time. The expression "from time to time" shows that the State Government has to revise the wages as and when the price index or the cost index increases Sub-rule (2) of Rule 647-B states that after considering the volume of work available in the jail for the tasks mentioned in Rule 647 and the services as provided in the rules, the Superintendent shall provide employment to the prisoners and the priority for the selection of prisoner in the order mentioned therein. It will be clear from sub-rule (2) of Rule 647-B that the prisoners undergoing life imprisonment or rigorous imprisonment and other prisoners undergoing rigorous imprisonment have to be given priority for employment and the prisoners undergoing simple imprisonment are to work only when they are willingly ready to work and in Sub Jails under trial prisoners who are willingly ready to render their services may be employed if the prisoners undergoing rigorous imprisonment or simple imprisonment are not available. Since it is compulsory under Section 35 of the Act and Rule 647 of the Rules for all prisoners undergoing rigorous imprisonment to put in labour and prisoners of this category undergoing rigorous imprisonment are likely to be few compared to those undergoing simple imprisonment, it is difficult to accept the contention of the respondents, that the volume of work available in the jail is not enough to provide the prisoners undergoing rigorous employment work for more than four hours in a day.

In sub para (3) of para 51 of the judgment of the Supreme Court in the case of *State of Gujarat* (supra), the Supreme Court has held that it is imperative that the prisoner should be paid "equitable wages" for the work done by them and the Supreme Court has not directed for payment of minimum wages to the prisoners as contended by the petitioner. According to Thomas, J. "equitable wages" payable to the prisoner can be worked out after deducting the expenses incurred by the Government on food, clothing and other amenities provided to the prisoners from the minimum wages

fixed under the Minimum Wages Act, 1948, (para 45). According to Wadhwa, J., the prisoner is not entitled to minimum wages fixed under the Minimum Wages Act, 1948, but there has to be some rational basis on which wages are to be paid to the prisoners (para 77). Rule 2 (J) of the rules, as we have seen, defines wages to mean the amount of money earned by a prisoner in a day in lieu of the task or service assigned to him. So far as prisoners undergoing rigorous imprisonment are concerned, we have seen that under the Rules, the normal period of work cannot be four hours. In some kinds of tasks and services, the period of their employment is nine hours and in other kinds of tasks or services, the employment is as per quantum of work and not as per hours. Wages as defined in Rule 2(J) would thus mean such wages as are payable for the hours of labour or for the quantum of work assigned to the prisoner in the jail. Determination of wages for four hours of work is thus not in accordance with law. Further, the rates of wages of Rs. 8/- for unskilled prisoner and Rs. 10/- for skilled prisoner were fixed by the order dated 30th June, 1999 before Section 36-A was introduced in the Act by the Prison (Madhya Pradesh Amendment) Act, 1999 and before rules were amended by the notification dated 19th April, 2001 to give effect to Section 36-A of the Act. The State Government therefore will have to fix and notify the wages afresh in accordance with Section 36-A and Rules 2(J) and 647-B of the Rules keeping in mind the hours of labour or the quantum of work involved in the tasks or the services assigned to the prisoner.

The wages so determined for the services or the tasks performed by the prisoners must have some rational basis and minimum wages fixed for similar task/ service can constitute a rational basis for determination of such wages. Out of such wages, deductions will have to be made towards food and clothing and other amenities provided to the prisoners, Medical expenses being part of the obligation of the State under Artile 21 of the Constitution as held be the Supreme Court in *Permanand Katara v. Union of India* (supra) and *Pashchim Benga Khet Mazdoor Samiti and Others v. State of West Bengal and another* (supra) cannot be deducted from such wages. After such deductions, equitable wages payable to the prisoners can be fixed and notified by the State Government under sub-rule (1) of Rule 647-B of the Rules from time to time.

Such equitable wages cannot be a pittance and has to be reasonable because under the scheme of Section 36-B and Rule 647-B, such wages are not only to take care of the expenses of the prisoners in the jail but also are to provide for future rehabilitaton of the prisoner as well as compensation to the victims.

The chart would show that as against the deposits made, disbursement to victims has been very meager and the result is that Rs. 4,71,57,687/- is lying in the common fund whereas victims of offences committed by prisoners continue to suffer.

Thus the object of Section 36-A and Rules 647-A and 647-B to compensate

the victim or his family out of the common fund created from part of the wages of the prisoner who has committed the offence is not being effectively achieved.

Unless a deserving victim of the offence is properly identified on the basis of relevant material and he or his family is paid compensation in time, the object of Section 36-A and Rules 647-A and 647-B cannot be realized. Obviously, the victim of the offence the commission of which entailed the sentence of imprisonment to the prisoner can be properly identified by the Court in which the prisoner is tried for the offence on the basis of materials before the Court. Further, whether such victim or his family deserves payment of compensation can be correctly decided if a human right activist in the area sensitive to the needs of the victim or his family is consulted. Accordingly, the State Government in the Jail Department must issue instructions under sub-rule (4) of Rule 647-A that the deserving victims will be determined in consultation with the Court in which prisoner is being tried for the offence and a human right activist in the area to be nominated by the State Human Rights Commission.

We would, however, like to clarify that since Section 36-A of the Act creates a common fund from part of the wages earned by the prisoners for purposes of giving compensation to the deserving victims, it is not to be understood that only when deductions are made from the wages of a particular prisoner who has committed the offence that the victim of the offence committed by him is to be paid compensation. A deserving victim of an offence can be paid compensation out of the common fund irrespective of whether deductions from the wages of the prisoner who commits the offence have been made or not. Similarly the quantum of compensation of be paid to the deserving victim of an offence may not have any nexus with the quantum of deductions made from the wages of the prisoner who committed the offence. The reason for creating a common fund is that the victim and his family may not accept the compensation if they come to know that the compensation has been paid by the prisoner who has committed the offence.

Moreover, identification of the victim or his family and payment of compensation out of the common fund need not await the conclusion of the trial before the Court. The victim of an offence or his family may require compensation immediately after the commission of the offence and in such a case, compensation can also be paid to the victim of the offence or his family as soon as the deserving victim or his family is identified on the basis of materials available before the Court in which the prisoner is being tried for the offence.

(Paras 12, 19, 20, 21, 22, 26, 27 and 28)

Cases Referred :

State of Gujarat and anr. v. Hon'ble High Court of Gujarat, AIR 1998 SC 3164, *Sunil Batra v. Delhi Administration & ors.* AIR 1978 SC 1675, *Smt. Maneka*

Gandhi v. Union of India, AIR 1978 SC 597, *Permanand Katara v. Union of India*, 1989 SC 2039, *Paschim Benga Khet Mazdoor Samity & ors. v. State of West Bengal & anr.*; (1996) 4 SCC 37.

Petitioner in person.

Ashok Kutumbale, Additional Advocate General for the respondents.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** : This is a Public Interest Litigation filed by the petitioner complaining of violation of the fundamental rights of the prisoners lodged in the jails of Madhya Pradesh.

2. The petitioner has alleged in the writ petition that as against the capacity of the jails in Madhya Pradesh to accommodate 15,000 prisoners, there are more than 33,000 prisoners in the jails of Madhya Pradesh and this amounts to violation of fundamental rights of the prisoners and in particular their right to personal liberty and life under Article 21 of the Constitution. The petitioner has also alleged in the writ petition that convicts who have been lodged in the jail have to put in labour but they are being paid a sum of Rs. 1.00 per day which is much less than the minimum wages fixed under the Minimum Wages Act and this is being done in violation of Article 23 of the Constitution which prohibits beggar and other similar forms of forced labour. The petitioner has prayed that the respondents be directed to build-up additional number of jails to accommodate the prisoners in the next ten years and to pay wages as prescribed under the Minimum Wages Act to the convicts.

3. A return has been filed on behalf of the respondents in which the respondents have admitted that there is overcrowding in jails in the State of Madhya Pradesh, but have stated that the State Government has initiated action for construction of new jails. In particular, the respondents have stated that sub-jails have been constructed in Indore/Ujjain circles at Khachrod, Sailana, Neemuch, Susner, Shujalpur, Agar, Bagli, Sonkutch, Dharampuri, Barawaha, Manawar, Maheshwar, Badhnaward, Kasrawal, Mhow, Depalpur, Sanwer and Jawad. In the return, the respondents have also stated that many more sub-jails have been constructed in other circles in the State. The respondents have also stated that the District Jail, Ujjain has been converted into a Central Jail and about 515 prisoners who were earlier lodged in the Central Jail, Indore have been shifted to the Central Jail, Ujjain. The respondents have also stated in the return that a Central Jail has also been constructed at Bhopal for accommodating 3000 prisoners with all facilities. Regarding wages paid to the prisoners, the respondents have stated in the return that the Supreme Court delivered

a judgment *State of Gujarat and another v. Hon'ble High Court of Gujarat*[1] in which guidelines were laid down for determining the wages of prisoners and the State Government constituted a Committee which determined in accordance with the guidelines laid down by the Supreme Court the wages to be paid to the prisoners as Rs. 8/- per half day for every unskilled prisoner and Rs. 10/- per half day for every skilled prisoner after deducting the amounts spent on the prisoners on food, clothes etc. and after deducting some amount for victims of the offences.

4. When the writ petition was taken up for hearing on 20.2.2007, the petitioner brought to our notice the provisions of Madhya Pradesh Prisons Rules, 1968 (for short 'the Rules') made under the Prisons Act, 1894 (for short 'the Act') and particular Rule 30 of the Rules which provided *inter-alia* that 41.80 square meters should be taken as standard meter space per prisoner and accordingly the Court passed orders on 20.2.2007 calling upon the Inspector General of Prisons, the respondent No. 3, to indicate in a short affidavit the actual space per prisoner which is now available as compared to the required space 41.80 square meters per prisoner, as provided in Rule 30 of the Rules. On 20.2.2007, a query was also put by the Court to the learned Additional Advocate General why a half day's wage was being paid to the prisoners and the learned Additional Advocate General submitted that in the prisons where the prisoners are supposed to work, sufficient work is not available so as to absorb them for the entire day. The Court however found that in Rules 10, 11, 12 and 14 of the Rules elaborate provisions have been made for employment of convict labour for construction and repairs of jail buildings in execution of work by the Public Works Department and directed that an affidavit be filed by the respondent No. 3 indicating therein the work that is entrusted to the prisoners in different jails in the State of Madhya Pradesh and in particular whether the convicts are employed in construction and repairs of jail buildings undertaken by the Public Works Department in accordance with the rules.

5. Pursuant to the said order dated 20.2.2007, the respondent No. 3 filed an affidavit annexing thereto tables in Annexure R/1 and Annexure R/2 to show that presently the prisoners could not be provided with the required space of 41.80 square meters per prisoner as provided in Rule 30 of the Rules. Respondent No. 3 however has stated that a number of jails have been constructed keeping in mind the number of prisoners lodged in various jails and the prospective increase in the number of prisoners and even some additional new barracks have been constructed to accommodate the prisoners with intent to provide them requisite space as per the rules. In the affidavit, the respondent No. 3 has also stated that considering the number of prisoners lodged in different jails in the State of Madhya Pradesh, the work in the jails is insufficient and therefore prisoners cannot be kept engaged for the whole day in any work to be done by them. In the affidavit, the respondent No. 3 has

(1) AIR 1998 SC 3164

stated that when the jails or the barracks are being constructed by the Public Works Department, to the extent possible, prisoners suitable to carry out such a work are being employed but not all prisoners can be engaged in such work because of the risk of the prisoners' escaping from the jail. Along with the affidavit, respondent No. 3 has also filed a table Annexure R/5 which shows the amount which has been deducted under Section 36A of the Act form the wages of the convicts. Respondent No. 3 has stated in the affidavit that since substantial amount is available in the fund created under Section 36 A of the Act, there is no impediment to release the amount to the prisoners as per the entitlement.

6. The petitioner appearing in person submitted that under Article 21 of the Constitution no person can be deprived of his personal liberty except according to procedure established by law and Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. He submitted that a person who is convicted for an offence and is detained in prison continues to have fundamental rights under Articles 14 and 21 of the Constitution, though his fundamental rights are curtailed by law. He submitted that in *Sunil Batra v. Delhi Administration and others*[1], the Supreme Court has held that conviction for a crime does not reduce the person into a non-person whose rights are subject to the whim of the prison administration and that the personal liberty of such a person who has been convicted for a crime is only curtailed to a great extent by punitive detention. He further submitted that the word 'law' in the expression 'procedure prescribed by law' in Article 21 of the Constitution has been interpreted in *Maneka Gandhi's* case[2], to mean law which must be right, just and fair and not arbitrary, fanciful or oppressive. He referred to Rules 22 to 30 of the Rules to show the accommodation which has to be provided to the prisoners in the jails and submitted that unfortunately the accommodation as detailed in the Rules is not being provided to the prisoners in jails in Madhya Pradesh.

7. The petitioner next submitted that Clause (1) of Article 23 of the Constitution prohibits beggar and other similar forms of forced labour and further provides that any contravention of the provision shall be an offence punishable in accordance with law and Clause (2) of Article 23 provides that nothing in the Article shall prevent the State from imposing compulsory service for public purposes. He submitted that in the case of *State of Gujarat* (supra), the question for consideration before the Supreme Court was whether it was lawful to employ a person sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not in view of the provisions of Article 23 of the Constitution and the Supreme Court while answering the question in the affirmative held that it was however imperative that the prisoners should be paid equitable wages for the work done by them. He submitted that despite the judgment of the Supreme Court in the case of *State of Gujarat and*

(1) AIR 1978 SC 1675 (2) AIR 1978 SC 597

another v. Hon'ble High Court of Gujarat (supra), the State Government continues to pay meager sums of Rs. 8/- per day and Rs. 10/- per day to an unskilled and a skilled prisoner respectively. He vehemently argued that such pittance paid to the prisoners for their daily labour constitutes breach of their fundamental rights under Articles 14, 21 and 23 of the Constitution. He vehemently argued that prisoners who put in hard labour in the prison should be paid as prescribed under the Minimum Wages Act. He further argued that from such minimum wages the authorities can only deduct expenses towards food and clothing of the prisoners as has been held by the Supreme Court in *State of Gujarat and another v. Hon'ble High Court of Gujarat* (supra), but they cannot deduct expenses towards medical aid to the prisoners because medical aid from the State has been held by the Supreme Court in *Permanand Katara v. Union of India*[1] and in *Pashchim Benga Khet Mazdoor Samity and others v. State of West Bengal and another*[2] as part of the right to life guaranteed to every person under Article 21 of the Constitution.

8. In reply, Mr. Ashok Kutumbale, learned Additional Advocate General relying on the reply and affidavit filed on behalf of the respondents submitted that the jails in the State of Madhya Pradesh are no doubt overcrowded but the State Government has already initiated action for construction of new jails and sub jails in different places in the State of Madhya Pradesh for providing accommodation as mentioned in the rules. He submitted that it will also be clear from the reply and the affidavit filed by the respondents that whenever a jail is found to be crowded the prisoners are being transferred from the crowded jails to jails which can accommodate them. He submitted that since the State Government is already conscious of the problem of overcrowding of the jails and has initiated steps for expanding capacity of jails for accommodating the prisoners, no directions need be issued to the State in this regard.

9. Regarding wages paid to the prisoners, Mr. Kutumbale argued that a prisoner cannot be equated with a person outside the jail and he works only for four hours in a day and therefore he is not entitled to get minimum wages fixed under the Minimum Wages Act. He submitted that expenses towards clothes, food of the prisoners and other amenities provided to them also have to be deducted from their earnings as directed by the Supreme Court in case of *State of Gujarat* (supra). He submitted that as per the judgment of the Supreme Court in the case of *State of Gujarat* (supra), some amount also had to be deducted from the wages for the victims. He submitted that taking all these factors into account, a Committee constituted by the State Government has determined the amount payable to an unskilled prisoner as Rs. 8/- per day and to a skilled prisoner as Rs. 10/- per day. Relying on the affidavit filed by the

(1) AIR 1989 SC 2039 (2) (1996) 4 SCC 37

respondent No. 3, he submitted that it is not feasible to employ the prisoners in all the works of the PWD department in the jails and that the work available in the jails is not enough to provide more than four hours employment everyday to the prisoners and therefore the amount of Rs. 8/- per day and Rs. 10/- per day for unskilled and skilled labour respectively is for the four hours work they actually do.

10. The first issue raised in this PIL is in relation to the inadequate accommodation in the jails of Madhya Pradesh resulting in overcrowding of the jails. Before we deal with this issue, we must be clear that a convict lodged in a jail is not denuded of all his fundamental rights and at the same time he does not enjoy all the fundamental rights like other persons because of the punitive detention in accordance with law. In *Sunil Batra* (supra), D.A. Desai delivering the majority judgment on behalf of the Constitution Bench observed:

> "It is no more open to debate that convicts are not wholly denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and the Constitution. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed (see *Procunier* v. *Martineg)*[1]. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for a crime does not reduce the person into a non person whose rights are subject to the whim of the prison administration and, therefore, the imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards (see *Charles Wolff* v. *McDonnell)*[2]."

Hence a convict lodged in a jail must have reasonable accommodation to live a healthy life and enjoy his personal liberty to the extent permitted by law.

11. Section 59 of the Act provides that the State Government may make rules consistent with the Act *inter alia* for the classification of prisons, description and construction of wards, cells and other places of detention. Accordingly, Rules 22, 29 and 30 have been made by the State Government prescribing the accommodation in the wards, barracks, cells and the jail buildings for the prisoners. These Rules are quoted hereinunder :

> **"22. Capacity of wards.** - In every sleeping wards a certain amount of superficial area, cubic space and lateral ventilation shall be allowed for each prison, and the minimum allowance is stated below :

(1) (1974) 40 L Ed 2d 224 at p. 248. (2) (1974) 41 L Ed 2d 935 at p. 973

	Superficial area Metres	Cubic space Metres	Lateral ventilation Metres
In barracks	10.972	152.400	3.048
In hospital	16.459	274.320	3.048
In cells	22.860	304.800	3.048

Over the door of every ward there shall be hung up on a board in the following form, a statement showing the details in regard to the accommodation :

No.	Measurement	Barracks Accommodation
1.	Length	6. Cubic space.
2.	Breadth	7. At.Sq. metre.
3.	Height to bottom of beam.	8. At cubic metres.
4.	Lateral ventilation area.	9. At sq. metres Lateral ventilation.
5.	Superficial area	10. Number of berths.

29. Construction of according to standard plan : Cells for a separate cellular, and judicial solitary confinement on the standard plan shall be provided in all jails. Each cell shall have a yard attached to it, where prisoner can have the benefit of fresh air without having the means of communication with any other prisoner. In the outer door of the ward attached to each cell an eye-hole shall be made, so that the prisoner can be seen without seeing any one. Each cell shall be provided with the means of communication required by Section 22 of the Act.

30. Instructions to be followed in designing jail buildings : In designing a jail building, the following instructions should be attended to :

(a) 41.806 square metres should be taken as the standard metre space for prisoner. The area within the inner, wall, only deducting that of buildings to which the prisoner are not ordinarily confined should be taken into account in calculating the amount per prisoner.

(b) The minimum distance of any building inside the jail from the outer enclosure wall should be 4.8768 metres.

(c) The minimum height of the circumvallation wall round every jail should not be less than 4.5720 metres.

(d) Distance between the battons on the tiled roof of jail barracks and generally in all buildings or any portions of buildings in which prisoners are ordinarily confined, should not be more than 0.1524 metres.

(e) The District Magistrate should deal with applications for non-agricultural use of lands in the vicinity of jails having regard to the following principles :

(i) Government land within 201.1680 metres of the main jail wall should not be disposed of except on temporary agricultural lease and in the case of privately occupied lands similarly situated permission to build should not be granted when the Inspector General thinks it inadvisable.

(ii) In cases in which permission to build is granted minimum restrictions for the security of the jail administration should be imposed in consultation with the Inspector-General.

(f) No public privies, dye works, sewage drains other, public nuisances should if possible be allowed near the prison."

12. A reading of the rules quoted above would show that in every sleeping ward a certain amount of superficial area, cubic space and lateral ventilation must be allowed for each prison and the minimum allowances have been indicated in the chart below Rule 22. Rule 29 further provides that cells for separate cellular and judicial solitary confinement as per standard plan shall be provided in all jails and each cell shall have a yard attached to it where the prisoner can have the benefit of fresh air without having the means of communication with any other prisoner. Rule 30 contains the instructions to be followed in designing jail buildings and one of the instructions in Rule 30 is that 41.80 square meters should be taken as the standard meter space per prisoner. Other details regarding designing of jail building have also been mentioned in Rule 30. The respondent No. 3 in his affidavit filed pursuant to order dated 20.2.2007, has stated that new jails at various places in the State are being made so that the instructions in Rule 30 of the Rules are followed. In para 6 of the affidavit, the respondent No. 3 has fairly conceded that at the moment the prisoners cannot be provided with the space of 41.80 square meters per prisoner and in para 8 of the affidavit, the respondent No. 3 has stated that the State Government has visualized this position and prisoners in the overcrowded jails are being transferred to other jails where they can be accommodated in a better manner. In para 9 of the affidavit, the respondent No. 3 has stated that in the existing jails some additional new barracks have been constructed with a view to provide requisite space for the prisoners and in order to accelerate the construction work, the State Government in the Jail-

Department has already issued instructions to the Executive Engineers (PWD). The State Government will have to continue with the construction and expansion of jails to discharge its obligation under Article 21 of the Constitution and under the Act and the Rules towards the prisoners lodged in the jails of Madhya Pradesh.

13. The second issue raised in this PIL relates to the meager wages paid to the prisoners detained in the jails of Madhya Pradesh. In the case of *State of Gujarat* (supra) cited by the petitioner, the question raised before the Supreme Court was whether imposition of hard labour on a prisoner sentenced to rigorous imprisonment was violative of Clause (1) of Article 23 of the Constitution which prohibited beggar and other similar forms of forced labour. K.T. Thomas, J., in his judgment, was of the opinion that the imposition of forced labour on a prisoner being for a public purpose was saved by Clause (2) of Article 23 of the Constitution which provides that nothing in the Article shall prevent the State from imposing compulsory service for public purposes. D.P. Wadhwa, J., in his separate judgment, was of the opinion that since a prisoner is sentenced to undergo imprisonment with hard labour pursuant to orders of the Court in accordance with law, it does not amount to beggar or other similar form of forced labour and as such Article 23 of the Constitution is not attracted. Wadhwa, J. however agreed with the directions issued by Thomas, J in the judgment. M.M. Punchhi, C.J., as he then was, also accorded approval to the directions issued by Thomas, J. There was therefore unanimity amongst the three judges of the Supreme Court on the directions issued by Thomas, J in His Lordship's judgment. Paragraph 51 of the judgment of Thomas, J. in the case of *State of Gujarat* at page 3176 of the AIR contains the directions and is quoted hereinbelow:

> "51. The above discussion leads to the following conclusions :
>
> (1) It is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not.
>
> (2) It is open to the jail officials to permit other prisoners also to do any work which they choose to do provided such prisoners make a request for that purpose.
>
> (3) It is imperative that the prisoner should be paid equitable wages payable to prisoners the State concerned shall constitute a wage fixation body for making recommendations. We direct each State to do so as early as possible.
>
> (4) Until the State Government takes any decision on such recommendations every prisoner must be paid wages for the work done by him at such rates or revised rates as the Government concerned fixes in the light of the observations made above. For this purpose we direct all the State Government to fix the rate of

such interim wages within six weeks from today and report to this Court of compliance of this direction.

(5) We recommend to the State concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode."

14. It will be clear from the directions of the Supreme Court in the case of *State of Gujarat* (supra) that a prisoner sentenced to rigorous imprisonment would be lawfully employed to do hard labour whether he consents to do it or not and it will be open for other prisoners to do any work but they could not be compelled to do hard labour without their consent. The Supreme Court further directed that the prisoners should be paid equitable wages for the work done by them and the State concerned shall constitute a Wage Fixation Body for determining the wages to be paid to the prisoners. The Supreme Court further directed that until the State Government takes a decision on these recommendations, every prisoner must be paid for the work done by him at such rates or revised rates as the State Government concerned fixes in the light of the observations made in the judgment. The Supreme Court also recommended to the State Governments to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to the deserving victims of offences the commission of which entailed the sentence of imprisonment to the prisoner either directly or through a common fund to be created for the purpose or any other feasible mode.

15. It appears from Annexure R/4 annexed to the reply of the respondents that pursuant to the directions of the Supreme Court in the order dated 29.9.1998 in the case of *State of Gujarat* (supra), the State Government constituted a Committee headed by the Additional Chief Secretary (GAD), Government of Madhya Pradesh and on the basis of the recommendations of the Committee made in its meeting held on 17.5.1999, the State Government by order dated 30.6.1999 revised the rates of wages of skilled prisoners engaged in jail industries work for half day per prisoner at Rs. 10/- and for unskilled prisoners engaged in jail services and industries work for half day per prisoner at Rs. 8/- and for prisoners engaged in agriculture work for six hours at Rs. 8/- per prisoner per day. These revised rates of wages were fixed by the State Government as interim wages in accordance with the direction in sub para (4) of para 51 of the judgment in the case of *State of Gujarat* (supra) quoted above until the State Government constituted a wage fixation body for making recommendations for payment of equitable wages for work done by prisoners. The State Legislature thereafter amended the Prisons Act, 1894 by the Prison (Madhya

Pradesh Amendment) Act, 1999 so as to introduce a new Section 36-A in the Act. To give effect to his new provision in Section 36-A of the Act, the State Government in exercise of powers conferred by Section 59 of the Act has also amended the rules by notification dated 19th April 2001. The statutory provisions in the Act and the Rules will have to be examined by us in the light of the judgment of the Supreme Court in the case of *State of Gujarat* (supra) for finding out whether the revised wages fixed by the Government by order dated 30.6.1999 continue to be legal or not and, if not, then what directions will have to be issued by the Court to the respondents in this regard.

16. Sections 35 and 36 of the Act as well as Section 36-A of the Act as introduced by the Prison (Madhya Pradesh Amendment) Act, 1999 are quoted hereinbelow:

> "35. **Employment of criminal prisoners :** No criminal prisoner sentenced to labour or employed on labour at his own desire shall, except on an emergency with the sanction in writing of the Superintendent, be kept to labour for more than nine hours in any one day.
>
> (2) The Medical Officer shall from time to time examine the labouring prisoners while they are employed, and shall at least once in every fortnight cause to be recorded upon the history ticket of each prisoner employed on labour the weight of such prisoner at the time.
>
> (3) When the Medical Officer is of opinion that the health of any prisoner suffers from employment or any kind of class of labour, such prisoner shall not be employed on that labour but shall be placed on such other kind or class of labour as the Medical Officer may consider suited for him.
>
> **36. Employment of criminal prisoners sentenced to simple imprisonment :** Provision shall be made by the Superintendent for the employment (as long as they so desire) of all criminal prisoners sentenced to simple imprisonment, but no prisoner not sentenced to rigorous imprisonment shall be punished for neglect of work excepting by such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such a prisoner.
>
> **36-A.** The prisoners shall be paid wages for the employment provided to them at such rate as may be prescribed from time to time. The amount of fifty percent of the total amount of wages earned by the prisoner in a month shall be kept and deposited in a

separate common fund which shall be exclusively used for the payment of compensation to the deserving victims or his family of the offence the commission of which entailed the sentence of imprisonment to the prisoner. The account of the fund shall be maintained by the Suprintendent of Jail in such form and in such manner as may be prescribed. The rate of compensation to be paid to the victims shall be fixed by a committee consisting of such persons as may be prescribed."

It will be clear on a plain reading of Section 35 of the Act quoted above that no criminal prisoner sentenced to labour or employed on labour at his own desire can be kept to labour beyond nine hours in any one day. Section 36 of the Act however provides that criminal prisoners sentenced to simple imprisonment can be employed only as long as they so desire. Section 36-A of the Act states that prisoners shall be paid wages for the employment provided to them at such rate as may be prescribed from time to time. We thus have to refer to the rules as amended to find out the rates of wages for employment of prisoners to be prescribed in accordance with Section 36-A of the Act.

17. Rule 647 of the rules without the details of the tasks appended to sub-rule (3) thereto and Rules 2(J) and 747-B introduced by notification dated 19th April, 2001 to give effect to Section 36-A of the Act, are extracted hereinbelow :

"**647. Classes and forms of labour with classification of labour tasks :**

(1) All labour exacted from prisoners shall be classified as "hard", "medium" or "light" labour according to the amount of physical exertion required for the performance of a fixed task, and the maximum tasks which shall be exacted from any prisoner shall be fixed.

(2) No general reduction of the task fixed shall be allowed in any jail without the sanction of the Inspector General.

(3) The State Government have fixed the following standard tasks for each class of labour on the most important of the various kinds of taskable work practiced in the jails of the Madhya Pradesh."

2(J) "Wages" means the amount of the money earned by a prisoner in a day in lieu of the task or the service assigned to him/her in the jail by the Superintendent of the Jail.

647-B. Management of Wages and Common Fund :

(1) Wages for the tasks as provided in rule 647 and for rendering services as provided in these rules shall be fixed and notified by the State Government from time to time.

(2) After considering the volume of work available in the Jail for the tasks mentioned in rule 647 and services as provided in these rules, the Superintendent shall provide employment to the prisoners and the priority for the selection of prisoners shall be in the following order :

(a) Prisoners undergoing Life Imprisonment with rigorous imprisonment;

(b) Other prisoners undergoing rigorous imprisonment;

(c) Prisoners undergoing simple imprisonment and who are willing to work;

(d) In Sub Jails under trial prisoners who are willingly ready to render their services may be employed if the prisoners of above category are not available.

3. (a) 50% of the wages earned by a prisoner in a month shall be deposited in the common fund;

(b) A common fund shall be constituted at every jail in which the wages as mentioned in clause (a) shall be deposited. The fund shall be controlled by the District Magistrate of the district concerned and the Superintendent of the jail concerned;

(c) The amount of common fund shall be deposited in a personal deposit account opened in a treasury in the joint name of the District Magistrate of the district and the Superintendent of the concerned Jail;

(d) Such amount of compensation from the common fund shall be paid once to a deserving victim of the offence and in case of death of the deserving victim to the family member of the victim as decided by the committee.

(4) Remaining 50% of the wages shall be managed in the following manner :

(a) one third shall be paid to the prisoner or his family members to meet legal expenses. Provided that if there is no such necessity then this amount will be deposited in the bank account;

(b) another one third shall be deposited in the prisoner's bank account and the balance amount shall be paid to him at the time of his release;

(c) the remaining one third shall be available to the prisoner in the form of coupons for purchasing articles from the prison canteen or for making purchases from outside the jail through the jail Superintendent if canteen is not there :

Provided that the Superintendent of Jail shall not permit purchase of objectionable items and his decision shall be final;

(d) the wages of every prisoner shall be deposited in a joint bank account opened in the name of the prisoner concerned and the Superintendent of Jail. This account can be opened in any nationalized bank near the jail.

(5) Every prisoner shall be entitled to one day weekly off from the work or service as decided by the Superintendent of the Jail. In case of the prisoners employed in the task or the services the Superintendent of the Jail shall ensure that management of their employment is made in such a manner that they get one weekly off every week."

18. On a reading of Rule 647 of the rules, we find that labour exacted from prisoners are to be classified as "hard", "medium" or "light" labour according to the amount of physical exertion required for the performance of the task and the maximum tasks which shall be exacted from any prisoner shall be fixed. Sub-rule (2) of Rule 647 however provides that no general reduction of the task shall be provided in any jail without the sanction of the Inspector General. Sub-rule (3) of Rule 647 enumerates the standard tasks for each class of labour fixed by the State Government. It is not possible to enumerate all the standard tasks fixed by the State Government under sub-rule (3) of Rule 647, but by way of illustration we may give some of the standard tasks fixed by the State Government hereinbelow :

TASKS

1.	Storing and weighing	50 bags of 74 kilos i.e. 37 Quintals.
2.	Brick-making	moulding 1,000 bricks.
3.	Surkhi pounding	1 quintal and 75 kilos.
4.	Cooking	1 cook for every 50 prisoners.

(b) By time (i.e. 9 hours steady work) :

1. Carrying water

2. Carrying stone or clay
3. Masonary and concrete work
4. Grinding lime
5. Tile making
6. Pottery
7. Hewing and cleaving fire wood
8. Rope making
9. Sweeping.

It will be clear from the aforesaid tasks as fixed by the State Government under sub-rule (3) of Rule 647 that they relate to the quantum of work in case of storing and weighing, brick making, surkhi pounding and cooking and do not relate to four hours of work for which the revised rates have been fixed by the State Government by the order dated 30th June, 1999. Similarly, in case of task such as carrying water; carrying stone or clay; masonry and concrete work; grinding lime; tile making; pottery; hewing and cleaving fire wood; rope making and sweeping, the prisoners are required to do nine hours steady work and not four hours of work. As has been provided in sub-rule (2) of Rule 647, no general reduction of the task fixed by the State Government was to be allowed in a jail without the sanction of the Inspector General. Hence, the time of nine hours of steady work was not to be reduced to four hours without the sanction of the Inspector General.

19. We further find that Rule 2(J) defines "wages" to mean the amount of money earned by a prisoner in a day in lieu of the task or the service assigned to him/her in the jail by the Superintendent of Jail. Sub-rule (1) of Rule 647-A introduced by the notification dated 19.4.2001 further provides that wages for the task as provided in Rule 647 and for rendering services as provided in these rules shall be fixed and notified by the State Government from time to time. The expression "from time to time" shows that the State Government has to revise the wages as and when the price index or the cost index increases. Sub-rule (2) of Rule 647-B states that after considering the volume of work available in the jail for the tasks mentioned in Rule 647 and the services as provided in the rules, the Superintendent shall provide employment to the prisoners and the priority for the selection of prisoner in the order mentioned therein. It will be clear from sub-rule (2) of Rule 647-B that the prisoners undergoing life imprisonment or rigorous imprisonment and other prisoners undergoing rigorous imprisonment have to be given priority for employment and the prisoners undergoing simple imprisonment are to work only when they are willingly ready to work and in Sub Jails under trial prisoners who are willingly ready to render their services may be employed if the prisoners undergoing rigorous imprisonment or simple imprisonment are not available. Since it is compulsory under Section 35 of the Act and Rule 647 of the Rule for all prisoners undergoing rigorous imprisonment to put in labour and prisoners of this category undergoing rigorous imprisonment are

likely to be few compared to those undergoing simple imprisonment, it is difficult to accept the contention of the respondents that the volume of work available in the jail is not enough to provide the prisoners undergoing rigorous employment work for more than four hours in a day.

20. In sub para (3) of para 51 of the judgment of the Supreme Court in the case of *State of Gujarat* (supra), the Supreme Court has held that it is imperative that the prisoner should be paid "equitable wages" for the work done by them and the Supreme Court has not directed for payment of minimum wages to the prisoners as contended by the petitioner. According to Thomas, J. "equitable wages" payable to the prisoner can be worked out after deducting the expenses incurred by the Government on food, clothing and other amenities provided to the prisoners from the minimum wages fixed under the Minimum Wages Act, 1948 (para 45). According to Wadhwa, J., the prisoner is not entitled to minimum wages fixed under the Minimum Wages Act, 1948, but there has to be some rational basis on which wages are to be paid to the prisoners (para 77). Rule 2(J) of the rules, as we have seen, defines wages to mean the amount of money earned by a prisoner in a day in lieu of the task or service assigned to him. So far as prisoners undergoing rigorous imprisonment are concerned, we have seen that under the Rules, the normal period of work cannot be four hours. In some kinds of tasks and services, the period of their employment is nine hours and in other kinds of tasks or services, the employment is as per quantum of work and not as per hours. Wages as defined in Ruls 2(J) would thus mean such wages as are payable for the hours of labour or for the quantum of work assigned to the prisoner in the jail. Determination of wages for four hours of work is thus not in accordance with law. Further, the rates of wages of Rs. 8/- for unskilled prisoner and Rs. 10/- for skilled prisoner were fixed by the order dated 30th June, 1999 before Section 36-A was introduced in the Act by the Prison (Madhya Pradesh Amendment) Act, 1999 and before rules were amended by the notification dated 19th April, 2001 to give effect to Section 36-A of the Act. The State Government therefore will have to fix and notify the wages afresh in accordance with Section 36-A and Rules 2(J) and 647-B of the Rules keeping in mind the hours of labour or the quantum of work invovled in the tasks or the services assigned to the prisoner.

21. The wages so determined for the services or the tasks performed by the prisoners must have some rational basis and minimum wages fixed for similar task/ service can constitute a rational basis for determination of such wages. Out of such wages, deductions will have to be made towards food and clothing and other amenities provided to the prisoners. Medical expenses being part of the obligation of the State under Article 21 of the Constitution as held by the Supreme Court in *Permanand Katara v. Union of India* (supra) and *Pashchim Benga Khet Mazdoor Samiti and others v. State of West Bengal and another* (supra) cannot be deducted from such wages. After such deductions, equitable wages payable to the prisoners can

be fixed and notified by the State Government under sub-rule (1) of Rule 647-B of the Rules from time to time.

22. Such equitable wages cannot be a pittance and has to be reasonable because under the scheme of Section 36-B and Rule 647-B, such wages are not only to take care of the expenses of the prisoners in the jail but also are to provide for future rehabiltation of the prisoner as well as compensation to the victims. The provisions of Section 36-A and Rule 647-B of the Rules have been made pursuant to the recommendations in the judgment of the Supreme Court in the case of *State of Gujarat* (supra). In para 33 of the judgment as reported at page 3172 of the AIR, Thomas, J observed that assurance to the prisoner that his hard labour would eventually snowball into a handsome saving for his own rehabilitation would help him to get stripped of the moroseness and desperation in his mind while toiling with the rigors of hard labour during the period of his jail life. In paragraphs 47 and 50 of the judgment as reported at page 3175 of the AIR, Thomas, J has further held that the plight of the victims has been overlooked under the system of criminal justice and the State should constructively think and make appropriate law for diverting some portion of the income earned by the prisoner when he is in jail to the deserving victims. Wadhwa, J has observed in para 92 of the judgment as reported at page 3188 in the AIR that while fixing wages for the prisoners the State has to show equal concern for the victim and victim's family. In para 100 of the judgment as reported at page 3190 in the AIR, Wadhwa, J has made a strong plea in favour of the victims in the following words :

> "In our efforts to look after and protect the human rights of the convict we cannot forget the victim or his family in case of his death or who is otherwise incapacitated to earn his livelihood because of criminal act of the convict. The victim is certainly entitled to reparation, restitution and safeguards of his rights. Criminal jusctice would look hollow if justice is not done to the victim of the crime. Subject of victimology is gaining ground while we are also concerned with the rights of the prisoners and prison reforms. A victim of crime cannot be a "forgotten man" in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injury. This is apart from the factors like loss of reputation, humiliation, etc. An honour which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace."

If the twin objectives of rehabilitation of prisoners and compensation to victims are to be achieved, out of the earnings of the prisoner in the jail, then the income of the prisoner has to be equitable and reasonable and cannot be so meager that it can

neither take care of rehabilitation of the prisoner nor provide for compensation to the victims.

23. A plain reading of Section 36-A of the Act and Rule 647-B of the Rules quoted above would show that these two objects of rehabilitation of the prisoner and compensation to the victim forcefully pleaded in the judgments of Thomas, J. and Wadhwa, J. are sought to be achieved by the Legislature and the rule making authority. Section 36-A provides that 50% of the total amount of wages earned by the prisoner in a month shall be kept and deposited in a separate common fund which shall be exclusively used for the payment of compensation to the deserving victims of the offence the commission of which entailed the sentence of imprisonment to the prisoner or his family. In accordance with Section 36-A of the Act, sub-rule (3) of Rule 647-B quoted above provides that 50% of the wages earned by a prisoner in a month shall be deposited in a common fund and such amount of compensation forming the common fund shall be paid once to a deserving victim of the offence and in case of death of the deserving victim to the family member of the victim as decided by the committee. Sub-rule (4) of Rule 647-B provides that out of the remaining 50% of the wages, one third shall be paid to the prisoner or his family member, if any, one third shall be deposited in the prisoner's bank account as a saving to be paid to him at the time of his release and the remaining one third shall be available to the prisoner for purchasing articles from the prison canteen or for purchase from outside the jail. Therefore, unless the wages fixed and notified by the State Government from time to time under sub-rule (1) of Rule 647-B are equitable and reasonable, the dual objects of the statutory provisions, namely rehabilitation of the prisoner and compensation to the victims cannot be realized.

24. Rules 2(C-1), 2(C-2) and 647-A which have been made by the notification dated 19th April, 2001 for carrying out the provisions of Section 36-A of the Act for paying compensation to a victim of an offence and his family are quoted hereunder:

> "2(C-1) "Common Fund" means the fund created for a jail from the part of the wages earned by prisoners for the purpose of giving compensation to the deserving victims.
>
> (C-2) "Committee" means the Committee constituted for a jail under the provisions of Section 36-A of the Act for fixing amount of compensation to be given to the deserving victims from the common fund created for such jail."
>
> **647-A. Constitution of Committee and its Meeting :**
>
> (1) The committee for each Central, District and Sub Jail shall consist of :

(1)	District Magistrate	-	Chairman
(2)	Superintendent of Police	-	Member
(3)	Superintendent Central/ District/Sub Jail	-	Member-Secretary

Provided that the District Magistrate and Superintendent of Police may nominate their representative for the committee of a Sub Jail. Nominee of the District Magistrate shall be the Chairman.

(2) The meetings of the committee shall be held once in a quarter or at such intervals as is decided by the Chairman of the committee.

(3) The amount of the compensation shall be fixed by the committee at its meeting as per the instruction issued by the State Government in this behalf from time to time and the reasons shall be recorded in writing by the committee for fixing such compensation.

(4) For determination of the deserving victims as provided in Section 36-A of the Act, the State Government in the Jail Department shall issue instructions from time to time."

25. Section 36-A provides that the rate of compensation to be paid to the victims shall be fixed by a Committee consisting of such persons as may be prescribed. In Rule 2(C-2) quoted above, "Committee" is defined to mean the Committee constituted for a jail under the provisions of Section 36-A of the Act for fixing the amount of compensation to be given to the deserving victims from the common fund created for such jail and sub-rule (1) of Rule 647-A provides that such a committee for Central, District and Sub Jail will consist of the District Magistrate as the Chairman, the Superintendent of Police and the Superintendent, Cental/District/Sub Jail as Members of the Committee. Thus under Section 36-A and Rule 2 (C-2), the Committee only fixes the amount of compensation to be paid to the deserving victims from the common fund and cannot identify the "deserving victim" of the offence the commission of which entailed the sentence of imprisonment to the prisoner or his family, Sub-rule (4) of Rule 647 however provides for determination of the "deserving victim" as provided in Section 36-A of the Act and it states that the State Government in the Jail Department shall issue instructions from time to time.

26. Pursuant to our order dated 20.2.2007, the respondent No. 3 has filed an affidavit along with Annexure R/5 to show the amounts deposited in the common fund created under Section 36-A of the Act and the amounts disbursed to the victims of offences. The English translation of the aforesaid chart is extracted hereinbelow;

Statement of accumulated and disbursed amounts in the common fund of the prisoners lodged in jails of Madhya Pradesh under Section 36-A of the Prisons Act, 1894 showing the position as on 31.12.2006.

S.No.	Name of Circle Jail	Accumulated amount	Disbursed amount	Amount deposited in the common fund as on 31.12.2006
1.	Circle Jail, Indore and subordinate jails	53,61,422	4,60,000	49,01,422
2.	Circle Jail, Satna and subordinate jails	34,27,136	29,000	33,98,136
3.	Circle Jail, Jabalpur and subordinate jails	1,00,32,715	2,10,000	98,22,715
4.	Circle Jail, Gwalior and subordinate jails	34,78,731	60,000	34,18,731
5.	Circle Jail, Sagar and subordinate jails	23,37,659	2,70,000	20,67,659
6.	Circle Jail, Rewa and subordinate jails	47,33,067	1,50,000	45,83,067

7.	Circle Jail, Bhopal and subordinate jails	1,35,55,216	1,69,500	1,33,85,716
8.	Circle Jail, Datia and subordinate jails	5,98,813	00	5,98,813
9.	Circle Jail, Narsinghpur and subordinate jails	9,22,126	00	9,22,126
10.	Circle Jail, Ujjain and subordinate jails	41,89,302	1,30,000	40,59,302
			Total	**4,71,57,687**

Note : On the basis of information received from the jails of Madhya Pradesh, more than amount of Rs. 4,71,57,687/- have been accumulated as on date.

The chart would show that as against the deposits made, disbursement to victims has been very meager and the result is that Rs. 4,71,57,687/- is lying in the common fund whereas victims of offences committed by prisoners continue to suffer.

27. Thus the object of Section 36-A and Rules 647-A and 647-B to compensate the victim or his family out of the common fund created from part of the wages of the prisoner who has committed the offence is not being effectively achieved. In the affidavit filed pursuant to the order dated 3.4.2007, respondent No. 3 has stated that when the offence is committed, the Tehsildar invites information relating to victim and sends the same to the Superintendent of Jail and the victim is asked to contact the Jail Superintendent with the documents for identity of the victim along with the affidavit. This faulty procedure adopted for identifying the victim appears to be the reason why the laudable object of compensating a deserving victim or his family has not been satisfactorily achieved. Unless a deserving victim of the offence is properly identified on the basis of relevant material and he or his family is paid compensation in time, the object of Section 36-A and Rules 647-A and 647-B cannot be realized. Obviously, the victim of the offence the commission of which entailed the sentence of imprisonment to the prisoner can be properly identified by the Court in which the prisoner is tried for the offence on the basis of materials before the Court. Further,

whether such victim or his family deserves payment of compensation can be correctly decided if a human right activist in the area sensitive to the needs of the victim or his family is consulted. Accordingly, the State Government in the Jail Department must issue instructions under sub-rule (4) of Rule 647-A that the deserving victims will be determined in consultation with the Court in which prisoner is being tried for the offence and a human right activist in the area to be nominated by the State Human Rights Commission. The details of the instructions can be worked by the State Government in consultation of the High Court and the State Human Rights Commission on the adminstrative side.

28. We would, however, like to clarify that since Section 36-A of the Act creates a common fund from part of the wages earned by the prisoners for purposes of giving compensation to the deserving victims, it is not to be understood that only when deductions are made from the wages of a particular prisoner who has committed the offence that the victim of the offence committed by him is to be paid compensation. A deserving victim of an offence can be paid compensation out of the common fund irrespective of whether deductions from the wages of the prisoner who commits the offence have been made or not. Similarly the quantum of compensation to be paid to the deserving victim of an offence may not have any nexus with the quantum of deductions made from the wages of the prisoner who committed the offence. The reason for creating a common fund is that the victim and his family may not accept the compensation if they come to know that the compensation has been paid by the prisoner who has committed the offence. As observed by Wadhwa, J. in paragraph 104 at page 3191 of the AIT in the case of *State of Gujarat* (supra) :

> "104..... When a body is set up to consider the amount of equitable wages for the prisoners a Prison Fund can be created in which a certain amount from the wages of the prisoners be credited and out of that an amount be paid to the victim or for the upkeep of his family, as the rules may provide for the purpose. Creation of fund to my mind, is necessary as any amount of compensation deducted from the wages of the prisoner and paid directly to the victim or his family may not be acceptable considering the psyche of the people in our country."

Moreover, identification of the victim or his family and payment of compensation out of the common fund need not await the conclusion of the trial before the Court. The victim of an offence or his family may require compensation immediately after the commission of the offence and in such a case, compensation can also be paid to the victim of the offence or his family as soon as the deserving victim or his family is identified on the basis of materials available before the Court in which the prisoner is being tried for the offence.

29. In the result, we direct that :

(i) The Government of Madhya Pradesh in the Jail Department will continue to take steps to construct Jails, Sub Jails, Wards, Barracks, Cells in accordance with the Rules 22 to 30 of the Madhya Pradesh Prisons Rules, 1968 and the State Government will ensure that sufficient funds are made available in the budgets for the aforesaid purpose from year to year;

(ii) Within two months from receipt of the copy of this judgment, the State Government will fix the equitable and reasonable wages for the prisoners in accordance with the Rule 647-B of the Madhya Pradesh Prisons Rules, 1968 in the light of the observations made in this judgment;

(iii) Within two months from receipt of the copy of this judgment, the State Government in the Jail Department will, after consultation with the High Court and the State Human Rights Commission, issue instructions under sub-rule (4) of Rule 647-A of the Madhya Pradesh Prisons Rules, 1968 for determination of the victim of the offence committed by the prisoner so that the Court before whom the prisoner is tried for the offence and a human right activist of the area are involved in the identification of the deserving victim and in case of his death his family members.

(iv) Within three months from today, an affidavit will be filed on behalf of the respondents to show compliance with our aforesaid directions relating to fixation of wages under Rule 647-B(1) and relating to issue of instructions under Rule 647-A(4) of the Madhya Pradesh Prisons Rules, 1968.

30. With the aforesaid directions, the writ petition is disposed of. Copies of this judgment will be sent to the petitioner, the Principal Secretary, Jail Department, Government of Madhya Pradesh, Bhopal, the Secretary, State Human Rights Commission and the Registrar General of the Registry.

Petition disposed of.

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice S.L. Jain

16 May, 2007

DR. SHAILENDRA KUMAR PATNE ....Petitioner*

v.

STATE OF M.P. & ors. .... Respondents

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P., 2007–Rule 9.2(a)–*Vires* of Rule 9.2(a) restricting demonstrator to opt a seat in his own subject challenged–Petitioner working as Demonstrator in Pharmacology–Appeared in Post Graduate Entrance Examination and was called for counselling–Seat of M.D. Pharmacology was not available therefore, was not allotted the seat and was not allowed to opt for a seat in any other subject in view of Rule 9.2(a)–Held–Classification of Demonstrators for the purposes that they donot leave the service as Demonstrator after PG course has no rational nexus with object of granting admission–Such object is achieved by provision made in rules that Demonstrator has to execute a bond of Rs.3 lacs to serve the Govt. for five years–Provision in Rule 9.2 (a) restricting Demonstrators to opt a seat in his own subject is discriminatory and *ultra-vires* Article 14 of Constitution.

Admissions in Post Graduate courses are to be governed by merit of candidates. But as has been held by the Supreme Court in *State of Madhya Pradesh and ors. v. Gopal D. Tirthani and ors.* (supra), candidates can be categorized to different classes for the purposes of determining their *inter se* merit within the class if the classification is based on intelligible differentia and such differentia has rational nexus with the object sought to be achieved. The classification of Demonstrators and the Medical Officers for the purposes of ensuring that Demonstrators do not leave the service as Demonstrator after PG course affects the right of Demonstrators to choose a subject of his choice on the basis of their merit position in the merit list of in service candidates and such a classification has no rational nexus with the object of granting admission on the basis of the *inter se* merit of candidates and is clearly violative of the right to equality of the demonstrators guaranteed by Article 14 of the Constitution.

That apart, we find that in Rule 9.2(a) a provision has also been made that in case of selection to PG course, a Demonstrator has to execute a bond of Rs. 3 lakhs to serve five years after completion of degree course.

Hence if the object behind the rule is that the Demonstrator does not leave the

* W.P.No. 5056/2007 (J)

service after completing his PG course, such object is achieved by the provision made in the rules that the Demonstrator has to execute a bond of Rs. 3.00 lacs to serve the Government for five years after completion of degree course.

We, therefore, declare the provision in Rule 9.2(a) of the Rules restricting the Demonstrators to opt a seat in his own subject only in which he is working as discriminatory and *ultra-vires* Article 14 of the Constitution. Rest of the provisions in Rule 9.2(a) of the rules are not assailed. In view of the aforesaid declaration, the petitioner will now be allowed to participate in the counselling in subjects other than the subject in which he is working. The writ petition is allowed with the aforesaid direction. (Paras 7,8 and 9)

Case Referred :

State of Madhya Pradesh & ors. v. Gopal D. Tirthani & ors.; AIR 2003 SCW 3636.

Aditya Sanghi, for the petitioner.

Kumaresh Pathak, Dy. Advocate General, for respondents No. 1& 2.

Mrs. Indira Nair with *Ms. Jasmeet Chana,* for the respondent No. 3.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **A.K. Patnaik, Chief Justice** :–The petitioner is working as a Demonstrator in Pharmacology in Gandhi Medical College, Bhopal and he has completed more than 12 years of service. He appeared in the Post Graduate Entrance Examination, 2007 as an in-service candidate and was ranked at Sr. No. 4 in the merit list of Scheduled Caste candidates. On the basis of his position in the merit list, he was called for counselling but was not allotted a seat of M.D. Pharmacology because a seat of M.D. Pharmacology was not available to be allotted to the petitioner. He was not allowed to opt for a seat in any subject other than Pharmacology because of the provision in Rule 9.2(a) of the Madhya Pradesh Medical and Dental Post Graduate Course Entrance Examination Rules, 2007 (for short 'the Rules') that a Demonstrator working on a regular basis in Medical College of Government of Madhya Pradesh who has completed five years of regular service will be eligible to opt a seat in his own subject only in which he is working. Aggrieved, the petitioner has filed this writ petition with a prayer to declare the provision in Rule 9.2(a) of the rules as *ultra-vires* the Constitution.

2. Mr. Aditya Sanghi, learned counsel for the petitioner submitted that a Demonstrator and a Medical Officer are both in-service candidates. Under the Rules, a Medical Officer can opt for any subject in the PG course but under the

impugned Rule 9.2(a) of the Rules, a restriction has been put that a Demonstrator can opt a seat in his own subject only in which he is working in case he selected to the PG course. He vehemently submitted that this amounts to discrimination against a Demonstrator and Rule 9.2 (a) of the rules is therefore violative of the equality clause in Article 14 of the Constitution and should be declared as *ultra-vires.*

3. Mr. Kumaresh Pathak, learned Deputy Advocate General, on the other hand, relying on the return filed by the respondents No. 1 and 2 submitted that the restriction for allowing the Demonstrator for in-service candidate only in the subject in which he has been working has been put in the Rules for the purposes of ensuring that the Demonstrator after doing PG course does not leave the service. He submitted that if a Demonstrator is allowed to opt for a seat in any subject other than the subject in which he is working as Demonstrator, he may leave the job after doing PG in other subjects and there will be shortage of Demonstrators in Medical Colleges. He further submitted that a demonstrator is appointed for a particular subject whereas a Medical Officer is not appointed for any particular subject and a Medical Officer works in different areas of medical service. He submitted that Demonstrators and Medical Officers therefore constitute two different classes and the equality clause in Article 14 of the Constitution is no way violated.

4. Mr. Sanghi cited the decision in *State of Madhya Pradesh and others v. Gopal D. Tirthani and others*[1], in which the Supreme Court has held that Article 14 of the Constitution permits classification but such classification must satisfy two tests and these are - (i) it must be founded on the intelligible differentia which distinguishes persons or things placed in a group from those left out or placed not in the group and (ii) the differentia must have a rational relation with the object sought to be achieved. Mr. Sanghi submitted that in *State of Madhya Pradesh and others v. Gopal D. Tirthani and others* (supra), the Supreme Court upheld the classification of open candidates and in-service candidates and therefore a classification can be made for open candidates and in-service candidates for the purposes of determining the *inter se* merit of open candidates and in-service candidates separately. He submitted that once the *inter se* merit of in-service candidates, Medical Officers is determined a further classification cannot be made in the Rules so as to permit Medical Officers to choose any subject of their choice in PG course depending upon their turn on merit while debarring Demonstrators from making such choice of any subject in PG course and restricting the Demonstrators to seek admission in the PG course only in the subject in which he is working.

5. It is not disputed that under the Rules Medical Officers as well as Demonstrators can apply for admission to PG course as in-service candidates. In *State of Madhya Pradesh and others v. Gopal D. Tirthani and others* (supra), the Supreme Court

(1) AIR 2003 SCW 3636

has held in para 25 at page 3656 of the judgment as reported in the AIR SCW that the eligibility test called the entrance test or the pre-PG test is conducted with for two purposes and these are (i) to assess the *inter se* merit of candidates and (ii) to ensure that candidates with minimum qualifying percentage are admitted to Medical Post Graduate courses. The Supreme Court further held in para 28 at page 3652 as reported in the AIR SCW that the High Court was therefore right in coming to the conclusion that in a State where five Universities existed with different standards and assessment methods, the *inter se* academic merit of the candidates passing out from five different Universities cannot be assessed except through a common entrance examination. Paragraphs 25 and 28 of the judgment of the Supreme Court are quoted hereinbelow :

> "The eligibility test, called the entrance test or the pre-PG test, is conducted with dual purposes. Firstly, it is held with the object of assessing the knowledge and intelligence quotient of a candidate whether he would be able to prosecute post-graduate studies if allowed an opportunity of doing so; secondly, it is for the purpose of assessing the merit *inter se* of the candidates which is of vital significance at the counselling when it comes to allotting the successful candidates to different disciplines wherein the seats are limited and some disciplines are considered to be more creamy and are more coveted than the others. The concept of a minimum qualifying percentage cannot, therefore, be given a complete go-by. If at all there can be departure, that has to be minimal and that too only by approval of experts in the field of medical education, which for the present are available as a body in the Medical Council of India."

> "Clearly the State of Madhya Pradesh was not justified in holding and conducting a separate entrance test for in-service candidates. Nor could it have devised a formula by combining Cls. (i) and (ii) of Regulation 9(1) by resorting to Cl. (iv). Recourse can be held to Cl. (iii) when there is only one University. When there is only one University in one State, the standard of assessment can reasonably be assumed to have been the same for assessing the academic merit of the students passing from that University. When there are more Universities than one in a State, the standards of different Universities and their assessment methods cannot obviously be uniform and may differ. Then it would be futile to assess the comparative merit of individual performances by reference to Cl. (iii). The High Court is, therefore, right in forming an opinion that in the State of Madhya Pradesh, where five Universities exist, the

method of evaluation contempled by Cl. (iii) is not available either in substitution of or in addition to Cl. (i). The candidates qualified at the Pre-PG or entrance test held in common for in-service and open category candidates, would then be divided into two separate merit lists to be prepared for the two categories and merit *inter se* of the successful candidates shall be available to be assessed separately in the two respective categories."

It is thus clear that candidates who qualify in the Pre-PG or entrance test are divided into two separate merit lists to be prepared for the two categories and merit *inter se* of successful candidates is assessed separately in the in service and the open categories.

6. In the present case, under the rules, it is not disputed that entrance test was held both for in-service and open candidates and separate merit lists of in-service candidates and open candidates were drawnup. It is also not disputed that in the separate merit list of in-service candidates, the Medical Officers and the Demonstrators were placed in order of merit on the basis of marks obtained by them in the common examination. In other words, in the same merit list of in-service candidates, Medical Officers and Demonstrators were placed as per their position in the merit list. Now if a Medical Officer placed lower than the Demonstrator in the merit list of in-service candidates was to be allowed seat in any subject in the Post Graduate course and a Demonstrator even though placed above such Medical Officer in the merit list was to be allowed a seat only in the subject in which he is working and was not to be allowed seat in PG course in other subjects, the right of Demonstrators for equal treatment guaranteed under Article 14 of the Constitution would be violated.

7. Admissions in Post Graduate courses are to be governed by merit of candidates. But as has been held by the Supreme Court in *State of Madhya Pradesh and others v. Gopal D. Tirthani and others* (supra), candidates can be categorized to different classes for the purposes of determining their *inter se* merit within the class if the classification is based on intelligible differentia and such differentia has rational nexus with the object sought to be achieved. The classification of Demonstrators and the Medical Officers for the purposes of ensuring that Demonstrators do not leave the service as Demonstrator after PG course affects the right of Demonstrators to choose a subject of his choice on the basis of their merit position in the merit list of in service candidates and such a classification has no rational nexus with the object of granting admission on the basis of the *inter se* merit of candidates and is clearly violative of the right to equality of the demonstrators guaranteed by Article 14 of the Constitution.

8. That apart, we find that in Rule 9.2(a) a provision has also been made that in

case of selection to PG course, a Demonstrator has to execute a bond of Rs. 3 lakhs to serve five years after completion of degree course. Rule 9.2 (a) of the impugned Rule is quoted hereinbelow :

> "9.2 (a) Demonstrator working on regular basis in Medical College of Govt. of Madhya Pradesh who have completed five years of regular service, will be eligible to opt a seat in their own subject only in which they are working. In case of selection to PG course, the demonstrator has to execute a bond to serve the State Government for five years after completion of degree course. As per Government order the demonstrator has to execute bond of Rs. 3 Lacs compulsorily. The maximum age limit for selection to PG course for demonstrator will be 45 years on 30th April of exam year."

Hence if the object behind the rule is that the Demonstrator does not leave the service after completing his PG course, such object is achieved by the provision made in the rules that the Demonstrator has to execute a bond of Rs. 3.00 lacs to serve the Government for five years after completion of degree course.

9. We, therefore, declare the provision in Rule 9.2(a) of the Rules restricting the Demonstrators to opt a seat in his own subject only in which he is working as discriminatory and *ultra-vires* Article 14 of the Constitution. Rest of the provisions in Rule 9.2(a) of the rules are not assailed. In view of the aforesaid declaration, the petitioner will now be allowed to participate in the counselling in subjects other than the subject in which he is working. The writ petition is allowed with the aforesaid direction.

Petition allowed.

WRIT PETITION

Before Mr. A.K. Patnaik Chief Justice and Mr. Justice S.L. Jain
17 May, 2007

DR. ARVIND BHATIA .... Petitioner*
v.
STATE OF M.P. & ors. .... Respondents

A. Medical and Dental Post Graduate Course Entrance Examination Rules, M.P., 2007–Rule 10(2)–Weightage of marks for service rendered in rural areas–Peitioner appeared in common entrance examination to Post Graduate Medical Degree/Diploma Courses as in-service candidate–Petitioner secure higher marks than those candidates

* W.P. No. 4847/2007 (J)

who had served in rural areas–Position in merit list went substantially down because of weightage of marks given to candidates having served in rural areas–*Vires* of Rule 10(2) providing for giving weightage of 25% marks challenged–Held–Rule 10(1) provides that in-service candidate should secure minimum qualifying marks–Apprehension that candidates of poor quality may get admission taken care of 50 marks out of 200 are to be awarded depending upon the number of years and the area in which in-service candidate has served–Considering peculiar experience of State of M.P., weightage of marks to in-service candidates upto ceiling of 25% for service in rural and tribal areas not unreasonable and irrational–Not *ultra vires* Article 14 of Constitution of India.

B. Medical and Dental Post Graduate Course Entrance Examination Rules, M.P., 2007–Rule 10(3)–Weightage of marks to Demonstrators–Weightage of 10 marks for each year of service after 5 years of minimum regular service rendered to Demonstrator–Reason for giving weightage of marks because there are no career prospects for Demonstrator–Held–Rule 9.2 putting restriction that Demonstrator can only opt for seat in the subject in which he is working already declared *ultra vires*–Demonstrators as in-service candidates can opt for seat in other subjects also–Rule 10(3) providing weightage of marks to Demonstrators *ultra vires* Article 14 of Constitution of India–Respondents direct to conduct counselling accordingly.

C. Medical and Dental Post Graduate Course Entrance Examination Rules, M.P., 2007–Rule 20(9)–*Vires* of Rule 20(9) which provides that seats remaining vacant after category wise counselling of in-service candidates will be made available unchanged to open category challenged–Held–Such provision has been made to ensure that seats reserved for different categories are not affected–Rule 20(11) provides seats to be filled upon from open unreserved candidates if candidates are not available from reserved categories–In such situation percentage of reservation is affected because of non-availability of candidates and not by a provision in Rules–If candidates from reserved categories are not available for remaining seats for S.C., S.T. or O.B.C. then such seats cannot go waste and will have to be filled from open unreserved category candidates–Rule 20(9) is not discriminatory and violative of Article 14 of Constitution of India.

In accordance with the said judgment of the Supreme Court in *State of M.P.* v. *Gopal D. Tirthani* (supra) we find that Rule 10(1) of the Rules provides that in-service candidates shall have to secure minimum qualifying marks as prescribed, in the Pre-PG Entrance Examination. The said Rule 10(1) of the Rules is quoted herein below :

> **"10. Examination and Merit List : (In-service candidates)**
>
> (1) There will be one common entrance examination for Post Graduate entrance conducted by Professional Examination Board. The in-service candidates will be selected on the basis of the same entrance examination. The in-service candidates shall have to secure minimum qualifying marks in the Pre-PG Entrance Examination. As prescribed in those rules for admission. The Professional Examination Board will prepare and declare separate merit list of selected in-service candidates. Total marks for the examination for in-service candidates shall be 200. Such in-service candidates, declared successful will be considered for final merit list by addition of marks calculated on the following basis."

Thus, the apprehension of the Supreme Court in *Dinesh Kumar* (supra) that if additional marks up to 15% are given to candidates who serve in rural areas, then candidates of poor quality may get admission in Post Graduate courses, has been taken care of by providing that every in-service candidate has to secure the minimum qualifying marks in the Common Entrance Examination.

Moreover, a reading of Rule 10(1) of the Rules quoted above would show that it is not that every in-service candidate who has served in rural area gets 50 marks out of 200 marks, equivalent to 25%. Depending upon the number of years and the area in which the in-service candidates has served, he will get marks as mentioned in clauses (a), (b) and (c) of Rule 10(2).

If the rule making authority, in its wisdom, has thought if necessary to give such additional marks to in-service candidates serving in rural area up to a maximum of 25% for the purpose of ensuring that in-service candidates actually serve in rural and tribal areas of the State of M.P., we cannot, in exercise of our powers of judicial review under Article 226 of the Constitution, substitute our own wisdom for that of rule making authority and take a view that maximum of 25% marks sought to be added in the case of in-service candidates who have served in rural or tribal area is excessive and was not necessary. We are also of the considered opinion that considering the peculiar experience of the State of M.P., the weightage of marks to in-service candidates up to the ceiling of 25% for service in rural and tribal areas in Madhya Pradesh is not unreasonable or irrational and is not *ultra vires* Article 14 of the Constitution.

Rule 10(3) of the Rules which provides for weightage of marks to Demonstrators is quoted below :

> "(2) Demonstrator–Demonstrator will be given 10 marks for each year of service after 5 years of minimum regular service rendered, whose maximum limit shall be 50 marks for 5 years. The marks will be allotted by the Dean of the concerned College."

The aforesaid Rule 10(3) of the Rules thus provides that a Demonstrator will be given 10 marks for each year of service after 5 years of minimum regular service rendered whose maximum limit shall be 50 marks for 5 years. The reason given in the return for this rule is that there are no career prospects for Demonstrators. We fail to appreciate this reason given in the return. If the Demonstrator is admitted to Post Graduate Medical Course and he completes his Post Graduate course, he can be promoted to the Post of Lecturer, Reader and thereafter Professor, as contended by Mr. Mishra, learned Senior Counsel. Moreover, the restriction put in Rule 9.2 of the Rules that a Demonstrator can only opt for a seat in the subject in which he is working has already been declared by the Court to be *ultra vires* Art. 14 of the Constitution. Hence, the Demonstrator as an in-service candidate can now opt for seats in subjects other than the subject in which he is working in the same manner as other Medical Officers. Our judgment declaring the restriction in Rule 9.2 of the Rules as *ultra vires* Article 14 of the Constitution has now further opened up the career prospects of Demonstrators. They can undertake Post Graduate Medical Courses in any subject other than those in which they are working and after they secure Post Graduate degree or diploma, they can go in for better medical career. Mr. Pathak, learned Dy. Advocate General has not brought to our notice any judgment of the Apex Court or of this Court to show that such a weightage in favour of Demonstrators has been held to be reasonable and rational and not violative of Article 14 of the Constitution. We, Therefore, declare the provisions of Rule 10 (3) of the Rules as *ultra-vires* Article 14 of the Constitution.

The last limb of Rule 20 (9) of the Rules provides that the seats remaining vacant after category wise counselling will be made available unchanged to the open category (non-service) candidate of same category. Such a provision has been made to ensure that the provision in Rule 8 of the Rules that 20% seats are reserved for candidates belonging to ST, 16% seats are reserved for candidates belonging to SC and 14% seats are reserved for candidates belonging to OBCs, is not affected. In case, as suggested by Mr. Mishra, seats remaining vacant after category wise counselling is made available to un-reserved in-service candidates, then seats which were reserved for ST, SC and OBCs would be filled up by in-service unreserved candidates and the consequence would be that the reservation of 20%, 16% and 14% of the total seats for ST, SC and OBC candidates respectively would be affected.

Rule 20 (11) provides for counselling for open (non-service) candidates. If candidates are not available from amongst ST, SC and OBC categories, obviously the seats have to be filled up from open unreserved category. In such an event, the percentage of reservation for ST, SC and OBC categories is affected because of non-availability of candidates of ST, SC and OBC categories and not by a provision in the Rules. Obviously, if in the counselling for open categories, after the counselling for in-service candidates, ST, SC and OBC category candidates are not available for remaining seats reserved for ST, SC and OBC categories, such seats cannot go waste and will have to be filled up from open unreserved category candidates. We, thererfore, do not find that the provision in Rule 20 (9) of the Rules, in so far as it is different from Rule 20 (11) of the Rules is discriminatory and violative of Article 14 of the Constitution of India. (Paras 11, 12, 15 and 18)

Cases Referred :

Dr. Dinesh Kumar and Ors. v. Motilal Nehru Medical College, Allahabad & ors., (1986) 3 SCC 727; *Dr. Snehlata Patnaik and ors. v. State of Orissa & ors.*, (1992) 2 SCC 26; *State of M.P. & ors. v. Gopal D. Tirthani & ors.*, 2003 AIR SCW 3636.

Ajay Mishra, with Neeraj Singh for the petitioner.

Kumaresh Pathak, Dy. A.G. for the respondents.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice** :–In this writ petition under Article 226 of the Constitution, the petitioner has challenged the *vires* of Rules 10 (2), 10 (3) and 20 (9) of the Madhya Pradesh Medical and Dental Post Graduate Course Entrance Examination Rules, 2007 (for short 'the Rules').

2. The facts briefly are that the petitioner, after passing MBBS degree, was selected and appointed as an Insurance Medical Officer Class-II in ESI Service under the Department of Labour, Government of Madhya Pradesh on 4.7.2000. After completing the period of probation of two years, he was confirmed as Insurance Medical Officer Class-II on 15.4.2004.

3. For admission to Post Graduate Medical Degree and Diploma courses, the State Government has framed the rules under Section 10 of the Madhya Pradesh Chikitsa Shiksha Sanstha Niyantran Adhiniyam, 1973. Under the Rules, a common entrance examination for admission to Post Graduate Medical Degree / Diploma courses is to be held for both in-service candidates and open candidates but the merit lists of in-service and open candidates are to be prepared separately. Rule 10 (1) of the Rules provides that the in-service candidates will have to secure minimum

qualifying marks in the Pre-PG Entrance Examination and the Professional Examination Board will prepare and declare separate merit list of selected in-service candidates. Rule 10 (1) further provides that total marks for the examination for in-service candidates shall be 200 and in-service candidates declared successful will be considered for final merit list by addition of marks calculated on the basis indicated in Rules 10 (2) and 10 (3) of the Rules. In Rule 10 (2), it is provided that *inter-se* merit of the selected in-service candidates shall be fixed up by adding marks of weightage for their services rendered in rural areas and the candidates serving in rural areas will get maximum of 50 marks allotted in the manner provided in clauses (a), (b), (c) and (d) of Rule 10 (2) of the Rules. Rule 10 (3) provides that a Demonstrator will be given 10 marks for each year of service after 5 years of minimum regular service rendered and the maximum limit of such marks shall be 50 for 5 years.

4. The grievance of the petitioner in the writ petition is that candidates who have served in rural areas and candidates who have worked as Demonstrators have been given marks up to maximum of 50 out of 200 marks in accordance with Rules 10 (2) and 10 (3) of the Rules. As a consequence, although the petitioner, who has not served any rural area and is not a Demonstrator, has secured higher marks than such candidates who have served in rural areas and as Demonstrator, in the Common Entrance Examination, his position in the final merit list has gone substantially down. The petitioner therefore has prayed that the provisions of Rules 10 (2) and 10 (3) of the Rules be declared as *ultra-vires* Art. 14 of the Constitution. The further grievance of the petitioner in the writ petition is that in Rule 20 (9) of the Rules, it is provided that counselling of in-service candidates will be done first and category-wise in the sequence provided therein i.e. (A) ST category, (B) SC category, (C) OBC category and (D) Unreserved category, but it is also provided in Rule 20 (9) of the Rules that seats remaining vacant after category-wise counselling will be made available unchanged to the open category (non-service) candidate of same category and thus seats of a particular reserved category remaining vacant after counselling of in-service candidates of that particular category are not made available to in-service candidates of un-reserved category and the petitioner, who belongs to un-reserved category, suffers discrimination in the process. Hence, the petitioner has also prayed for declaring Rule 20 (9) of the Rules as *ultra vires* Art. 14 of the Constitution.

5. Mr. Ajay Mishra, learned Senior Counsel for the petitioner submitted that in *Dr. Dinesh Kumar and others v. Motilal Nehru Medical College, Allahabad and others*[1], the Supreme Court has observed that it may be eminently desirable that some incentive should be given to doctors to go to the rural areas because there is concentration of doctors in the urban areas and the rural areas appear to be neglected but such incentive should not go to the length of giving a weightage of

(1) 1986 3 S.C.C. 727

15 per cent of the total marks obtained by a candidate. He also cited the decision in *Dr. Snehlata Patnaik and others v. State of Orissa and others*[1] in which the Supreme Court has taken a view that the authorities might well consider giving weightage up to a maximum of 5 per cent of marks in favour of in-service candidates who have done rural service for five years or more. He submitted that the maximum weightage of 5 per cent could have been granted in favour of in-service candidates who have done rural service of 5 years or more, but under Rule 10 (2) of the Rules, a maximum weightage of 25% is sought to be given to candidates who have served in rural areas. He submitted that as a result of such high weightage of 25% given to candidates who have served in rural areas, the petitioner is being denied admission in Medical Post Graduate Degree and Diploma courses on the basis of his merit as determined in the Common Entrance Examination and candidates with much lesser merit as determined in the Common Entrance Examination are being given a better chance for admission to Medical Post Graduate Degree and Diploma courses by adding marks up to 50 out of 200 equivalent to 25%.

6. Mr. Kumaresh Pathak, learned Deputy Advocate General, on the other hand, relying on the return filed on behalf of the respondents, submitted that the long experience of the State has been that Medical Officers do not undertake to serve in rural areas and when they are posted in rural areas, they go on long leave and also remain absent without leave. He submitted that considering this experience of the State of M.P., the rule making authority has considered it necessary to provide in Rule 10 (2) of the Rules for giving weightage to candidates serving in rural areas up to a maximum of 50 out of 200 marks depending upon the number of years and area in which the candidate has served. He explained that it is not that every candidate who has served in a rural area gets a weightage of 25% and that the exact marks up to 50 out of 200 marks are given in the manner provided in Rule 10 (2) of the Rules. Mr. Pathak cited the decision of the Supreme Court in *State of M.P. and others v. Gopal D. Tirthani and others*[2], in which the Supreme Court has held that in the set up of Health Services in the State of M.P. and the geographical distribution of population, no fault can be found with the principle of assigning weightage of service rendered in rural and tribal areas while finalizing the merit list of successful in-service candidates for admission to Post Graduate Medical courses but the State Government shall take care to see that the weightage assigned is reasonable and is worked out on a rational basis. He submitted that considering the peculiar experience in the State of Madhya Pradesh of doctors not willing to serve in rural areas, the rule making authority has considered it fit to give weightage of marks up to a maximum of 50 out of 200 as provided in Rule 10 (2) of the Rules and hence Rule 10 (2) of the Rules is reasonable and rational and cannot be held to be *ultra-vires* Article 14 of the Constitution.

(1) 1992 (2) S.C.C. 26

(2) 2003 AIR SCW 3636

7. We have considered the submissions of learned counsel for parties and we find that in *Dr. Dinesh Kumar and others v. Motilal Nehru Medical College, Allahabad and others* (supra) cited by Mr. Mishra, the Supreme Court took note of the suggestion of Government of India under the scheme of examination of Post Graduate Medical Courses that weightage of 15 marks obtained by a candidate in the All India Entrance Examination should be given after he has put in a minimum of 3 years of rural service and observed that while it is eminently desirable that some weightage should be given to doctors who go to rural areas, such incentive should not go to the length of giving weightage of 15% of the total marks obtained by them. The Supreme Court was of the view that when selection of candidates should be made on all India basis, no factor other than merit should be allowed to tilt the balance in favour of a candidate. The reason given by the Supreme Court for not permitting weightage of 15 per cent to a doctor with 3 years rural service are quoted herein below :

> ".....We are of the view that when selection of candidates is being made for admission on an all India basis, no factor other than merit should be allowed to tilt the balance in favour of a canidate. We must remember that what we are regulating are admissions to post-graduate courses and if we want to produce doctors who are MD or MS, particularly surgeons who are going to operate upon human beings, it is of the utmost importance that the selection should be based on merits....."

Thus, the real reason given by the Supreme Court in *Dr. Dinesh Kumar and others v. Motilal Nehru Medical College, Allahabad and others* (supra) was that while regulating admissions to Post Graduate Medical courses, such as MD and MS, selection should be based on merit and no compromise should be made with merit in such selection when surgeons who are going to operate human beings were being produced through such courses.

8. In *Snehlata Patnaik v. State of Orissa* (supra), the observations of Supreme Court in *Dr. Dinesh Kumar and others v. Motilal Nehru Medical College, Allahabad and others* (supra) that merely by offering a weightage of 15 per cent to a doctor who has done 3 years rural service, it will not be possible to bring about a migration of doctors from urban to rural areas was cited and the Supreme Court said :

> "..... in our opinion, this observation certainly does not constitute the ratio of the decision. The decision is in no way dependent upon these observations. Moreover, those observations are in connection with All India Selection and do not have equal force when applied to selection from a single State. These observations, however,

> suggest that the weightage to be given must be the bare minimum required to meet the situation. In these circumstances, we are of the view that the authorities might well consider giving weightage up to a maximum of 5 per cent of marks in favour of in-service candidates who have done rural service for five years or more. The actual percentage would certainly have to be left to the authorities....."

In the aforesaid case of *Snehlata Patnaik v. State of Orissa* (supra), therefore, the Supreme Court also suggested to the authorities for their consideration that some preference might be given to in-service candidates who have done 5 years rural service and the reason given is that it is possible that the facilities for keeping up with the latest medical literature might not be available to such in-service candidates and looking to the nature of their work, it is difficult for them to acquire knowledge about very recent medical research which the candidates who have come after freshly passing their graduate degree might have and this might act as an incentive to doctors who had done their graduation to do rural service for some time. In the year 1992 when the judgment was delivered in *Dr. Snehlata Patnaik v. State of Orissa* (supra), the Supreme Court was of the view that weightage up to 5 per cent of marks in favour of in-service candidates who had done rural service for 5 years or more should be given but the Supreme Court made it clear that the actual percentage will have to be left to the authorities.

9. After more of experience since 1992 and taking into account the experience of the State of Madhya Pradesh, the Supreme Court in the case of *State of M.P. v. Gopal D. Tirthani* (supra), the Supreme Court held that in the set up of health services in the State of M.P. and the geographical distribution of population, no fault can be found with the principle of assigning weightage for the service rendered in rural/tribal areas while finalizing the merit list of successful in-service candidates for admission to PG courses of studies but the State Government shall take care to see that the weightage assigned is reasonable and is worked out on a rational basis. The relevant portion of the judgment of the Supreme Court in the case of *State of M.P. v. Gopal D. Tirthani* (supra) is quoted here under :

> "..... We find merit and much substance in the submissions of the learned Advocate General for the State of Madhya Pradesh that Assistant Surgeons (i.e. Medical Graduates entering the State Services) are not temperamentally inclined to go to and live in villages so as to make available their services to the rural population; they have a temptation for staying in cities on account of better conditions, better facilities and better quality of life available not only to them but also to their family members as also better educational facilities

in elite schools which are to be found only in cities. In-service doctors being told in advance and knowing that by rendering service in rural/tribal areas they can capture better prospects of earning higher professional qualifications, and consequently eligibility for promotion, acts as motivating factor and provides incentive to young in-service doctors to opt for service in rural/tribal areas. In the set up of health services in the State of Madhya Pradesh and the geographical distribution of population, no fault can be found with the principle of assigning weightage for the service rendered in rural/tribal areas while finalizing the merit list of successful in-service candidates for admission to PG course of studies. Had it been a reservation, considerations would have differed. There is no specific challenge to the quantum of weightage and in the absence of any material being available on record, we cannot find fault with the rule of weightage as framed. We hasten to add that while recasting and reframing the rules, the State Government shall take care to see that the weightage assigned is reasonable and is worked out on a rational basis."

10. In the aforesaid case of *State of M.P. v. Gopal D. Tirthani* (supra), yet another question which came up for consideration was whether a Common Entrance Examination could be dispensed with in the case of in-service candidates and the Supreme Court held that a Common Entrance Examination for in-service candidates could not be dispensed with for various reasons. Paragraph 25 of the judgment of the Supreme Court which contains the reasons is extracted herein below :

"..... The eligibility test, called the entrance test are the Pre-PG test, is conducted with dual purposes. Firstly, it is held with the object of assessing the knowledge and intelligence quotient of a candidate whether he would be able to prosecute post-graduate studies if allowed an opportunity of doing so; secondly, it is for the purpose of assessing the merit *inter-se* of the candidates which is of vital significance at the counselling when it comes to allotting the successful candidates to different disciplines wherein the seats are limited and some disciplines are considered to be more creamy and are more coveted than the others. The concept of a minimum qualifying percentage cannot, therefore, be given a complete go-bye. If at all there can be departure, that has to be minimal and that too only by approval of experts in the field of medical education, which for the present are available as a body in the Medical council of India."

It will be clear from the aforesaid paragraph 25 of the judgment that the Common Entrance Examination or the Pre-PG test is conducted not only for the purpose of assessing the merit *inter-se* of a candidate but also to ensure that the candidates who are admitted to the Post Graduate Medical courses, have the minimum standard for such admission to Post Graduate Medical courses and have obtained minimum qualifying percentage required for such admission.

11. In accordance with the said judgment of the Supreme Court in *State of M.P. v. Gopal D. Tirthani* (supra) we find that Rule 10 (1) of the Rules provides that in-service candidates shall have to secure minimum qualifying marks as prescribed, in the Pre-PG Entrance Examination. The said Rule 10 (1) of the Rules is quoted herein below :

> **"10. Examination and Merit List : (In-service candidates)**
>
> (1) There will be one common entrance examination for Post Graduate entrance conducted by Professional Examination Board. The in-service candidates will be selected on the basis of the same entrance examination. The in-service candidates shall have to secure minimum qualifying marks in the Pre-PG Entrance Examination. As prescribed in those rules for admission. The Professional Examination Board will prepare and declare separate merit list of selected in-service candidates. Total marks for the examination for in-service candidates shall be 200. Such in-service candidates, declared successful will be considered for final merit list by addition of marks calculated on the following basis."

Thus, the apprehension of the Supreme Court in *Dinesh Kumar* (supra) that if additional marks up to 15% are given to candidates who serve in rural areas, then candidates of poor quality may get admission in Post Graduate courses, has been taken care of by providing that every in-service candidate has to secure the minimum qualifying marks in the Common Entrance Examination.

12. Moreover, a reading of Rule 10 (1) of the Rules quoted above would show that it is not that every in-service candidate who has served in rural area gets 50 marks out of 200 marks, equivalent to 25%. Depending upon the number of years and the area in which the in-service candidates has served, he will get marks as mentioned in clauses (a), (b) and (c) of Rule 10 (2) Rule 10 (2) is quoted herein below :

> **"(2) Medical Officer** : The *inter-se* merit of the selected in-service candidate shall be fixed up by adding marks of weightage for their services rendered in rural areas. The candidates serving in rural area will get maximum of 50 marks, allotted on the following basis :

(a) For Government service of one year duration while posted in rural area a weightage of maximum 06 marks will be given. For the service in rural area, the maximum gain of marks will be 30 or 20 as per following marks for one year each, for five years.

If the regular services are rendered in Primary Health Centre or Community Health Centre situated in rural area, then 06 marks will be given for one year and if regular services are rendered in Primary Health Centre or Community Health Centre in Nagar Panchayat area, which has been formed under the 'Municipalities Act, 1961' then 04 marks will be given for one year.

(b) For every year of regular service, 04 additional marks will be given, if the rural area comes under tribal sub-plan. If such services are rendered in Primary Health Center the candidate will get maximum 20 additional marks at the rate of 04 additional marks per year for five years and for rendering such regular services at community health center, the candidate will get total additional 10 marks at the rate of 02 marks per year for five years.

(c) For the purpose of this rule, the period of service of candidate, while posted in rural area or Nagar Pacnhayat area of tribal area and if he/she was on unauthorised absence from duty/any dies-non period/any period of leave without pay/any period on training exceeding 3 months/attachment in urban area during the tenure of rural service will not be counted for the purpose of calculation of marks for weightage of rural service.

(d) The final merit of in-service candidates will be prepared by Professional Examination Board for counselling on the basis of marks obtained in entrance examination (equivalent to 200 marks) and marks secured for weightage of rural/tribal area service (equivalent to maximum 50 marks) thus a total of 250 marks.

(e) In case of two or more candidates obtaining equal marks, the *inter-se* merit will be decided as per procedure described in sub-rule (2) of Rule 19.

(f) The counselling of in-service candidates will be done by the Medical Education Department."

A reading of clauses (a), (b) and (c) of Rule 10 (2) of the Rules, quoted above, would further show that marks are sought to be given taking into consideration the actual service rendered by an in-service candidate in rural areas and tribal areas. If

the rule making authority, in its wisdom, has thought it necessary to give such additional marks to in-service candidates serving in rural area up to a maximum of 25% for the purpsoe of ensuring that in-service candidates actually serve in rural and tribal areas of the State of M.P., we cannot, in exercise of our powers of judicial review under Article 226 of the Constitution, substitute our own wisdom for that of rule making authority and take a view that maximum of 25% marks sought to be added in the case of in-service candidates who have served in rural or tribal area is excessive and was not necessary. We are also of the considered opinion that considering the peculiar experience of the State of M.P., the weightage of marks to in-service candidates up to the ceiling of 25% for service in rural and tribal areas in Madhya Pradesh is not unreasonable or irrational and is not *ultra vires* Article 14 of the Constitution.

13. Mr. Mishra next submitted that Rule 10 (3) of the Rules also gives weightage of marks to a Demonstrator up to maximum of 50 marks for 5 years and this provision is clearly violative of Article 14 of the Constitution inasmuch there is no rationale whatsoever in giving weightage of marks to Demonstrators and placing them above the other in-service candidates in the merit list for admission to Post Graduate Medical courses.

14. Mr. Pathak, learned Dy. A.G. relying on the return filed on behalf of the respondents submitted that Demonstrators have been given this benefit because there are no career prospects for Demonstrators and the Demonstrators have been treated as a separate class altogether from other in-service candidates. He further submitted that in Rule 9.2 of the Rules, a restriction was put that a Demonstrator will not be eligible to opt for a seat other than a seat in the subject in which he was working, but the Court has declared such restriction to be *ultra-vires* Art. 14 of the Constitution in the judgment delivered in the case of *Dr. Shailendra Patne* v. *State of M.P. and others*[1].

15. Rule 10 (3) of the Rules which provides for weightage of marks to Demonstrators is quoted below :

> "**(2) Demonstrator :** Demonstrator will be given 10 marks for each year of service after 5 years of minimum regular service rendered, whose maximum limit shall be 50 marks for 5 years. The marks will be allotted by the Dean of the concerned College."

The aforesaid Rule 10 (3) of the Rules thus provides that a Demonstrator will be given 10 marks for each year of service after 5 years of minimum regular service rendered whose maximum limit shall be 50 marks for 5 years. The reason given in the return for this rule is that there are no career prospects for Demonstrators. We

(1) W.P. No. 5056 of 2007 on 16.5.2007.

fail to appreciate this reason given in the rertum. If the Demonstrator is admitted to Post Graduate Medical Course and he completes his Post Graduate course, he can be promoted to the post of Lecturer, Reader and thereafter Professor, as contended by Mr. Mishra, learned Senior Counsel. Moreover, the restriction put in Rule 9.2 of the Rules that a Demonstrator can only opt for a seat in the subject in which he is working has already been declared by the Court to be *ultra vires* Art. 14 of the Constitution. Hence, the Demonstrator as an in-service candidate can now opt for seats in subjects other than the subject in which he is working in the same manner as other Medical Officers. Our judgment declaring the restriction in Rule 9.2 of the Rules as *ultra vires* Article 14 of the Constitution has now further opened up the career prospects of Demonstrators. They can undertake Post graduate Medical courses in any subject other than those in which they are working and after they secure Post Graduate degree or diploma, they can go in for better medical career. Mr. Pathak, learned Dy. Advocate General has not brought to our notice any judgment of the Apex Court or of this Court to show that such a weightage in favour of Demonstrators has been held to be reasonable and rational and not violative of Article 14 of the Constitution. We, therefore, declare the provisions of Rule 10 (3) of the Rules as *ultra-vires* Article 14 of the Constitution.

16. Coming now to the challenge to Rule 20 (9) of the Rules, Mr. Mishra, learned Senior Counsel for the petitioner, submitted that the Proviso to Rule 20 (9) of the Rules provides that the seats remaining vacant after category wise counselling will be made available unchanged to the open category (non-service) candidate of same category. This is in contrast to the provision in Rule 20 (11) of the Rules which provides that seats remaining vacant after category wise counselling for open candidates will be filled up by unreserved category candidates.

17. Mr. Pathak, learned Deputy Advocate General on the other hand submitted that this provision has been made in Rule 20 (9) of the Rules to ensure that the percentage of reservations for reserved category candidates belonging to ST, SC and Other Backward Classes (OBC) is maintained.

18. Rule 20 (9) of the Rules is quoted herein below :

> "20. Counselling :
>
> .....
>
> (9) Counselling of in-service candidates will be done first and category wise in the following sequence :
>
> A. ST Category
> B. SC Category
> C. OBC Category
> D. Unreserved Category.

A candidate will only be eligible to opt a seat from her/her own category.

Seats remaining vacant after category wise counselling will be made available unchanged to the open category (non-service) candidate of same category."

The last limb of Rule 20 (9) of the Rules provides that the seats remaining vacant after category wise counselling will be made available unchanged to the open category (non-service) candidate of same category. Such a provision has been made to ensure that the provision in Rule 8 of the Rules that 20% seats are reserved for candidates belonging to ST, 16% seats are reserved for candidates belonging to SC and 14% seats are reserved for candidates belonging to OBCs, is not affected. In case, as suggested by Mr. Mishra, seats remaining vacant after category wise counselling is made available to un-reserved in-service candidates, then seats which were reserved for ST, SC and OBCs would be filled up by in-service unreserved candidates and the consequence would be that the reservation of 20%, 16% and 14% of the total seats for ST, SC and OBC candidates respectively would be affected. Rule 20 (11) provides for counselling for open (non-service) candidates. If candidates are not available from amongst ST, SC and OBC categories, obviously the seats have to be filled up from open unreserved category. In such an event, the percentage of reservation for ST, SC and OBC categories is affected because of non-availability of candidates of ST, SC and OBC categories and not by a provision in the Rules. Obviously, if in the counselling for open categories, after the counselling for in-service candidates, ST, SC and OBC category candidates are not available for remaining seats reserved for ST, SC and OBC categories, such seats cannot go waste and will have to be filled up from open unreserved category candidates. We, thererfore, do not find that the provision in Rule 20 (9) of the Rules, in so far as it is different from Rule 20 (11) of the Rules is discriminatory and violative of Article 14 of the Constitution of India.

19. In the result, the challenge to Rules 10 (2) and Rule 20 (9) of the Rules in this writ petition fails, but the challenge to Rule 10 (3) of the Rules succeeds and we declare Rule 10 (3) of the Rules as *ultra-vires* Article 14 of the Constitution of India. The counselling will be conducted accordingly.

Order accordingly

WRIT PETITION

Before Mr. Justice Deepak Verma & Mr. Justice S.C. Sinho

20 June, 2007

SATYAPAL ANAND ....Petitioner*

v.

HIGH COURT OF M.P. & ors. .... Respondents

States Reorganization Act (XXXVII of 1956)–Section 51–Circuit Bench of High Court–Petitioner filed Public Interest Litigation that there should be a Circuit Court of High Court at Bhopal–Held–Provision under which Circuit Bench of High Court can be created is included in Section 51 of Act–Unless Chief Justice of State is of opinion with prior approval of Governor to have Division Courts of High Court at other places, same cannot be directed–There is no such opinion of Hon'ble Chief Justice to have Circuit Court at Bhopal–Number of Districts have been carved out from original State of Madhya Pradesh to form Chhattisgarh after M.P. Reorganization Act, 2000 came into force–Assertions made in petition wholly unwarranted and have no factual basis–Petition dismissed.

Perusal of the relevant provision of law would show that unless the Chief Justice of the State is of the opinion with the prior approval of the Governor to have Judges and Division Courts of the High Court at other places also, the same cannot be directed. Thus, it is the sole discretion and the prerogative of the Chief Justice to form an opinion and to decide if any Circuit Court or Bench is required to be established in the State.

In the case in hand, so far there is no such opinion of Hon'ble the Chief Justice to have a Circuit Court at Bhopal also. Thus, according to us, there is no merit or substance in this petition. It is absolutely misconceived.

It is worth noting here that the State of M.P. has already been bifurcated by M.P. Reorganization Act 2000 as a result of which number of districts have been carved out from the original State of M.P. to form the State of Chhattisgarh. Thus, the assertion are also absolutely unwarranted and have no factual basis.

(Paras 9, 10 & 13)

Cases Referred :

Union of India & anr. v. S.P. Anand & ors.; (1998) 6 SCC 466, *Mithilesh Kumar v. R. Venkataraman;* 1987 Supp. SCC 692, *Federation of Bar Associations in Karnataka v. Union of India;* (2000) 6 SCC 715, *State of Maharashtra v. Narayan Shamrao Puranik & ors.;* AIR 1982 SC 1198.

Case Relied upon :

Abdul Taiyab v. Union of India & ors.; AIR 1977 M.P. 116.

Cur.adv.vult.

* W.P. No. 7253/2007 (J)

ORDER

The Order of the Court was delivered by DEEPAK VERMA, J :–Petitioner no. 1 Shri Satya Pal Anand appeared in person and argued the matter.

1. Petitioner no. 1 as *pro bono publico* has preferred this Writ Petition under Article 226 and 227 of the Constitution of India claiming several reliefs which are reflected in paras-7, 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 7(h), 7(i), 7(j) and 7(k) in the petition. Petitioner no. 2 is a practicing Advocate of this Court.

2. In nutshell, basic and foremost prayers are that there should be a Circuit Court of this High Court at Bhopal, and further Indore and Gwalior Benches should also be empowered to entertain and decide all types of cases, including the *vires* matters.

3. Looking to the prayer made, it is profitable to reproduce Section 51 of the States Reorganization Act, 1956 (hereinafter referred to as 'the Act') :

> "51. **Principal seat and other places of sitting of High Courts for new States :** (1) The principal seat of the High Court for a new State shall be at such place as the President may, by notified order, appoint.
>
> (2) The President may, after consultation with the Governor of a new State and the Chief Justice of the High Court for that State, by notified order, provide for the establishment of a permanent Bench or Benches of that High Court at one or more places within the State other than the principal seat of the High Court and for any matters connected therewith.
>
> (3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Judges and Division Courts of the High Court for a new State may also sit at such other place or places in that State as the Chief Justice may, with the approval of the Governor, appoint."

4. In furtherance of this he has submitted that on a bare and plain reading of Sub-section (3) of Section 51 of the Act, it is clear that Judges and Division Courts of the High Court can also sit at such other place or places in that State as the Chief Justice may with the approval of the Governor, decides to do so. According to him, looking to the fact that more than 70% cases pending in the High Court, State of M.P. is a party, therefore, it is desirable that a Circuit Court may be directed to be established at Bhopal. It is urged by him that to defend the cases filed against the State or to prosecute the matters filed by the State, Government officers are required to come all the way from Bhopal to Jabalpur causing burden to the Government exchequer. To avoid un-necessary expenditure, it is necessary to have a Circuit

Court at Bhopal. To buttress his point, he has placed reliance on, *State of Maharashtra v. Narayan Shamrao Puranik and others*[1].

5. To appreciate the said submissions, we have critically perused both the decisions. In both these cases the challenge was to the order of the Bombay High Court wherein the notification issued by Chief Justice of Bombay High Court in exercise of his powers under Sub-section (3) of Section 51 of the Act, with the prior approval of the Governor of Maharashtra by which he appointed Aurangabad as a place at which the Judges and Division Courts of Bombay High Court shall sit, was quashed. It is patent that both the aforesaid judgments of the Supreme Court had arisen on account of the same order passed by the High Court of Bombay between the same parties. The aforesaid judgments of the Supreme Court do not help the cause of the petitioner in any manner whatsoever.

6. According to Article 214 of the Constitution, there shall be a High Court for each State, but with regard to constitution of Benches, the power has been conferred under Section 51 of the Act. This High Court was constituted w.e.f. 1.1.1956. At the time, on account of Presidential notification issued in this regard, Benches at Indore and Gwalior were also constituted. Thus, we already have the Main Seat at Jabalpur with permanent Benches at Indore and Gwalior. In the said Presidential notification there was no mention with regard to the Circuit Court at Bhopal, and rightly so, as the said power has been conferred exclusively on the Chief Justice of the State under Sub-section (3) of Section 51 of the Act, with the approval of the Governor of the State.

7. We may also refer to the decision rendered in the case of *Union of India and Another v. S.P. Anand and Others*[2]. In the aforesaid case Union of India had assailed the notice issued by the High Court of M.P., Indore Bench. The prayer in the said Writ Petition filed by the present petitioner at the Indore Bench was for issuance of writ of mandamus to have a Bench of Supreme Court at Indore. The Apex Court scrutinized the language employed under Article 130 of the Constitution of India and thereafter referred to the report of the Constituent Assembly Debates and eventually in para-20 of the judgment expressed an opinion as under :

> "20. On this view of Article 130 of the Constitution, the whole edifice of the case set up by the petitioners in the writ petition falls to the ground. We, therefore, arrive at the conclusion that the relief sought by the petitioners in the writ petition filed by the petitioners in the High Court could not be granted by the High Court in exercise of its jurisdiction under Article 226 of the Constitution and the said writ petition could not be entertained. The issuing of a notice to the respondents in the writ petition would serve no useful purpose and would only distract the

(1) AIR 1982 SC 1198 and AIR 1983 SC 46 (2) (1998) 6 SCC 466

> respondents from performing their other important functions. In our opinion, this was a case which should have been dismissed in limine and the High Court was in error in issuing a notice to the respondents to defend the writ petition."

After so stating, their Lordships referred to the decision rendered in *Mithilesh Kumar v. R. Venkataraman*[1], wherein it had been opined that seeing one's name in newspapers everyday has lately become the worst intoxicant and the number of people who have become victims of it is increasing day by day. Thereafter their Lordship in para-22 has opined thus :

> "22. At the stage of preliminary hearing of a writ petition, the High Court, before issuing a notice to the respondent, has to guard against the court being used as a forum for gaining publicity by the person or persons moving the writ petition. The need for such caution is greater when a person holding a high constitutional office is impleaded as a respondent in the writ petition or when matters of policy are involved. In the instant case, we are constrained to say that in passing the impugned order issuing notice on the writ petition, the learned Judge of the High Court has failed to bestow the requisite care and circumspection. We are, therefore, unable to uphold the impugned order."

In the same judgment it has been held that in case a Writ Petition filed by the petitioner in the High Court does not raise a triable issue, then the same should be dismissed in limine.

8. A somewhat similar question had cropped up for consideration before the Supreme Court in the matter of *Federation of Bar Associations in Katnataka v. Union of India*[2]. In the said matter demand for establishment of High Court Bench at Dharwad-Hubli was made. Supreme Court has held that Article 214 of the Constitution only mentions that there shall be a High Court for each State, but nothing is stated therein for establishment of Benches of the High Court at different centres. The statutory provision under which a Circuit Bench of the High Court can be created is included in Section 51 of the Act.

9. Perusal of the relevant provision of law would show that unless the Chief Justice of the State is of the opinion with the prior approval of the Governor to have Judges and Division Courts of the High Court at other places also, the same cannot be directed. Thus, it is the sole discretion and the prerogative of the Chief Justice to form an opinion and to decide if any Circuit Court or Bench is required to be established in the State.

10. In the case in hand, so far there is no such opinion of Hon'ble the Chief Justice

(1) 1987 Supp. SCC 692 (2) (2000) 6 SCC 715

to have a Circuit Court at Bhopal also. Thus, according to us, there is no merit or substance in this petition. It is absolutely misconceived.

11. We have no hesitation in holding that the present litigation has been filed to see one's name published in the newspaper as if it is an intoxicant to sustain the petitioner. We say so as petitioner Shri Satya Pal Anand is a chronic litigant, a court bird and is knocking the doors of the Court under Articles 226 and 227 of the Constitution on slightest of cause, under the garb of Public Interest Litigation. His several matters had travelled to the Apex Court. His energy seems to be really misdirected.

12. Quite apart from the above, certain assertions have been made with regard to requirement of Bench of the High Court at Bhopal. The same is also factually incorrect. As mentioned hereinabove, there is a principal seat at Jabalpur and permanent Benches at Indore and Gwalior. The said arrangements which was envisaged at the time of formation of the State of M.P. is catering well to the needs of the litigating public. After all, glory and aura of the High Court cannot be reduced to that of glorified District Courts by having so many Benches or Circuit Courts within the State.

13. It is worth noting here that the State of M.P. has already been bifurcated by M.P. Reorganization Act 2000 as a result of which number of districts have been carved out from the original State of M.P. to form the State of Chhatisgarh. Thus, the assertions are also absolutely unwarranted and have no factual basis.

14. As far as second relief is concerned, the same also cannot be granted to the petitioners in the light of the opinion expressed by majority view of Full Bench in *Abdul Taiyab v. Union of India and Others*[1]. Thus, this ground also has no merit and substance.

15. We would be failing in our duty if we do not say that we would have imposed exemplary heavy costs on the petitioner, but taking pity on his old age, we refrain from doing so, atleast in this case.

16. In the result the Writ Petition, being devoid of merit and substance, stands dismissed in limine. The security amount, if deposited by the petitioner, be refunded to him after due verification.

Petition dismissed.

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(1) AIR 1977 M.P. 116.

WRIT APPEAL

Before Mr. Justice S.K. Kulshrestha & Mr. Justice J.K. Maheshwari

27 February, 2007

NAGDA MUNICIPALITY, NAGDA .... Appellant *

v.

ITC LIMITED .... Respondent

A. **Municipalities Act, M.P. (XXXVII of 1961)–Section 339-A and Bylaws–Development Charges–Respondent constructed building for its own use–Section 339-A amended by Act No. 29 of 2003 included builder–Builder means who construct buildings for the purpose of transfer by sale or otherwise all or some of them to persons other than members of his family–By laws makes provision for development charges from the colonizers and person in occupation for making available the basic facilities to inhabitants–By laws not amended to bring activity of person like petitioner within the net–No fault in order of Single Judge in quashing notice demanding development charges–Appeal dismissed.**

B. **Municipalities Act, M.P. (XXXVII of 1961)–Section 187-A–Compounding of offences of construction of buildings without permission–Clause (d) of Section 187-A does not restrict the power of Municipality to compound even in relations to plots having area exceeding 300 sq. meters–Municiplity or Corporation is empowered to order of demolition has also the power to compound–Authority first consider whether offence of illegal construction can be compounded–Demolition should be resorted to only when compounding is not possible.**

The said provision, as we read, is in relation to a builder who constructs or cause to be constructed on any land in the municipal area, whether held by him or any other person, independent buildings or a single building with apartments; or converts or causes to be converted an existing building or any part of such building into apartments, for the purpose of transfer by sale or otherwise all or some of them to persons other than members of his family. Learned counsel for the respondent-petitioner submits that the building constructed by the petitioner ITC is for its own commercial purpose and not intended to be alienated in the manner contemplated in clause (b) of section 339-A (1) of the Act. We also find that after the addition of word builder by the amending Act no change has been made in the bye laws Annexure P/7 to bring the activities of the person such as petitioner, within the net. Under these circumstances, we are unable to find any fault the order in so far as learned Single Judge has quashed the notice Annexure P/9 demanding development

* W.A. No. 457/2006 (I)

charges. In relation to demand of development charges, if still there is any provision to justify the demand, the municipality shall be free to proceed in the matter and give notice to the petitioner and decide the matter in accordance with law.

In reference to the clause (d) reproduced above, learned senior counsel for appellant submits that the intention of law is clear that the compounding of offences of the illegal construction is restricted to the plot which are not more than three hundred square meters in area. Though at first glance, the provision does give such an indication, we find that clause (d) does not restrict the power of the municipality to take action in consonance with the provision of Section 187-A of the Act even in relation to the plots having area exceeding three hundred square meters as such a course is not contra indicated.

Where the authority under the municipality or municipal corporation empowered to order demolition has also the power to compound law enjoins such authority with a duty to first consider whether offence of illegal construction can be compounded and it is only when such compounding is not possible, resort to demolition can be taken. We are fortified in our view by the judgment of the Apex Court in the case of *Muni Suvrat Swami Jain S.M.P. Sangh* v. *Arun Nathuram Gaikwad & ors.* (AIR 2007 SC Weekly 38). Their Lordships have clearly held that mere departure from the authorised plan or putting up of a construction without sanction does not *ipso facto* and without more necessarily and inevitably justify demolition of the structure. Thus, it is only in such cases which are not amenable to compounding that the drastic step of demolition, if authorised, can be taken.

(Paras 9, 11 & 12)

Cases Referred :

M/s B.S.N. Joshi & Sons. v. Nair Coal Services Ltd. & ors.; AIR 2007 SC 437, *Sri Justice S.K. Ray v. State of Orissa & ors.*; AIR 2003 AC 924, *Director of School Education, Madras & ors. v. Gnanaraj & anr.*; AIR 1992 Madras 124, *Muni Suvrat Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad & ors.*; AIR 2007 SCW 38.

C.L. Yadav with *O.P. Solanki*, for the appellant

S.C. Bagadiya with *Pankaj Bagadiya*, for the respondent.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by S.K. KULSHRESTHA, J. :– This appeal assails the order dated 26.9.2006 passed by the learned Single Judge in W.P. No. 1699/2006, whereby the learned Single Judge has quashed the demand raised vide notice Ex. P/9 for development charges and in

relation to the determination of compounding fee for illegal construction by the respondent-petitioner, directions have been issued as under :

> "In the facts and circumstances of the case, the demand raised by the respondents towards Development Charges, Annexure P-6 and compounding fee Annexure P/19 are quashed with the following directions :
>
> 1. That the petitioner shall submit a detailed representation before the respondent No. 2, regarding the nature of land and the actual area of unauthorized construction within a week.
>
> 2. If such a representation is submitted by the petitioner, the respondents shall submit the same before President-in-Council, who shall consider the same in accordance with Section 187-A of the Act and also in accordance with the Guidelines issued by Collector for the year 2006-2007 and shall raise the demand accordingly.
>
> 3. The respondents shall pass a necessary order within a period of two weeks from the date of receipt of representation after giving opportunity of hearing to the petitioner.
>
> 4. The amount already deposited by petitioner in compliance of the interim order passed by this Court shall be adjusted by the respondents.
>
> 5. Since the letter of demand Annexure P/6 relating to Development Charges has been quashed, therefore, the bank guarantee deposited by the petitioner in pursuance of the interim order passed by this Court stands discharged.
>
> 6. It is made clear that if any further construction is raised, then the same shall be with the permission/sanction of the respondents."

2. The respondent-petitioner, with a view to establish a Farmer Facility Centre and Godown at village Padliya Kala, Tehsil Nagda, District Ujjain, purchased a piece of agricultural land admeasuring 4.164 Hect. It was alleged that after purchasing the land, the petitioner got its name mutated in the revenue record and also obtained the order of diversion from the Sub-Divisional Officer, Nagda for its commercial use. The site plan for the proposed Facility Centre and Godown was approved by the Town & Country Planning Department, Ujjain and thereafter the petitioner applied for building permission in the office of appellant vide application on 24.12.2005. The respondent-petitioner contends that since no objection was communicated in respect of the plan submitted nor the plans were sanctioned within the period prescribed therefor, on assumption of its deemed permission the building was constructed. However, the appellant, treating the said building to be an illegal construction,

proceeded to demand development charges vide Annexure P/9 in the sum of Rs. 22,40,232 and rejected the representation of the petitioner. It was in these circumstances that the writ petition was filed challenging the demand Annexure P/9.

3. During the pendency of the petition an interim order was passed to the effect that upon depositing Rs. 11,00,000/- within a period of one week, the present appellant shall not interfere with the construction of the F.F.C. as per the building plan submitted by them. It was further directed that the remaining amount of the impugned demand shall be secured by the bank guarantee in favour of the appellant (respondents to the petition) which shall be kept alive during pendency of the writ petition.

4. This order was not assailed by the appellant but it was only after the writ petition was decided, the appellant has filed this appeal.

5. Learned counsel for appellant Shri C.L. Yadav, Senior Advocate, submits that the issue raised before the writ Court was only as regards the development charges demanded vide Annexure P/9 and the demand of compounding charges was not a subject matter of the petition. In this connection, learned senior counsel has referred to the decision of the Apex Court in the case of *M/s B.S.N. Joshi & Sons. v. Nair Coal Services Ltd. & ors.*[1], to the effect that if a point is not pleaded, the High Court should not allow it to be urged during arguments. He has further invited our attention to the para 5 of the affidavit filed by the Legal Manager Shri T.V. Balaji Rao of the petitioner company in which it has categorically be stated that since the issue of grant of building permission and compounding charges is alien to the present controversy the petitioner shall take the issue separately as per the decision of the respondents. The counsel, therefore, contends that not only law as laid down in *M/s B.S.N. Joshi and Sons* (supra), but also by the said statement in the affidavit, the company divested itself of raising the point in the said writ petition. It is in this background that the contention of the senior counsel for appellant is that the learned Single Judge should not have allowed this aspect of the matter and ventured to decide the same.

6. Shri S.C. Bagadiya, Senior Advocate, per contra, submits that the writ Court has the power to grant the relief which has not been claimed. In this connection reference has been made to the decision of the Apex Court in the case of *Sri Justice S.K. Ray v. State of Orissa and others*[2]. He has also invited attention to the decision of Hon'ble Madras High Court in the case of *Director of School Education, Madras and others v. Gnanaraj and another*[3], to the effect that the powers of the writ Court are not scuttled down to the exact prayer projected in the petition and subsequent events can also be taken note of.

(1) AIR 2007 SC 437 (2) AIR 2003 SC 924 (3) AIR 1992 Madras 124

7. While we agree with the learned counsel for appellant that in view of the specific averment made in the affidavit to the effect that the company was not raising the issue with regard to the demand of compounding charges till the matter was decided by the municipality, the learned Single Judge should have left the party at liberty to pursue the legal remedy after decision of the municipality, since the matter has been decided and certain directions have been issued, we are of the view that only on the technical ground that the company at one point of time represented to the Court that it was not raising that issue, the matter need not be jettisoned. Accordingly, we propose to decide the issues on merits.

8. In reference to the demand made vide notice Annexure P/9 for the development charges, the source of authority has been pleaded to be the bye laws Ex. P/7. We have keenly gone through the bye laws and we find that the bye laws make a provision for development charges only from the colonizers and the persons in occupation for making available the basic facilities to the inhabitants. Learned counsel for the appellant has, however, referred to Section 339-A of the M.P. Municipalities Act, 1961 (hereinafter referred to as "the Act") which by an amendment by M.P. Act No. 29 of 2003, adds builder also along with colonizer. Section 339-A of the Act reads as under :

> **"339-A. Registration of (Colonizer or Builder). (1) Any person who :**
>
> (a) as a colonizer intends to undertake the establishment of a colony in the area of Municipal Council or Nagar Panchayat for the purpose of dividing the land into plots, with or without developing the area, transfers or agrees to transfer gradually or at a time, to persons desirous of settling down on those plots by constructing residential or non-residential or composite accommodation, or
>
> (b) as a builder constructs or cause to be constructed on any land in a municipal area, whether held by him or any other person, independent buildings or a single building with aparatments; or converts or causes to be converted an existing building or any part of such building into apartments, for the purpose of transfer by sale or otherwise all or some of them to persons other than members of his family and includes his assigness shall apply to such competent authority as may be appointed by the State Government for the grant of a Registration Certificate."
>
> (2) On receipt of the application for registration under sub-section (1), (such competent authority, as may be appointed by the State Government) shall, subject to the rules made in this behalf, either

issue or refuse to issue the Registration Certificate, within thirty days:

Provided that if (such competent authority, as may be appointed by the State Government) refuse to issue the Registration Certificate, the reasons for refusal shall be intimated to the applicant:

(Provided further that an appeal may be filed by the Appeal Committee constituted under Section 307 within 30 days from the date of rejection of application of registration by the competent authority.)

(3) The State Government shall have power to make rules prescribing the form of application, amount of fees for registration and other terms and conditions, for issue of Registration Certificate.

9. The said provision, as we read, is in relation to a builder who constructs or cause to be constructed on any land in the municipal area, whether held by him or any other person, independent buildings or a single building with apartments; or converts or causes to be converted an existing building or any part of such building into appartments, for the purpose of transfer by sale or otherwise all or some of them to persons other than members of his family. Learned counsel for the respondent-petitioner submits that the building constructed by the petitioner ITC is for its own commercial purpose and not intended to be alienated in the manner contemplated in clause (b) of section 339-A(1) of the Act. We also find that after the addition of word builder by the amending Act no change has been made in the by laws Annexure P/7 to bring the activities of the person such as petitioner, within the net. Under these circumstances, we are unable to find any fault the order in so far as learned Single Judge has quashed the notice Annexure P/9 demanding development charges. In relation to demand of development charges, if still there is any provision to justify the demand, the municipality shall be free to proceed in the matter and give notice to the petitioner and decide the matter in accordance with law.

10. Coming to the second question, the demand of compounding charges, the learned Single Judge has observed in para 10 of the impugned order that since the facts have come on record by way of moving an application and affidavits and also in pursuance of the order of the learned Single Judge (the interim order) the validity of the demand raised by respondent towards compounding fee is also required to be examined. While we feel that the learned Single Judge, in view of the specific affidavit that this aspect was not being agitated, should have left the party to proceed in the said matter in accordance with law, since the direction issued by the learned Single Judge, reverts the matter to the municipality and its functionaries to take decision with regard to the compounding charges under Section 187-A and the

matter is left in the hands of the municipality, we do not consider it fit to quash the same. We may refer to the provisions of Section 187-A regarding compounding of offences of construction of buildings without permission. The said provision reads as extracted below :

> **187-A. Compounding of offences of construction of buildings without permission.** - Notwithstanding anything contained in this Act or any other Act, for the time being in force or any rules or byelaws made thereunder, the offence of constructing buildings without permission or contrary to the permission granted, may be compounded, if -
>
> (a) such contravention does not effect the regular building line; and
>
> (b) the area of unauthorised construction made in the marginal open spaces or in excess of the prescribed Floor Area Ratio does not exceed ten percent of the prescribed floor are ratio:
>
> (c) area notified by the State Government as a hill station or a place of tourist importance or sensitive / fragile from the point of ecology.
>
> (d) area specified for parking of vehicles.
>
> (e) area coming within the Road or area affecting alignment of Public Roads.
>
> (f) area specified for tanks (Talab).
>
> (g) area of construction affecting regular building life:
>
> (Provided that in compunding the cases, fees shall be charged, as under in respect of the area of unauthorised construction on the basis of the rate of sale of land determined by the Collector of stamps for the area concerned;
>
> (a) If the construction relates to a plot of one hundred square meter, ten percent of the rate of sale, in respect of residential building and fifteen percent of the rate of sale, in respect of non-residential building;
>
> (b) If the construction relates to a plot of one hundred square meter, but does not exceed two hundred square meter, twenty percent of rate of sale, in respect of residential building and thirty percent of the rate of sale, in respect of non-residential building;

(c) If the construction relates to a plot of two hundred square meter, but does not exceed three hundred fifty square meter, thirty percent of the rate of sale, in respect of residential building and forty five percent of the rate of sale, in respect of non-residential building;

(d) If the construction relates to a plot of three hundred square meter, forty percent of the rate of sale, in respect of residential building and sixty percent of the rate of sale, in respect of non-residential building:

Provided further that the compounding shall be made in case of residential construction by the Chief Municipal Officer and in case of non-residential construction with the permission of President-in-Council:

Provided also that nothing contained in this Section shall apply to any person who does not have any right over the building for the land on which the construction has been made).

11. In reference to the clause (d) reproduced above, learned senior counsel for appellant submits that the intention of law is clear that the compounding of offences of the illegal construction is restricted to the plot which are not more than three hundred square meters in area. Though at first glance, the provision does give such an indication, we find that clause (d) does not restrict the power of the municipality to take action in consonance with the provision of Section 187-A of the Act even in relation to the plots having area exceeding three hundred square meters as such a course is not contra indicated.

12. Where the authority under the municipality or municipal corporation empowered to order demolition has also the power to compound law enjoins such authority with a duty to first consider whether offence of illegal construction can be compounded and it is only when such compounding is not possible, resort to demolition can be taken. We are fortified in our view by the judgment of the Apex Court in the case of *Muni Suvrat Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad & ors.*[1]. Their Lordships have clearly held that mere departure from the authorised plan or putting up of a construction without sanction does not *ipso facto* and without more necessarily and inevitably justify demolition of the structure. Thus, it is only in such cases which are not amenable to compounding that the drastic step of demolition, if authorised, can be taken.

13. The municipality has issued Annexure P/19, demand notice, for payment of Rs. 49,57,439/-. Since the learned Single Judge, despite the fact that it was stated

(1) AIR 2007 SC Weekly 38

that the petitioner was not challenging this demand in the said petition, has issued directions, we find that the appellant municipality does not suffer any prejudice even if the said directions are complied with and the demand is worked out afresh. The petitioner has already deposited a sum of Rs. 11,00,000/- with the municipality under the interim order dated 27.4.2006, before the exercise for calculating the compounding fees is undertaken, the petitioner company shall desposit a further sum of Rs. 9,00,000/- with the municipality within a fortnight and give an undertaking that if eventually the demand raised by the municipality is more than the amount deposited, the petitioner company shall satisfy the same within three months. In the event it is found that the liability of the petitioner company is less than the amount deposited, the municipality shall refund the balance amount to the company within fifteen days from the crystallisation of the liablility. Other directions contained in para 11 of the judgment of the learned Single Judge shall remain unaffected subject, however, to the modification hereinabove stated. This appeal is accordingly disposed of with no order as to cost.

Appeal disposed of

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mrs. Justice S.R. Waghmare
14 May, 2007

STATE OF M.P. & ors. .... Appellants*
v.
ASHOK KUMAR TRIPATHI & anr. .... Respondents

Constitution of India, Articles 243-B, 243-C, 243-M, 244, Vth Schedule Part C, Panchayat (Extension to the Scheduled Areas) Act, 1996, Section 2, M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993, Section 129-E–Reservation of post of President Zila Panchayat for Scheduled Tribe–District Shahdol was constituted of many tahsils–On 15.8.2003 District Anuppur was constituted–District Anuppur consisted of four tahsils which were already declared as Scheduled Areas–Gram Panchayats and Janpad Panchayats reserved for Schedule Tribes–Petition was filed contending that office of President Zila Panchayat be reserved for Scheduled Tribes–Petition allowed by Single Judge directing State Govt. to make reference to President for declaring Anuppur District as Scheduled Area and to defer the holding of election till the matter is decided by President–Held–Concept of reservation would get attracted once there is an order by President declaring such area

* W.A. No. 1364/2006 (J)

to be Scheduled Area–There is distinction between various categories of Panchayats at various levels–District has different unit for election under Article 243-M–An area cannot form part of Scheduled Area unless there is declaration of President–Section 129-E of Act, 1993 cannot override Constitution–As State Govt. has already forwarded its recommendations to Union of India decision may be taken in that regard–However keeping elections in abeyance till decision is set aside–Writ Appeal allowed.

On 15.8.2003, it was reorganized and two separate districts, namely Shahdol and Anuppur were constituted. District Anuppur by virtue of re-organization comprises of four Tahsils, namely Anuppur, Pushparajgarh, Jaithari and Kotma. These four Tahsils were declared as Scheduled areas under the provisions of Scheduled Area (State of Bihar, Gujarat, Madhya Pradesh and Orissa) order, 1977. These four Tahsils were scheduled areas and all the seats of Gram Panchayats and Janpad Panchayats were reserved for Scheduled Tribes alone. Total number of Gram Panchayats in four tahsils are 276 and all have been reserved for Scheduled Tribes. Similarly, there are four Janpad Panchayats in four Tahsils and they have also been reserved for Scheduled Tribes.

It was contended by them that while all the Tahsils of Anuppur district are reserved for Scheduled Tribes, the office of President of Zila Panchayat should have been reserved for Scheduled Tribes as the district Anuppur is constituted of such tahsils which form whole of the area of the district as scheduled area.

From the aforesaid, it is clear as crystal that there is a clear cut distinction between various categories of Panchayats at various levels.

What is contended by Mr. Trivedi is that when the Presidential Order included Anuppur in the Scheduled Area, the State Government cannot exclude it. The aforesaid submission, in our considered opinion, is unacceptable. What was included in the notification dated 20.2.2003, by which the President rescinded the Scheduled Area of order of 1977 is a substitution. Anuppur which was a Tahsil has become a part of Scheduled Area. Anuppur was part of Shahdol district at the time of notification. The State Government has bifurcated District Shahdol into two districts Shahdol and Anuppur. It is propounded by Mr. Trivedi, if Anuppur is not regarded as a Scheduled Area, there will be a flagrant violation of the Constitutional Scheme. It is worthwhile to state here Anuppur which was included as a Scheduled Area as one of the Tahsils of district Shahdol and is still treated as a Scheduled area and all Gram Panchayats and Janpad Panchayats of Anuppur Tahsil are reserved for Scheduled Tribes. Anuppur has at present become a District consisting of four Tahsils, namely Anuppur, Pushparajgarh, Jaithari and Kotma. The four Tahsils still maintain their

status as Scheduled Areas but Anuppur, as a district, has not been regarded as a Scheduled Area. As has been stated earlier, the Zila Panchayat is meant for the district. It has a different entity.

On a reading of the Constitutional scheme, we are of the considered opinion that unless there is a declaration by the President in Part-C of the Fifth Schedule, an area cannot form a part of Scheduled Area. The constituents having already been declared Scheduled areas are maintained as such. The district has a different Unit for the purpose of election under Article 243-M of the Constitution. The concepts of Zila Panchayat and reservation are different things. It is not an arithmetical concept by which one can arrive at a conclusion that when all the tahsils constitute as a district, the district must be regarded as a Scheduled Area, specially, for the purpose of election of Zila Panchayat. We are not persuaded by the said argument of learned senior counsel for the respondents.

(Paras 2, 13 & 14)

Cases Referred :

Samatha v. State of Andhra Pradesh & ors.; 1997 AIR SCW 3361, *Amarendra Nath Dutta v. State;* AIR 1983 Pat. 151, *Neeraj Kumar Sharma v. State of M.P.;* W.P. No. 3138/2007. *Jagannath v. State of Maharashtra;* AIR 1963 SC 728.

T.S. Ruprah, Addl. A.G., for the appellants
A.M. Trivedi with Ashish Trivedi; for the respondents.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–Regard being had to the similarity pertaining to the question of law involved in both these appeals, they were heard analogously and are disposed of by this common order. Be it noted that the pregnability of the order dated 19.5.2005 passed by the learned single Judge in W.P. 853 of 2005 has been challenged by the State of M.P. and its functionaries in Writ Appeal No. 1364 of 2006 and the defensibility of the said order is assailed by the appellant in W.A. No. 658 of 2006 who had filed an application for intervention in the writ petition.

2. The facts which are required to be exposited are that district Shahdol was constituted of many a Tahsil. On 15.8.2003, it was re-organized and two separate districts, namely Shahdol and Anuppur were constituted. District Anuppur by virtue of re-organization comprises of four Tahsils, namely Anuppur, Pushparajgarh, Jaithari and Kotma. These four Tahsils were declared as Scheduled areas under the provisions of Scheduled Area (State of Bihar, Gujarat, Madhya Pradesh and Orissa) order, 1977. These four Tahsils were scheduled areas and all the seats of Gram Panchayats

and Janapad Panchayats were reserved for Scheduled Tribes alone. Total number of Gram Panchayats in four tahsils are 276 and all have been reserved for Scheduled Tribes. Similarly, there are four Janapad Panchayats in four Tahsils and they have also been reserved for Scheduled Tribes. The respondents in W.A. No. 1364 of 2006 invoked the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India contending *inter-alia* that the respondent No. 1 is a resident of village Kuhka, Post Malga, Tahsil Kotma, District Anuppur and was Sarpanch of Gram Panchayat from 1994 to 2000 and the respondent No. 2 belongs to Scheduled Tribe and is a member of Zila Panchayat and has been elected in January 2005 from Ward No. 8 of Pushparajgarh. It was contended by them that while all the Tahsils of Anuppur district are reserved for Scheduled Tribes, the office of President of Zila Panchayat should have been reserved for Scheduled Tribes as the district Anuppur is constituted of such tahsils which form whole of the area of the district as scheduled area. It was put forth that Section 129-E of the M.P. Panchayat Raj and Gram Swaraj Adhiniyam, 1993 (for short 'the Adhiniyam') provides for reservation of such area and there was no justification on the part of the State of M.P. and its functionaries not to reserved the office of the President, Zila Panchayat for the Scheduled Tribes.

3. The said stand and stance of the writ petitioners were combated by the respondents therein stating *inter-alia* that the scheduled area for the office of the President, Zila Panchayat is meant for the district and unless the district Anuppur is notified to be a scheduled area by a Presidential notification, as envisaged under Article 244 of the Constitution of India, the State cannot issue a notification for such reservation. The learned single Judge adverted to Article 244 and the Fifth Schedule of the Constitution, the notification issued on 31.12.1977, the notification published in extra-ordinary gazette on 20th February, 2003 by which the President of India had rescinded the Scheduled Area of order of 1977 in so far as it relates to the area presently comprising in the State of Chhattisgarh, Jharkhand and Madhya Pradesh, Article 243-M, the Panchayat (Extension to the Scheduled Areas) Act, 1996, a Central piece of legislation (for short Act of 1996), and directed as under :

> "(11) Consequently, this petition is allowed in part and following directions are issued :
>
> 1. Respondent No. 1 is directed to consider the matter to make a reference to the President in accordance with law and procedure for declaring Anuppur district as scheduled area. Aforesaid exercise shall be done by the respondent No. 1 within a period of 60 days from the date of communication of the order.
>
> 2. After reference is made by the respondent No. 1 to the President, the respondent No. 1 shall await final verdict from the

President in this regard and thereafter shall proceed in accordance with the presidential notification, and proceed with in accordance with the provisions of Section 129E of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993.

3. Till the matter is finally decided by the President, the election of the office of President, Zila Panchayat, Anuppur shall remain in abeyance."

4. The appellant in W.A. No. 658 of 2006 preferred Special Leave Petition No. 19191 of 2005 and the Apex Court passed the following order :

"The direction of the High Court that till the President, the election of the office of President, Zila Panchayat, Anuppur in abeyance is stayed till further orders.

Counter affidavits and vakalatnama be filed within two weeks thereafter."

5. It is worth noting at that time the enactment of the 'Madhya Pradesh Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005' had not come into force and after its coming into force, the following order was passed by the Apex Court :

"In view of the remedy of intra-court appeal being now available as a result of the enactment of the Madhya Pradesh Uchcha Nyayalaya (Khandpeeth ko Appeal) Adhiniyam, 2005, we are not inclined to entertain this special leave petition under Article 136 of the Constitution of India. The special leave petition is, thus, dismissed with liberty to the petitioner to approach the High Court.

The interim protection granted by this Court will continue for a period of two months."

We have narrated the said aspect only to indicate the chronology.

6. We have heard Mr. T.S. Ruprah, learned Additional Advocate General for the appellants in the State Appeal and Mr. N.S. Kale, learned Senior Counsel assisted by Mr. Greeshma Jain in W.A. No. 658 of 2006 and Mr. A.M. Trivedi, learned Senior Counsel with Mr. Ashish Trivedi, Advocate for the private respondents in W.A.No. 1364 of 2006. We have also heard Mr.S.C. Sharma, learned Senior Counsel with Mr. S.N. Prajapati, Advocate for the respondent No. 5 in W.A. No. 658 of 2006.

7. It is submitted by Mr. Ruprah, learned Additional Advocate General and Mr. N.S. Kale, learned Senior Counsel along with Mr. Greeshma Jain, Advocate that

unless there is a notification in respect of district Anuppur by the President of India in exercise of the power under Fifth Schedule to the Constitution of India, the State cannot reserve the office of the District Panchayat for Scheduled Tribes despite the fact that the District constitutes of all the tahsils which have been declared as Scheduled Areas. The learned counsel for the appellant submitted that besides what has been notified by the Gazette on 20.2.2003, nothing can be added to it or extracted from it by the executive. It is urged by them, the learned single Judge has committed the error by directing the State Government to refer the matter to the President in accordance with law and procedure for declaring Anuppur as a Scheduled Area and even assuming the same is correct, there was no justification to direct that till the matter is finally decided by the President of India, the election of the office of President of Zila Panchayat, Anuppur shall remain in abeyance. It is proponed by them that Anuppur as a district cannot be regarded or treated as a Scheduled Area because its constituents form a Scheduled Area as the same is not permissible within the Constitutional frame-work to treat a particular thing with particular status by any kind of inference.

8. Mr. A.M. Trivedi, learned Senior Counsel being assisted by Mr. Ashish Trivedi, Advocate, *per contra*, submitted that the order of the learned single Judge is absolutely impeccable inasmuch as when the entire area that constitutes the district has been declared as a Scheduled Area and the 'area' being the term used in the Fifth Schedule to the Constitution, there would be no impropriety to declare Anuppur as a district, the Scheduled Area. The learned counsel has invited our attention to Art. 243-M, Article 244 and the Fifth Schedule of the Constitution to emphasize that if the said Constitutional provisions are read with studied scrutiny, there can be no scintilla of doubt that district Anuppur falls within the ambit and sweep of Scheduled Area and there is no escape from the said conclusion. It is urged by the learned Senior Counsel that there is no need for the Presidential notification but the learned single Judge, by abundant caution, has directed the State Government to refer the matter to get the maze clear and soundly and correctly has directed election to the office of the President, Zila Panchayat, Anuppur to remain in abeyance. He has commended us to the decisions rendered in *Samatha v. State of Andhra Pradesh and others*[1], *Amarendra Nath Dutta v. State*[2] (Full Bench), the decision dated 12.4.2007 rendered in (*Neeraj Kumar Sharma* v. *State of M.P.*[3]) decided by Division Bench of this Court, and *Jagannath* v. *State of Maharashtra*[4].

9. The spinal and seminal issues that really emanate for consideration in these two appeals are whether the district Anuppur stands declared as a Scheduled Area because its constituents have been declared as Scheduled Areas and whether the Court while exercising power under Article 226 of the Constitution can express an

(1) 1997 AIR SCW 3361
(2) AIR 1983 Patna 151
(3) W.P. No. 3138 of 2007
(4) AIR 1963 S.C. 728

opinion in that regard and direct the State Government to move in that direction to refer the matter to the President of India and till then, direct stay of election to the office of President of Zila Panchayat.

10. Article 244 of the Constitution occurring in Part-X reads as under :

> **"Art. 244.** Administration of Scheduled Areas and Tribal Areas:
>
> (1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State, other than the States of Assam, Meghalaya and Tripura.
>
> (2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam, Meghalaya and Tripura and the Union territory of Mizoram.
>
> Clause (1) makes the applicability of the 5th Sch. to the (a) Scheduled Areas, and (b) Scheduled Tribes in States other than Assam and Meghalaya e.g., the Scheduled Areas in Bihar, Gujarat, Madhya Pradesh, Orissa, Madras (Godavari Agency). The 'Scheduled Areas' are such Areas in these States as are specified by the President under Para 6 of the 5th Sch. post."

Clause (1) of Article 244, as is perceptible categorically provides that provisions of Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State. Part-B of the Fifth Schedule relates to administration and control of Scheduled Areas and Scheduled Tribes. Paragraph 4 of the same deals with Tribes Advisory Council. Para 5 deals with law applicable to Scheduled Areas. Part-C which deals with Scheduled Areas, contains para 6 and the same reads as under :

> **"6. Scheduled Areas** - (1) In this Constitution, the expression 'Scheduled Areas' means such areas as the President may by order declare to be Scheduled Areas.
>
> (2) The President may at any time by order :
>
> (a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area;
>
> [(aa) increase the area of any Scheduled Area in a State after consultation with the Governor of that State;]
>
> (b) alter; but only by way of rectification of boundaries, any Scheduled Area;

(c) on any alteration of the boundaries of a State of on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area;

[(d) rescind, in relation to any State or States, any order or orders made under the paragraph, and in consultation with the Governor of the State concerned, make fresh order redefining the areas which are as to be Scheduled Areas;]

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order."

In this context, we may refer to Article 243-M, which provides that nothing in the said part shall apply to the Scheduled Areas referred to in Clause (1) and the Tribal areas referred to in Clause (2) of Article 244. The provisions of 1996 Act (Act 40 of 1996) deals with extension of provisions of Part IX of the Constitution relating to the Panchayats to the Scheduled Areas. Section (2) reads as under:

"**2. Definition :** In this Act, unless the context otherwise requires, 'Scheduled Areas' means the Scheduled Areas as referred to in clause (1) of Article 244 of the Constitution."

Section 4 of the Act of 1996 carves out exceptions and modification to Part IX of the Constitution.

11. Section 129-E of the 1993 Adhiniyam reads as under :

"**Section 129-E - Reservation of seats :**

(1) The reservation of seats for Scheduled Tribes in every Panchayat in Scheduled Area shall be in proportion to their respective population in that Panchayat:

Provided that reservation for Scheduled Tribes shall not be less than one-half of the total number of seats:

Provided further that all seats of Sarpanch or President, as the case may be, of Panchayat at all levels in Scheduled Areas shall be reserved for members of Scheduled Tribes.

(2) The State Government may nominate persons belonging to such Scheduled Tribes as have no representation in a Panchayat in the Scheduled Areas at the intermediate level or in a panchayat in the Scheduled Areas at the district level.

Provided that such nomination shall be exceed one-tenth of the total members to be elected in that Panchayat.

(3) In a Panchayat in Scheduled Areas such number of seats shall be reserved for persons belonging to other backward classes, which together with the seats already reserved for Scheduled Tribes, and Scheduled Castes, if any, shall not exceed three-fourths of all the seats in that Panchayat."

On a perusal of the aforesaid provisions, it is clear as noon day that the concept of reservation would get attracted once there is an order by the President declaring such area to be a Scheduled Area. Submission of Mr. Ruprah, learned Additional Advocate General and Mr. Kale, learned Senior Counsel is that there has been no declaration in respect of district Anuppur. *Per contra,* submission of Mr. A.M. Trivedi, learned Senior Counsel is that once there has been a notification of areas which are Scheduled Areas and they constitute a district and the State Government has reserved all the offices of the said Pacnhayats and Janapad Panchayats for Scheduled Tribes, and hence, a distinction cannot be drawn in respect of Zila Panchayat. In this context, we may refer with profit to Article 243-B, which reads as under:

"**Article 243-B.** Constitution of Panchayats :

(1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part.

(2) Notwithstanding anything in clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs."

12. Article 243-C of the Constitution deals with composition of Panchayats. Section 2 (xvii) of the Adhiniyam defines 'Panchayat' as under :

"(xvii) 'Panchayat' means a Gram Panchayat, a Janpad Panchayat or a Zila Panchayat, as the case may be."

13. From the aforesaid, it is clear as crystal that there is a clear cut distinction between various categories of Panchayats at various levels. In the case of *Samatha* (supra), their Lordships opined that the word 'regulate' used in A.P. Scheduled Area Land Transfer Regulation (1 of 1959) in respect of allotment of land to members of Scheduled Tribes in Scheduled Area in Fifth Schedule vide clause (a) of sub-para (2) of Para 5 must be read as a whole to ensure regulation of the land only to and among the members of the Scheduled Tribes in the Scheduled area and there is implied prohibition on the State's power of allotment of its land to non-tribals in the

Scheduled Areas. In our considered opinion, the said decision is of no assistance to the learned counsel for the respondents.

14. In the decision rendered in *Amarendra Nath Dutta* (supra), the Full Bench of Patna High Court in paragraph 37 has held as under:

> "37. As I have already pointed out, the Amendment Act by its own terms and by its own force, does not include any areas within the Scheduled areas. Whether any particular area shall or shall not be included within the Scheduled areas is a matter which remains within the discretion of the President even after the amendment. If a new area becomes a part of the Scheduled area, it is because in the exercise of the power under sub-paragraph (1) conferred upon the President by the Constitution makers themselves, the President has determined that it should be so. Therefore, the deprivation of the right to be governed by laws made by their elected representatives occurs primarily and directly due to the act of the President, in exercise of power conferred upon him by the original Constitution, and not by the Amendment Act. The Amendment cannot, therefore, be regarded as destroying or damaging the democratic form of Government."

The said enunciation of law, in our considered opinion, does not improve the case of the respondents. On the contrary, it interprets Part-C of Fifth Schedule in a manner, which does not sub-serve the cause of the respondents. In paragraph 40, their Lordships have held as under :

> "40. The power of redefining the Scheduled areas is a very general and wide power. The areas may be redefined by excluding areas which have been included and/or by including areas which were originally not included within the Scheduled areas, for the power to redefine is simply the power to define once again. Clause (2) of paragraph 6 does not lay down the circumstances under which the President may rescind the previous Order or Orders made under Paragraph 6, nor does if impose any limitation or restriction on the said power of the President. How the areas should be redefined and, which areas should be included in Scheduled areas and which should be left out is apparently left to the absolute discretion of the President. *Prima facie,* therefore, the Order has been made within the scope of the powers conferred and does not violate any limitation or restriction imposed on the exercise of that power. It seems therefore, that the decision of the President regarding the areas,

which are to form the Scheduled Areas, is not open to question and to judicial scrutiny."

It is discrenible that the President by notification dated 20.2.2003 at Serial No. 13, which related to Madhya Pradesh, had substituted the entry as under:

"13. Pushparajgarh, Anuppur, Jaithari, Kotma, Jaithpur, Sohagpur and Jaisinghnagar tehsils of Shahdol district."

What is contended by Mr. Trivedi is that when the Presidential Order included Anuppur in the Scheduled Area, the State Government cannot exclude it. The aforesaid submission, in our considered opinion, is unacceptable. What was included in the notification dated 20.2.2003, by which the President rescinded the Scheduled Area of order of 1977 is a substitution. Anuppur which was a Tahsil has become a part of Scheduled Area. Anuppur was part of Shahdol district at the time of notification. The State Government has bifurcated District Shahdol into two districts Shahdol and Anuppur. It is propounded by Mr. Trivedi, if Anuppur is not regarded as a Scheduled Area, there will be a flagrant violation of the Constitutional Scheme. It is worthwhile to state here Anuppur which was included as a Scheduled Area as one of the Tahsils of district Shahdol and is still treated as a Scheduled Area and all Gram Panchayats and Janpad Panchayats of Anuppur Tahsil are reserved for Scheduled Tribes. Anuppur has at present become a District consisting of four Tahsils, namely Anuppur, Pushprajgarh, Jaithari and Kotma. The four Tahsils still maintain their status as Scheduled Areas but Anuppur, as a district, has not been regarded as a Scheduled Area. As has been stated earlier, the Zila Panchayat is meant for the district. It has a different entity.

15. The learned counsel for the respondents would submit that the decision rendered in *Neeraj Kumar Sharma* (supra) would apply with full force to the instant case. In the aforesaid case, a Division Bench was interpreting sub-section (2) of Section 3 of the M.P. Cooperative Societies Act, 1960 (for short the Act of 1960) and in that context, the Division Bench referring to the powers conferred by the First Schedule under the Act of 1960 expressed the opinion that the Deputy Registrar, Shahdol can exercise of the power of the Registrar under Section 49 of the Act of 1960 in Shahdol district which included the present district of Anuppur. In our considered opinion, the said decision was rendered in a different context altogether and that is of no assistance to the learned counsel for the respondents.

16. On a reading of the Constitutional scheme, we are of the considered opinion that unless there is a declaration by the President in Part-C of the Fifth Schedule, an area cannot form a part of Scheduled Area. The constitutents having already been declared Scheduled areas are maintained as such. The district has a different Unit for the purpose of election under Article 243-M of the Constitution. The concepts of

Zila Panchayat and reservation are different things. It is not an arithmetical concept by which one can arrive at a conclusion that when all the tahsils constitute as a district, the district must be regarded as a Scheduled Area, specially, for the purpose of election of Zila Panchayat. We are not persuaded by the said argument of learned senior counsel for the respondents.

17. The learned single Judge has observed that the entire purpose of declaring the Scheduled Area is to comply with the Constitutional provisions of Article 244. It is within the discretion of the President. A positive act is required to be done. The Court cannot substitute the said action or issue a *mandamus* by taking recourse to conceptual inference. What is urged by the learned counsel for the respondents is that unless the office of the President of Zila Panchayat Anuppur is declared as reserved for Scheduled Tribes, the entire purpose of Section 129-E of the Adhiniyam shall be frustrated. We are afraid we cannot subscribe to the said view. Section 129-E cannot over-ride the Constitution. It has to follow it till the district Anuppur as a area or unit is declared as a Scheduled Area for the purpose of election of Zila Panchayat. In our considered opinion, it cannot be regarded as a Scheduled Area by deductive or syllogistic process.

18. At this juncture, we may note with profit that Mr. Ruprah, learned Additional Advocate General has submitted that the State Government has forwarded its recommendation to the Union of India. The Union of India has not been made a party. Be that as it may, as the State Government has already forwarded, it shall pursue the same with the Union of India and appropriate decision may be taken in that regard.

19. In view of the aforesaid premises, the writ appeals are allowed in part and the directions contained in clauses (2) and (3) in paragraph 11 of the impugned order are set aside. There shall be no order as to costs.

Appeals allowed in part.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

28 February, 2007

RAMDAYAL .... Appellant*

v.

HARI SINGH .... Respondent

Guardian and Wards Act (VIII of 1890)–Sections 7, 8–Custody of child–Son of applicant/respondent died in a road accident leaving behind his 12 years and 10 years old daughters and wife–Wife took the youngest daughter with her–Wife remarrying and started living separately–Youngest daughter living with her maternal grand father at a different place where there is no educational facility–Maternal grand father of the girl also convicted in a case of murder of which appeal is pending–Held–Re-marriage does not disqualify mother for claiming custody of child–However mother cannot always claim superior custody rights–Mother has not claimed custody of the girl–Mother residing separately in a different village–No educational facility where girl is residing–Proper education is one of the main consideration–Grand Father residing at Sehore which is District Head Quarter having educational facilities–Elder daughter already living with her grand father and getting proper educaiton–It is proper that they should not part with company and it is in their welfare if they live together–Court below rightly handed over the custody of girl to her grand father–Appeal dismissed.

It is not in dispute that mother has performed re-marriage and is residing at Village Bamuliya not at Village Alampura where Ku. Nidhi aged 10 years is residing. Ku. Nidhi is not admittedly residing with mother. Mother was called in the Court, she was having an infant child in her lap born out of re-marriage. Mother is not at all looking after Ku. Nidhi. It is also clear that there is no school facility available at village Alampura where appellant resides, Ku. Nidhi has to go to village Barkhedi to attend a school whereas proper education facility is available at Sehore which is a District Headquarter and a house has also been constructed by grand father at proper Sehore for proper education of both girls Ku. Neha and Ku. Nidhi, thus considering the significant aspect that better education facility is available at Sehore as compared to village Barkhedi and non availability of education facility at village Alampura tilts the balance in favour of Hari Singh. Proper education facility is one of the main consideration in the matter of welfare of the child.

It is true that re-marriage does not disqualify the mother for claiming custody of child as held by the Apex Court in *Kumar V. Jahgirdar v. Chethana Ramatheertha* (supra). At the same time the Apex Court has held that mother cannot always claim

* M.A. No. 4166/2006 (J)

superior custody rights. As in the instant case mother herself is not claiming custody of the child, the ratio of aforesaid decision is of no help to the appellant.

It is also not in dispute that one of the daughters Ku. Neha aged 12 years an elder sister of Ku. Nidhi is residing with her grand father Hari Singh and obtaining proper education at Sehore. As both the girls are aged 12 years and 10 years, it is considered proper that they should not part with the company and it would be better for their welfare if they live together. (Paras 7, 8 & 9)

Case Referred :

Kumar V. Jahgirdar v. Chethana Ramatheertha; (2004) 2 SCC 688.

Chandrahas Dubey, for the appellant.

Nagendra Singh Solanki, for the respondent.

Cur.adv.vult.

ORDER

ARUN MISHRA, J :–This Misc. Appeal has been filed under section 47 of the Guardians and Wards Act, 1890. Appellant Ram Dayal maternal grand father of Ku. Nidhi has claimed her custody. The Court below has allowed the application filed by Hari Singh respondent under section 7 read with section 8 of Guardians and Wards Act.

2. It is not in dispute that marriage of Rekha was performed with late Indrapal Singh S/o Hari Singh more than 13 years before. Two daughters namely Ku. Neha aged 12 years and Ku. Nidhi aged 10 years were born out of wedlock. Indrapal had died in an accident dated 22.1.1996. It is not in dispute that Rekha the mother of Ku. Neha and Ku. Nidhi has performed re-marriage (Natra) with one Makhan Singh of Village Bamuliya and she is residing separately at Village Bamuliya, not with any of the daughter. An elder daughter Ku. Neha is living with grand father Hari Singh, he field an application under section 7 read with Section 8 of Guardians and Wards Act submitting that both the daughters after death of Indrapal Singh lived with him i.e. grand father for their proper education. He got a house constructed at Bhopal Naka, Sehore and has shifted for the purpose of education of grand daughters to Sehore. Ku. Neha was obtaining education in Class 5th whereas Ku. Nidhi was also obtaining education. Rekha had taken one of the daughters Ku. Nidhi to village Alampura where Ram Dayal maternal grand father resides. Rekha has performed re-marriage and was residing at Village Bamuliya not at Village Alampura with Ku. Nidhi. Custody of Ku. Nidhi has not been handed over by Ramdayal to Hari Singh. On account of consideration of remarriage Ram Dayal has obtained a sum of Rs. 50,000/-. The future of Ku. Nidhi was not safe with Ram Dayal. Considering the welfare of Ku. Nidhi custody was prayed by Hari Singh. It was submitted that for proper development and education it was necessary that Ku. Neha and Ku. Nidhi live

together, a house has been constructed at proper Sehore Town by grand father for proper education. Grand father was having substantial agricultural land whereas Ram Dayal maternal grand father and his two sons have been sentenced for life imprisonment in a case of murder of which appeal is pending in the High Court. The maternal grand father owned only 5 acres of land and was residing in a village whereas the grand father was having 13.5 acres of land, which was sufficient for proper looking after of Ku. Neha and Ku. Nidhi and used to reside in a town.

3. Application was contested by the maternal grand father Ram Dayal, it was admitted that Rekha had performed re-marriage and he was looking after Ku. Nidhi. No consideration was received by him in lieu of re-marriage (Natra) of Rekha. He was having 7.828 acres of agricultural land and was in financially sound condition to look after the interest of Ku. Nidhi. She was obtaining education at village Barkhedi a nearby village as such it was prayed that application filed by Hari Singh be dismissed.

4. The Court below as per impugned order has ordered handing over of the custody to the grand father. The order has been assailed in this appeal.

5. Shri Chandrahas Dubey, learned counsel appearing for appellant has submitted that mere performance of re-marriage does not disentitle the mother, custody of child. Desire of mother has to be given due weightage with respect to custody of child as mother want that child should reside with maternal grand father. Handing over of the custody to the grand father is bad in law. He has placed reliance on a decision of Apex Court in *Kumar V. Jahgirdar v. Chethana Ramatheertha*[1]. He has further submitted that Ku. Nidhi was obtaining education in a nearby School at Village Barkhedi. Appellant was having substantial land and was properly looking after Ku. Nidhi as such impugned order be set aside.

6. Shri Nagendra Singh Solanki, learned counsel appearing for respondent has submitted that no case for interference in the impugned order is made out as the mother of Ku. Nidhi has admittedly performed re-marriage and she is not residing with Ku. Nidhi at Alampura. There is no school at Village Alampura as such she has to go to nearby Village for obtaining education. It cannot be said that in nearby village she is able to obtain proper education whereas grand father has constructed a house at Bhopal Naka, Sehore, which is a grown up town and Ku. Neha aged 12 years is residing with grand father. Welfare of both the sisters requires that they should live together in company of each other. Grand father is looking after Ku. Neha aged 12 years as such it would be proper that both the sisters are brought up together in a town where proper education and other facilities are available. Coming to means of maintenance, agricultural land held by Hari Singh is more as compared to agricultural land held by Ram Dayal. In the facts and circumstances of the case, no case for interference in the order is made out.

(1) (2004) 2 SCC 688

7. It is not in dispute that mother has performed re-marriage and is residing at Village Bamuliya not at Village Alampura where Ku. Nidhi aged 10 years is residing. Ku. Nidhi is not admittedly residing with mother. Mother was called in the Court, she was having an infant child in her lap born out of re-marriage. Mother is not at all looking after Ku. Nidhi. It is also clear that there is no school facility available at village Alampura where appellant resides, Ku. Nidhi has to go to village Barkhedi to attend a school whereas proper education facility is available at Sehore which is a District Headquarter and a house has also been constructed by grand father at proper Sehore for proper education of both girls Ku. Neha and Ku. Nidhi, thus considering the significant aspect that better education facility is available at Sehore as compared to village Barkhedi and non availability of educaiton facility at village Alampura tilts the balane in favour of Hari Singh. Proper education facility is one of the main consideration in the matter of welfare of the child, thus welfare of Ku. Nidhi lies in obtaining proper education by residing at Sehore along with Hari Singh and her sister Ku. Neha not at village Alampura where no education facility is available and she has to go to a different village Barkhedi to obtain education.

8. It is true that re-marriage does not disqualify the mother for claiming custody of child as held by the Apex Court in *Kumar V. Jahgirdar v. Chethana Ramatheertha* (supra). At the same time the Apex Court has held that mother cannot always claim superior custody rights. As in the instant case mother herself is not claiming custody of the child, the ratio of aforesaid decision is of no help to the appellant.

9. It is also not in dispute that one of the daughters Ku. Neha aged 12 years an elder sister of Ku. Nidhi is residing with her grand father Hari Singh and obtaining proper education at Sehore. As both the girls are aged 12 years and 10 years, it is considered proper that they should not part with the company and it would be better for their welfare if they live together. Ku. Nidhi can obtain better education along with Ku. Neha at Sehore so that she may not leg behind. Circumstances are not such to permit both the sisters should reside separately.

10. Thus the Court below has rightly found that welfare of Ku. Nidhi is in residing with grand father as such custody has been rightly ordered to be handed over to him. Financial aspect has also been taken into consideration and comaparative literacy in the family.

11. In the overall facts and circumstances of the case, the order passed is found to be proper. No case for interference is made out. Thus I find appeal to be devoid of merit, same is dismissed. No order as to costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra & Mr. Justice K.S. Chauhan

3 May, 2006

SHADAB GRIH NIRMAN SAHKARI SANSTHA MARYADIT, BHOPAL .....Appellant*

v.

PARITA GRIH NIRMAN SAHKARI SAMITI MARYADIT, BHOPAL & anr. .... Respondents

A. **Civil Procedure Code (V of 1908), Order 7, Rule 11, Court Fees Act, 1870, Section 7–Valuation of suit property–Appellant filed suit for declaration of sale-deed as void and also for possession–Sale Deed was executed for a consideration of Rs. 18 lacs–Suit valued by plaintiff at Rs. 18 lacs–Defendants in application under Order 7 Rule 11 raised objection that as houses have been built and other development activity has taken place the present value of property is not less than Rs. 8 Crores–Trial Court held that *ad valoram* Court Fee on valuation of property is payable–Held–Earlier in writ petition it was directed that *ad valoram* Court Fee is payable on Rs. 18 lacs–Whether the valuation of the land has increased is a question of fact and cannot be decided as preliminary issue–Trial Court directed to advert to question of valuation at the time of final decision if it is raised in written statement.**

B. **Civil Procedure Code (V of 1908), Order 7, Rule 11, Indian Limitation Act, Section 14, Article 56, Co-operative Societies Act, M.P. 1961, Section 64–Rejection of Plaint–Question of Limitation is mixed question of fact and law–Suit filed by appellant for declaration that sale deed was not binding being void–Sale deed executed on 2.12.2000–Consideration amount was to be paid in installments by way of post dated cheques–Last installment was payable on 7.10.2002–Cheque not handed over nor consideration amount paid in any other mode–Trial Court dismissed suit as barred by limitation while deciding it as preliminary issue–Held–It is not the case that even in case of default of one installment, entire amount became recoverable–Not possible for plaintiff to know that intention of defendant was not to make the payment in future–Suit was filed within 3 years from the date of last installment–Dispute raised by plaintiff before Registrar Co-operative Societies was dismissed for want of jurisdiction–All questions being mixed questions of facts and law could not have been decided by way of preliminary issue–Dismissal of suit as barred by time set aside–Trial Court directed to decide the issue of limitation after recording evidence.**

* F.A. No. 957/2006 (J)

C. Civil Procedure Code (V of 1908), Order 7, Rule 11, Co-operative Societies Act, M.P., 1961, Section 94–Legal Notice to Registrar Co-operative Societies–Trial Court dismissed the suit for want of notice under Section 94 to Registrar Co-operative Societies–Held–Trial Court ignored the plaint averment that legal notice was served on 17.6.2003–Dispute whether notice was given or not is a question of fact which could not be decided as preliminary issue–No averment in plaint with respect to business of defendant No. 1–Question whether notice was mandated cannot be decided as preliminary issue–Defect of notice could not have been gone into at preliminary stage–Trial Court directed to decide the question after recording evidence–Appeal allowed.

Earlier the matter has travelled to this Court, this Court held in W.P. No.3615/2006 and W.P. No. 4199/2006 as per order dated 20.5.2006 that *ad valorem* court fee was required to be paid at Rs. 18 lakh, the valuation of the sale-deed. If it was a case that valuation of the land had increased to Rs. 8 Crores approximately and it was necessary to make the payment of court fee for possession. It appears *prima facie* that *ad valoren* court fee paid as per valuation of the sale-deed was enough. Valuation at present whether it was 8 crore was a question of fact, it could not have been decided as preliminary issue. Trial Court has to decide such question of valuation not as preliminary issue if it is raised in written statement it would be adverted to only at the time final decision after recording evidence.

Coming to the question of limitation, in our considered opinion, this question being mixed question of law and fact could not have been decided as a preliminary issue, in the peculiar facts and circumstances of the case considering the nature of transaction, as per the plaint the sale consideration was not to be paid at the time of execution of sale-deed on 2.12.2000. The sale consideration was required to be paid w.e.f. 7.7.2001 on 7th day of each of succeeding month by way of post dated cheques. Installments were to be over on a subsequent date on 7.10.2002. Thus, it was not possible for the plaintiff as per the plaint averments if averments are taken to be correct, to know that intention of the defendants was not to make the payment in future in installments and it is not the case that even in the case of default of one installment entire amount became recoverable at once. Thus, *prima facie* the suit was filed within a period of 3 years from the date of last installment and dates of several installments fell within the zone of 3 years. We hold that it was not proper for the trial Court to dismiss the suit as barred by limitation at threshold under Order 7 Rule 11 of the C.P.C. Apart from that may be for the first time plea has been raised for invoking section 14 of the Limitation Act, it is apparent from averments made to the plaint that the dispute for declaring the sale-deed as void was raised before the Registrar, Cooperative Societies, it was dealt with by Dy. Registrar, the

nominee of the Registrar, the period spent in proceedings under section 64 was claimed to be excluded for considering the aforesaid plea also, it was necessary to record the evidence, consider the pleadings made in the application filed u/s 64 of the Act, the issues involved and the order passed in the dispute u/s 64. It was also to be considered whether such a dispute was raised *bona-fidely* and perused with due diligence and good faith. All these questions being mixed questions of law and fact could not have been decided by way of preliminary issues, thus, we have no hesitation in setting aside the dismissal of the suit as barred by limitation and we direct the trial Court to decide the question of limitation also after recording evidence at the time of final hearing.

Coming to the question of want of notice and consequently maintainability of suit : Section 94 of M.P. Co-operative Societies Act envisages a notice to be served on the Registrar, Cooperative Society in order to institute a suit against a society or any of its officer. We set aside dismissal of the suit for want of notice on several grounds. Firstly there is an averment made in paragraph 18 of the plaint that requisite legal notice was served on 17.6.2005. Trial Court has ignored this as per and the averment made in paragraph 18. Secondaly, if it was disputed that requisite legal notice was not given. This being mixed question of law and fact whether requisite legal notice was given or not, could not have been decided as a preliminary issue. Thirdly, it has to be gone into what is the business of defendant society. There is no averment made in the plaint with respect to business of defendant No.1, its bye-laws, if any or purpose of establishment is not on record. This being position the question could not have been adverted to as a preliminary issue. It was also necessary to consider whether the suit filed was with respect to the business of the society defendant No. 1. Further question was required to be gone into whether the suit filed for payment of consideration, declaring the sale-deed to be void, payment of consideration, restoration of possession, was within the realm of constitution, management or business of the society for which notice u/s 94 was mandated. These questions could not have been decided as a preliminary issued as it was averred in the plaint paragraph No. 18 that requisite notice was given.

As we find as per the averments made in the plaint, notice was served, Registrar was approached, it was not proper for the trial Court to dismiss the suit at threshold on the aforesaid ground treating it as a preliminary issue. Trial Court is directed to decide the issue at a later stage of final decision, question whether notice was served, if not what prejudice was caused. The defect of notice if any could not have been gone into at a preliminary stage, such question ought to be decided at the time of final decision of the case after recording the evidence.

(Paras 9, 10 & 11)

Cases Referred :

Balasaria Construction (P) Ltd. v. Hanuman Seva Trust & ors. (2006) 5 SCC 658, *Ramti Devi (Smt.) v. Union of India;* (1995) 1 SCC 198, *Prem Singh & ors. v. Birbal & ors.;* (2006) 5 SCC 353, *Sukaloo & anr. v. Punau;* AIR 1961 MP 176, *Chhotelal Hanuamanprasad Gupta v. Deputy Registrar, Co-operative Societies Indore & ors.* 1976 MPLJ 577=1976 JLJ (SN) 53, *Secretary, M.P. Rajya Hath Kargha Bunker Samiti (Maryadit), Gopalbagh, Jabalpur and anr. v. Kapoorchand & anr.* 1977 (1) MPWN 17, *Pahad Singh v. Smt. Rajkumari Dubey,* 1996 RN 104.

K.N. Fakhruddin & Harvinder Singh, for the appellant

Ravindra Shrivastava, Ashok Lalwani & Manoj Sharma for the respondents.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by, ARUN MISHRA, J : This appeal has been filed by Shadab Grih Nirman Sahkari Sanstha Limited, calling in question legality of an order dt. 5.10.2006 passed by the 6th Additional District Judge, Bhopal in Civil Suit No. 268-A/2006, thereby rejecting the plaint under Order 7 Rule 11 C.P.C. on preliminary issues.

2. Plaintiff, Shadab Grih Nirman Sahkari Sanstha Limited filed a suit seeking declarataion that the sale-deed dt. 2.12.2000 being void was not binding over the plaintiff. Alternatively, relief was prayed that consideration for which land was sold be ordered to be paid along with interest. Permanent prohibitory injunction was also claimed restraining the defendants from selling the constructed bungalows and further development activities. In addition prayer was also made for restoration of possession along with costs.

3. It is necessary to refer to the plaint averments in extenso for the reason that the plaint has been rejected at the threshold at the preliminary stage without filing of written statement. In the plaint it has been averred that the plaintiff was a registered housing construction cooperative society registered on 4.11.1982. The society owned 12 acres of land comprised in Survey No. 7/3/1, 7/3/2 and 7/3/3 to be sold to defendant No. 2 on 2.12.2000 consideration of Rs. 18 lakh was fixed. Consideration was agreed to be paid with the sale-deed by way of post dated cheques of Rs. 1 lakh each from 7.7.2001, on 7th of each succeeding month till 7.10.2002. For 7.9.2002 and 7.10.2002 post dated cheques in the sum of Rs. 2 lakh were issued. All the chques were of Bhopal Cooperative Central Bank Limited, Branch Motia Park, Bhopal. Inspite of serveral demands made by the plaintiff the cheques were not

handed over nor sale consideration was paid in any other mode. The defendant No. 1 has defrauded the plaintiff. Defendant No. 1 has entered into an agreement with defendant No. 2 for development and construction over some part of the disputed land, remaining area was vacant. As consideration was not paid to plaintiff the sale-deed was illegal and void *ab initio*. Without payment of consideration it was not open to the defendant No. 1 to enter into an agreement with defendant no. 2 for developmental activities. The plaintiff has approached the Dy. Registrar, Cooperative Societies by way of filing a dispute u/s 64 of the M.P. Cooperative Societies Act on 24.6.2002 for declaring the sale-deed as void, registered as Case No. E-21/2002 it was dismissed for want of jurisdiction on 15.4.2004. A legal notice was served on 17.6.2005. Cause of action arose on 26.6.2002 when defendant No.1 indicated inability to make the payment of consideration. Cause of action also arose on 15.4.2004 when dispute filed u/s 64 was dismissed by Dy. Registrar for want of jurisdiction, further it arose on 12.6.2005 when defendant no. 2 published a notice for sale of bungalows constructed over the disputed land. Suit has been valued at Rs. 18 lakh. *Ad valorem* court fee of Rs. 1,13,800/- has been paid for permanent injunction suit has been valued at Rs. 1,000/-, *ad valorem* court fee of Rs. 300/- was paid.

4. Earlier the matter has travelled to this Court when trial Court had directed the plaintiff to make payment of *ad valorem* court fee on the valuation made on 18 lakhs as that was the valuation of the sale-deed. A Writ Petition - W.P. No. 3615/2006 was filed. Yet another writ petition - W.P. No. 4199/2006 was filed by the defendant assailing same order. Both the writ petitions were decided as per order dt. 20.5.2006. This Court held that since the plaintiff was party to the sale-deed, there was no misrepresentation to the contents of the sale-deed, as such plaintiff was required to make payment of *ad valorem* court fee, that order was upheld as question of valuation for other reliefs was not gone into by the trial Court whether it was proper or not was left open to be decided by the trial Court along with question of limitation as that was raised for the first time in the writ petition by the defendants, it was to be decided by the trial Court if raised before it.

5. The defendants raised three objections before the trial Court. Firstly that the valuation of the land was Eight Crore Forty Two Lakhs, on that *ad valorem* court fee ought to have been paid as the plaintiff has claimed the relief of possession also. Houses have been constructed, thus, valuation has increased. Second objection was raised with respect to the suit being barred by limitation. The third objection as to the maintainability of the suit for want of serving notice to the Registrar u/s 94 of the M.P. Cooperative Societies Act, 1960 (hereinafter referred to as the "Act") was also taken.

6. The trial Court as per the impugned order has upheld the aforesaid three objections raised by the defendants. It held that as the houses have been constructed

land has been sold to several persons it was no more an agriculture land, thus, the plaintiff was required to make the payment of *ad valorem* court fee on valuation of land. Sale-deed was executed on 2.12.2000. Suit could have been preferred within a period of 3 years from the date of execution of the sale-deed. The suit has been held to be barred by limitation. The Trial Court has further held that no notice u/s 94 of the M.P. Cooperative Societies Act was given to the Registrar, hence, the suit was not maintainable. As the plaint has been rejected, this appeal has been preferred.

7. Shri K.N. Fakhruddin with Shri Harvinder Singh learned counsel appearing on behalf of the plaintiff/appellant has submitted that these questions being mixed questions of law and facts could not have been decided at preliminary stage. They have relied upon the decision in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust and others*[1]. It was also submitted that there was proper valuation made of plaint as per the sale consideration of the sale-deed, even otherwise it was not possible to determine the present valuation as claimed by the defendants to be more than Eight Crores at this stage without recording the evidence. Thus, order passed by the trial court demanding *ad valorem* court fee as per the claim made by the defendants was not proper. It was further submitted that the consideration under the sale-deed itself required to be paid by way of post dated cheques subsequent to execution of the sale-deed. Sale-deed was executed on 2.12.2000 whereas the payment of sale consideration in installments had to commence w.e.f. 7.7.2001 and to be completed by 7.10.2002. The suit was preferred on 23.6.2005. It was barred not limitation as the suit was filed within 3 years from the last date of installment i.e. 7.10.2002. Apart from that it was submitted by learned counsel that as a dispute was filed u/s 64 of the M.P. Cooperative Societies Act before the nominee of the Registrar and it was not entertained, and dismissed for want of jurisdiction as per the order dt. 15.4.2004, the plaintiff was entitled for exlcusion of the said period by virtue of invoking section 14 of the Act. It was pursued *bona fidely*, diligently and was substantially for the same relief. Thus, the suit could not have been dismissed as barred by limitation. It was further submitted that requisite legal notice was served on 17.6.2005 as averred in paragraph No. 18 of the plaint. As notice was served and earlier a dispute was raised u/s 64 of the Act, same dispute was raised for which notice was served and suit was instituted, Registrar had the full notice as such the purpose of section 94 stood served, thus, even otherwise the suit could not have been dismissed for want serving notice u/s 94. Apart from that it was not a dispute touching constitution, management or business of the society. Consequently, no notice u/s 94 was required to be served on the Registrar. What was the business of the defendants society was also essentially a question of fact as such these questions could not have been decided as preliminary issue.

8. Shri Ravindra Shrivastava, learned Sr. counsel appearing with Shri Ashok

(1) (2006) 5 SCC 658

Lalwani and Shri Manoj Sharma controverted the aforesaid submissions. He has submitted that relief for possession has been sought knowing fully well that the houses have been constructed and other developmental activity has already taken place. Thus, it was incumbent to value the suit for possession on the basis of present value of the land. The land was no more an agriculture land. Its present valuation was not less than 8 crores, as such plaintiff ought to have paid *ad valorem* court fee at that valuation. Suit was filed essentially for a declaration that the sale-deed was void *ab initio*. Thus, limitation would commence under Article 59 or Article 113 from the date of its execution, not at any subsequent point of time. He has relied upon decisions in *Ramti Devi (Smt.) v. Union of India*[1], *Prem Singh and others v. Birbal and others*[2]; and *Sukaloo and anr. v. Punau*[3]. He has further submitted that the notice as envisaged u/s 94 of the Act is with respect to the suit not for filing a dispute u/s 64 and suit filed was with respect to the business of the defendant society. Hence, it was necessary to serve a notice on the Registrar, for that he has placed reliance on a Division Bench decision of this court in *Chhotelal Hanumanprasad Gupta v. Deputy Registrar, Co-operative Societies Indore and others*[4]. Thus, the learned Sr. counsel has submitted that after reading the plaint in its entirety no case for interfering in the order was made out.

9. First we advert to the question of payment of Court fee : Earlier the matter has travelled to this Court, this Court held in W.P. No. 3615/2006 and W.P. No. 4199/2006 as per order dt. 20.5.2006 that *ad valorem* court fee was required to be paid at Rs. 18 lakh, the valuation of the sale-deed. If it was a case that valuation of the land had increased to Rs. 8 crores approximately and it was necessary to make the payment of court fee for possession. It appears *prima facie* that *ad valorem* court fee paid as per valuation of the sale-deed was enough. Valuation at present whether it was 8 crore was a question of fact, it could not have been decided as preliminary issue. Trial court has to decide such question of valuation not as preliminary issue if it is raised in written statement it would be adverted to only at the time final decision after recording evidence.

10. Coming to the question of limitation, in our considered opinion, this question being mixed question of law and fact could not have been decided as a preliminary issue, in the peculiar facts and circumstances of the case considering the nature of transaction, as per the plaint the sale consideration was not to be paid at the time of execution of sale-deed on 2.12.2000. The sale consideration was required to be paid w.e.f. 7.7.2001 on 7th day of each of succeeding month by way of post dated cheques. Installments were to be over on a subsequent date on 7.10.2002. Thus, it was not possible for the plaintiff as per the plaint averments if averments are taken to be correct, to know that intention of the defendants was not to make the payment

(1) (1995) 1 SCC 198 (2) (2006) 5 SCC 353 (3) AIR 1961 MP 176
(4) (1976) MPLJ 577 = 1976 JLJ Short Note 53

in future in installments and it is not the case that even in the case of default of one installment entire amount became recoverable at once. Thus, *prima facie* the suit was filed within a period of 3 years from the date of last installment and dates of several installments fell within the zone of 3 years. We hold that it was not proper for the trial Court to dismiss the suit as barred by limitation at threshold under Order 7 Rule 11 of the C.P.C. Apart from that may be for the first time plea has been raised for invoking section 14 of the Limitation Act, it is apparent from averments made to the plaint that the dispute for declaring the sale-deed as void was raised before the Registrar, Cooperative Societies, it was dealt with by Dy. Registrar, the nominee of the Registrar, the period spent in proceedings under section 64 was claimed to be excluded for considering the aforesaid plea also, it was necessary to record the evidence, consider the pleadings made in the application filed u/s 64 of the Act, the issues involved and the order passed in the dispute u/s 64. It was also to be considered whether such a dispute was raised *bona-fidely* and perused with due diligence and good faith. All these questions being mixed questions of law and fact could not have been decided by way of preliminary issues, thus, we have no hesitation in setting aside the dismissal of the suit as barred by limitation and we direct the trial Court to decide the question of limitation also after recording evidence at the time of final hearing.

The Apex Court in *Balasaria Construction (P) Ltd* v. *Hanuman Seva Trust and others* (supra) has laid down that the words "barred by any law" in Rule 11 (d) of order 7 C.P.C. would also include barred by the law of limitation. The Apex court has held that the suit cannot be dismissed as barred by limitation without proper pleadings, framing of issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact and *ex facie* on reading of the plaint, suit cannot be held to be barred by limitation.

Shri Ravindra Shrivastava, learned Sr. counsel has relied upon the decision of the Apex Court in *Ramti Devi (Smt.) v. Union of India* (supra) in which the sale-deed was executed by the defendant to discharge pre-existing debts and got registered and came to the knowledge of the plaintiff on the same day, suit for declaration that the plaintiff was the owner of the house and that the said sale deed, having been executed to stifle the proposed prosecution of the defendant, was void and not binding on the plaintiff, filed beyond three years from the date of execution/registration of the sale-deed, was held to be barred by limitation applying the Article 59 of the Limitation Act. Facts are quite different in the instant case. In the said case cause of action had accrued on date of execution of sale-deed itself. Here there are two other question, as per plaint, consideration was agreed to be paid later in installment and relief has been claimed for payment of sale consideration along with interest. The sale consideration was payable in monthly installments. Payment of sale consideration in an installment had to commence after six months of execution of

the sale-deed. Thus, *prima facie* limitation could not have been computed w.e.f. 2.12.2000, the date of execution of the sale-deed, but, after defaults were made cause of action accrued as per the plaint due to non payment of sale consideration on a future date. It is not a case of fraud played while getting the sale-deed executed or a case of impersonation. Thus, the facts are different in the instant case.

In *Prem Singh and ors. v. Birbal and ors.* (supra) the Apex Court has dealt with Article 59 with reference to void and voidable transactions as referred in section 31 of the Specific Relief Act, 1963, dealing with cancellation of documents. When a document is valid, no question arises of its cancellation when a document is void *ab initio,* a decree for setting aside the same would not be necessary as the same is non est in the eye of law, as it would be a nullity. However, a suit is filed by a plaintiff for cancellation of transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary article would be applicable. Article 59 would apply to such case of instruments. It would, therefore, apply where a document is *prima facie* valid. It would not apply only to instruments which are presumptively invalid. In the instant case in view of peculiar transaction as set out in plaint we find that there is mixed question of law and fact to be decided when limitation envisaged under Article 59 commenced. Article 59 reads thus :

Description of suit run	period of limitation	Time from which period begins to
59. To cancel or set aside an instrument or decree or for the rescission of a contract	Three years	When the facts entitling the plaintiff to have instrument or decree cancelled or set aside or the contract rescinded first become known to him.

The limitation under Article 59 of the Limitation Act begins to run when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first became known to him. As already mentioned by us in the instant case consideration was agreed to be paid as per plaint on subsequent dates running w.e.f. 7.7.2001 to 7.10.2002. Thus, the correctness of the aforesaid averment is a question which has to be gone by the court-below after recording evidence. Thus, applicability of Article 59 has to be decided in the context whether the consideration became payable on the date of execution of the sale-deed itself or on subsequent date as mentioned in the plaint. There is no dispute with proposition laid down by the Apex court, we respectfully follow it, but, such a question depends on investigation of facts, correctness of averments made in the plaint. Thus, this

question has to be decided at a subsequent, i.e. final stage being mixed question of law and fact not as a preliminary issue.

11. Coming to the question of want of notice and consequently maintainability of suit : Section 94 of M.P. Co-operative Societies Act envisages a notice to be served on the Registrar, Cooperative Society in order to institute a suit against a society or any of its officer. We set aside dismissal of the suit for want of notice on several grounds. Firstly there is an averment made in paragraph 18 of the plaint that requisite legal notice was served on 17.6.2005. Trial court has ignored this as per and the averment made in paragraph 18. Secondly, if it was disputed that requisite legal notice was not given. This being mixed question of law and fact whether requisite legal notice was given or not, could not have been decided as a preliminary issue. Thirdly, it has to be gone into what is the business of defendant society. There is no averment made in the plaint with respect to business of defendant No. 1, its bye-laws, if any, or purpose of establishment is not on record. This being position the question could not have been adverted to as a preliminary issue. It was also necessary to consider whether the suit filed was with respect to the business of the society defendant No. 1. Further question was required to be gone into whether the suit filed for payment of consideration, declaring the sale-deed to be void, payment of consideration, restoration of possession, was within the realm of constitution, management or business of the society for which notice u/s 94 was mandated. These questions could not have been decided as a preliminary issued as it was averred in the plaint paragraph No.18 that requisite notice was given. However, we leave it appropriate to place on record, decisions cited at bar. Shri Ravindra Shrivastava, Sr. counsel has referred to the decision of the Division Bench of this court in *Chhotelal Hanumanprasad Gupta v. Deputy Registrar, Cooperative Societies* (supra) in which it has been laid down that the main purpose behind notice required to be given u/s 94 of the Act is that the Registrar has supervisory powers over the Society and with a prior notice being given to the Registrar, it may be possible for the Registrar in exercise of the supervisory jurisdiction to ensure that a rightful claim is settled and is not required to be taken needlessly to a civil court entailing avoidable expenditure of the Society. In our opinion also, apparently, it is with this object in view that section 94 of the Act has been enacted. Notice was required to be given for filing civil suit not to raise the dispute referred in section 64 of the Act. In the instant case the Registrar was approached u/s 64, *prima facie* for same kind of dispute, as averred in the plaint for declaration of the sale-deed to be void, nominee of the Registrar u/s 64 had passed an order in the year 2004 holding that the kind of dispute raised was not maintainable before it. Plaintiff was required to approach the civil court. This question was also required to be gone into by the trial Court whether the Registrar was already apprised of the dispute to be raised in the suit by filing a dispute us/ 64 of the Co-operative Societies Act and an order was

passed to approach the civil court whether intendement of section 94 stood fulfilled by that or not.

In *Secretary, M.P. Rajya Hath Kargha Bunker Samiti, (Maryadit), Gopalbagh, Jabalpur and another v. Kapoorchand and another*[1], the expression "act" was and act "Touching the business of the society", section 94 came for consideration, this Court has held that this has to be gone into what was the 'business' of the society, refusing to vacate was not touching the business of the society. In our opinion, such a question being of fact has to be decided not as an preliminary issue, in the instant case it could have been decided merely by the help of plaint averments. In *Pahad Singh v. Smt. Rajkumari Dubey*[2], requirement of notice was considered. There was dispute regarding boundary line between two plots holders, suit was not against the society or its officer, it was held that notice before filing of the suit was not necessary.

As we find as per the averments made in the plaint, notice was served, Registrar was approached, it was not proper for the trial Court to dismiss the suit at threshold on the aforesaid ground treating it as a preliminary issue. Trial Court is directed to decide the issue at a later stage of final decision, question whether notice was served, if not what prejudice was caused. The defect of notice if any could not have been gone into at a preliminary stage, such question ought to be decided at the time of final decision of the case after recording the evidence.

12. Resultantly, we allow the appeal, set aside the impugned order. We make it clear that any observation made by us in this order shall not come in the way of the trial Court at the time of final decision as we have not expressed any final opinion on the issues. These are required to be considered in the light of the evidence adduced by the parties independently by the trial Court in accordance with law unfettered by any of the observations made by us.

13. Prayer has been made to refund the court fee as suit was decided on preliminary point and we have directed the trial Court to decide the case on merit. Requisite certificate be issued of refund of the court fee paid by the appellant as provided in section 13 of the Court Fees Act r/w Order 41 Rule 23 of the C.P.C.

14. Appeal is allowed, no order as to costs.

Appeal allowed.

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(1) 1977 (1) MPWN 17 (2) 1996 RN 104

I.L.R. [2007] M.P., 976

SUPREME COURT OF INDIA

Before Mr. Justice S. B. Sinha & Mr. Justice Markandey Katju

15 May, 2007

CHAIRMAN, INDORE VIKAS PRADHIKARAN ....Appellant*

v.

M/s PURE INDUSTRIAL COCK & CHEM. LTD. & ors. ...Respondents.

A. **Nagar Tatha Gram Nivesh Adhiniyam, 1973–Sections 13,29, 38, 47A, 50(2), 50(3)–Draft Notification–State Govt. delegated its power under Sections 13, 47A to District Planning Committee–District Planning Committee on 13.11.2000 amended Planning area by adding 115 villages including Bicholi and Kanadia villages–Draft Development Plan published on 27.6.2003–Draft Development Plan returned back by State of M. P. with a direction to prepare plan for the projected population in the year 2021–Notification under Section 38(1) issued on 28.10.2005–Notification inviting objections issued on 18.5.2006–Draft Development Plan 2021 published on 13.7.2006–Respondents having land in Bicholi and Kanadia villages obtained sanction in terms of building by laws from Gram Panchayats–Applications for grant of development plans made on 2.12.2004–Application rejected by Joint Director, Town and Country Planning in view of purported publication of plan under Section 50(2) of Act–High Court in writ appeal struck down declaration made under Section 50(2) of Act–Held–End use of land is not frozen until a final sanction plan comes into being–Where valuable rights of citizens are involved it is mandatory that public authority should perfrom statutory duties within stipulated time–Right of property is not only constitutional but human right–Provisions which restrict the right of owner of property to use and develop requires strict interpretation–Draft publication which has not attained finality cannot determine rights and obligations of citizens–Until development plan is finalized it would have no statutory or legal force–freeze on usage of land without any development plan would lead to misuse of power and arbitrary exercise–Villages in question have been included in notification dated 28.10.2005–Any action taken prior there to is illegal and without jurisdiction–Appeal dismissed.**

B. **Statutory Duties–Performance of Statutory duty within stipulated time is directory however when it involves valuable rights of citizens and provides consequences thereof it would be construed as mandatory.**

*C. A. No. 2530/2007

C. Constitution of India–Article 300 A–Right to property is not only a constitutional right but is also a human right.

D. Interpretation of Statutes–Meaning–Meaning assigned to a term unless context otherwise requires should be given the same meaning.

E. Nagar Tatha Gram Nivesh Adhiniyam, 1973–Section 50(1)–At any time-Starting point of declaration of intention has to be from publication of development plan.

F. Nagar Tatha Gram Nivesh Adhiniyam, 1973–Section 38–Town and Development Country Authority–Authority was created for a definite purpose–Principle of legislation by incorporation was applied and not legislation by reference.

When a planning area is defined, the same envisages preparation of development plan and the manner in which the existing land use is to be implemented.

Once, however, the existing land use is in place, subject to certain restrictions contained in the Act, the Director would permit land use in the same manner as is found to be existing.

When existing land use is in place, use thereof for purposes other than the existing land use is frozen. However, subject to permission granted by the Director, the development of land is not frozen.

When a draft development plan is prepared, the same is subject to grant of approval and/ or modification thereof. We will deal with the matter at some details a little later but at this stage, we may notice that end use of the land is not frozen until a final sanction plan comes into being.

Where, however, a scheme comes into force, although it may cause hardship to the individual owners as they may be prevented from making the most profitable use of their rights over property, having regard to the drastic consequences envisaged thereunder, the statute should be considered in such a manner as a result whereof greater hardship is not caused to the citizens than actually contemplated thereby. Whereas an attempt should be made to prevent unplanned and haphazard development but the same would not mean that the court would close its eyes to the blatant illegalities committed by the State and/or the statutory authorities in implementation thereof. Implementation of such land development as also building laws should be in consonance with public welfare and convenience.

The Courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right to hold property, on the other.

For the aforementioned purpose, an endeavour should be made to find out as

to whether the statute takes care of public interest in the matter vis-a-vis the private interest, on the one hand, and the effect of lapse and/ or positive inaction on the part of the State and other planning authorities, on the other.

The Courts cannot also be oblivious of the fact that the owners who are subject to the embargos placed under the statute are deprived of their valuable rightful use of the property for a long time. Although ordinarily when a public authority is asked to perform statutory duties within the time stipulated it is directory in nature but when it involves valuable rights of the citizens and provides for the consequences therefor it would be construed to be mandatory in character.

The right of property is now considered to be not only a constitutional right but also a human right.

Earlier human rights were existed to the claim of individuals right to health, right to livelihood, right to shelter and employment etc. but now human rights have started gaining a multifacet approach. Now property rights are also incorporated within the definition of human rights. Even claim of adverse possession has to be read in consonance with human rights.

Property, while ceasing to be a fundamental right would, however, be given express recognition as a legal right, provisions being made that no person shall be deprived of his property save in accordance with law.

The Act being regulatory in nature as by reason thereof the right of an owner of property to use and develop stands restricted, requires strict construction. An owner of land ordinarily would be entitled to use or develop the same for any purpose unless there exists certain regulation in a statute or a statutory rules. Regulations contained in such statute must be interpreted in such a manner so as to least interfere with the right of property of the owner of such land. Restrictions are made in larger public interest. Such restrictions, indisputably must be reasonable one.

Respondents obtained permission for development from the competent authority for diversion of land use as far back as on 12.01.1989. They had applied for and were granted sanction of building plan by the gram panchayat in the year 1991. No step was taken by the statutory authorities or the appellant herein to notify a draft development plan. It was not notified till 2000. No further step was taken pursuant thereto or in furtherance thereof. Respondents filed an application before the Director for grant of permission only on 2.12.2004 which was rejected by reason of an order dated 14.12.2004.

The draft development plan was published on 27.06.2003 although it was sent for consideration of the State in terms of Section 19 of the Act on 9.10.2003. The same was returned to the appellant authority stating that plan to be prepared for the

projected population in the year 2021 on or about 4.01.2005. A draft development plan 2021 was published only on 13.07.2007 whereas the declaration by the appellant-authority was notified on 20.08.2004. Submission of Mr. Venugopal that a development plan would include a draft development plan is sought to be made as the statute has interchangeably used draft development plan, sanctioned development plan as development plan and, secondly, on the strength of clause (iv) of Sub-section (1) of Section 18 of the Act laying down that a notice shall be issued thereunder containing *inter alia* the particulars, viz., the provisions for enforcing the draft development plan and stating the manner in which permission for development may be obtained.

We do not see any force in the said argument. It is possible to enforce a draft development plan in a given case, but the statute must specifically provide for the same. But, a draft development plan which has not attained finality cannot be held to be determinative of the rights and obligations of the parties and, thus, it can never be implemented. Section 50 of the Act explicitly states that the authority may declare its intention to prepare a town development scheme which having regard to Section 2(u) of the Act must be read to mean declaration of its implementation to prepare a scheme for the implementation of the provisions of a development plan.

A development plan even in ordinary parlance can be implemented only when it is final and not when it is at the draft stage, i.e., susceptible to changes. Not only land use may make geographical change, the other details may also undergo a change. The objections and suggestions invited from the general public as also the persons affected may be accepted. There may be realignment. It may undergo serious modifications. Once the legislature has defined a term in the interpretation clause, it is not necessary for it to use the same expression in other provisions of the Act.

The purpose of declaring the intent under Section 50(1) of the Act is to implement a development plan. Section 53 of the Act freezing any other development is an incidence arising consequent to the purpose, which purpose is to implement a development plan. If the purpose of declaring such an intention is merely to bring into play Section 53, and thereby freeze all development, it would amount to exercise of the power of Section 50(1) for a collateral purpose, i.e., freezing of development rather than implementation of a development plan.

A bare perusal of Sections 17 and 49 would show that it is the development plan which determines the manner of usage of the land and the town development scheme enumerates the manner in which such proposed usage can be implemented. It would follow that until the usage is determined through a development plan, the stage of manner of implementation of such proposed usage cannot be brought about. It would also therefore follow that what is contemplated is the final development plan and not a draft development plan, since until the development plan is finalized

it would have no statutory or legal force and the land use as existing prior thereto with the rights of usage of the land arising therefrom would continue.

To accept that it is open to the town development authority to declare an intention to formulate a town development scheme even without a development plan and *ipso facto* bring into play a freeze on usage of the land under Section 53 would lead to complete misuse of powers and arbitrary exercise thereof depriving the citizen of his right to use the land subject to the permitted land use and laws relating to the manner of usage thereof. This would be an unlawful deprivation of the citizen's right to property which right includes within it the right to use the property in accordance with the law as it stands at such time.

Admittedly, the villages in question had been included by the State in its notification issued on 28.10.2005. Prior thereto, the said villages having not been included within the area of operation of the appellant authority, any action taken either by way of its intention to frame a town planning scheme or otherwise shall be wholly illegal and without jurisdiction. It would render its act in relation to the said villages a nullity.

It is well-settled that meaning assigned to a term as defined in the interpretation clause unless the context otherwise requires should be given the same meaning.

It is also well-settled that in the absence of any context indicating a contrary intention, the same meaning would be attached to the word used in the later as is given to them in the earlier statute.

(Paras 38,39,41,42,47,48,49,54,56,58,59,70,72,73,75,76,81,82,83 & 107)

Cases Referred :

T. Vijayalakshmi v. *Town Planning Member;* (2006) 8 SCC 502, *Prakash Amichand Shah* v. *State of Gujarat & others;* (1986) 1 SCC 581, *State of Gujarat* v. *Shantilal Mangaldas & ors.;* 1969 (3) SCR 341, *Balram Kumwat* v. *Union of India & Ors.*, (2003) 7 SCC 628, *Krishi Utpadan Mandi Samiti & Ors.* v. *Pilibhit Pantnagar Beej Ltd. & Anr.*; (2004) 1 SCC 391, *Union of India & Ors.* v. *West Coast Paper Mills Ltd. & Anr.*; (2004) 2 SCC 747, *Hindustan Petroleum Corporation Ltd.* v. *Daius Shapur Chenai & Ors.*; (2005) 7 SCC 627, *State of Rajasthan* v. *Basant Nahata;* JT 2005 (8) SC 171, *State of Uttar Pradesh* v. *Manohar;* (2005) 2 SCC 126, *Jilubhai Nanbhai Chachar & Ors.* v. *State of Gujarat and Anr.;* (1995) Supp. 1 SCC 596,*Sri Krishnapur Mutt, Udupi* v. *N. Vijayendra Shetty and Anr.;* 1992 (3) Kar.L.J. 326, *Pt. Chet Ram Vashist (Dead) by LRs.* v. *Municipal Corporatiopn of Delhi;* (1995) 1 SCC 47, *Raju S. Jethmalani* v. *State of Maharashtra;*(2005) 4 SCALE 688, *Lenhon* v. *Gobson & Howes Ltd.*; (1919) AC 709 at 711, *Venkata Subamma and another* v. *Ramayya and others;*AIR 1932 PC 92, *State of H.P. & Ors.* v. *Rajkumar Brijender Singh &*

Ors.; (2004) 10 SCC 585, *Bombay Dyeing and Mfg. Co. Ltd.* v. *Bombay Environmental Action Group and Ors.*, (2006) 3 SCC 434, *National Insurance Co. Ltd.* v. *Laxmi Narain Dhut*; 2007 (4) SCALE 36, *Maruti Udyog Ltd.* v. *Ram Lal and Others;* (2005) 2 SCC 638, *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.;* (1987) 1 SCC 424, *High Court of Gujarat* v. *Gujarat Kisan Mazdoor Panchayat*; (2003) 4 SCC 712, *Indian Handicrafts Emporium and Others* v. *Union of India and Others*; (2003) 7 SCC 589, *Deepal Girishbhai Soni and others* v. *United India Insurance Co. Ltd., Baroda*; (2004) 5 SCC 385, para 56, *State of Orissa and Others* v. *Commissioner of Land Records and Settlement, Cuttack and Others;*(1998) 7 SCC 162, *S.B. Bhattacharjee* v. *S.D. Majumdar & Ors.*, Civil Appeal arising out of S.L.P. (Civil) No. 3413 of 2006, *Rakesh Vij* v. *Dr. Raminder Pal Singh Sethi and Ors.;* AIR 2005 SC 3593, *Director of Public Works* v. *Ho Po Sang;* 1961 AC 901 : (1961) 2 All ER 721, *Lakshmi Amma* v. *Devassy;* 1970 KLT 204, *Howrah Municipal Corpn.* v. *Ganges Rope Co. Ltd.;* (2004) 1 SCC 663, *Union of India v. Indian Charge Chrome;* (1999) 7 SCC 314, *S.B. International Ltd. v. Asstt. Director General of Foreign Trade;*(1996) 2 SCC 439, *Kuldeep Singh* v. *Govt. NCT of Delhi;*(2006) 5 SCC 702.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S. B. SINHA, J.** :–Leave granted.

2. Interpretation of the provisions of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, (No. 23 of 1973) (for short, 'the Act') is in question in these appeals which arise out of the judgments and orders dated 06.03.2007 passed by a Division Bench of the High Court of Madhya Pradesh in Writ Petition No. 9396 of 2006 and Writ Appeal No. 462 of 2006.

3. Before we advert to the said question, we may notice the admitted fact of the matter.

4. The said Act was enacted to make provisions for planning and development and use of land; to make better provision of the preparation of the development plans and zoning plans with a view to ensuring that town planning schemes are made in a proper manner and their execution is made effective; to constitute a Town & Country Planning Authority for proper implementation of town and country development plan; to provide for the development and administration of special areas through a Special Area Development Authority; to make provision for the compulsory acquisition of land required for the purposes connected with the said matters. The said Act came into force with effect from 16.04.1973.

Statutory Provisions :

5. The terms "development", "existing land use map", "planning area", "Town Development Scheme" and "Town and Country Development Authority", which are relevant for the purpose of this case, have been defined in Section 2(f), 2(i), 2(o), 2(u) and 2(v) of the Act respectively in the following terms :

> "2(f)"development" with its grammatical variations means the carrying out of a building, engineering, mining or other operation in, on over or under land, or the making of any material change in any building or land or in the use of either, and includes sub-division of any land;"
>
> "2 (i) "existing land use map" means a map indicating the use to which lands in any specified area are put at the time of preparing the map, and includes the register prepared, with the map giving details of land-use."
>
> "2 (o)" planning area" means any area declared to be a planning area under this Act: Non-Planning area shall be construed accordingly."
>
> "2 (u) "Town Development Scheme" means a scheme prepared for the implementation of the provisions of a development plan by the Town and Country Development Authority and includes "Scheme"
>
> "2(v) "Town and Country Development Authority" means an authority established under Section 38."

6. Chapter IV of the Act deals with planning areas and development plans. Section 13(1) empowers the State Government to constitute planning areas for the purposes of the said Act and define the limits thereof. Sub-section (2) of Section 13 empowers the State Government by notification, *inter alia,* to alter the limits of the planning area so as to include therein or exclude therefrom such areas, as may be specified in the notification; to amalgamate two or more planning areas so as to constitute one planning area; to divide any planning area into two more planning areas; and to declare that the whole or part of the area constituting the planning area shall cease to be a planning area or part thereof. Sub-section (3) of Section 13 of the Act provides for a non-obstante clause, in terms whereof, the local authority mentioned therein shall in relation to the planning areas from the date of the notification issued under sub-section (1) cease to exercise the powers, perform the functions and discharge the duties which the State Government or the Director is competent to exercise. Section 14 of the Act enables the Director to prepare an

existing land use map and development plan. Section 15 enables the Director to carry out the survey and prepare an existing land use map and forthwith publish the same in the manner laid down therein. Once such a plan is published, no person is authorised to institute or change the use of any land or carry out any development of land for any purpose other than that indicated in the existing land use map without the permission in writing of the Director.

7. Clause (b) of sub-section (1) of Section 16, however, provides :

> "(b) no local authority or any officer or other authority shall, notwithstanding anything contained in any other law for the time being in force, grant permission for the change in use of land otherwise than as indicated in the existing land use map without the permission in writing of the Director."

8. Section 17 provides as to what should be the contents of the development plan. Section 17A(1) provides for constitution of a committee; sub-sections (2) and (3) whereof read as under :

> "(2) The Committee constituted under sub-section (1), shall :
>
> (a) consider and suggest modifications and alterations in the draft development plan prepared by the Director under section 14;
>
> (b) hear the objections after the publication of the draft development plan under section 18 and suggest modifications or alterations if any; to the Director.
>
> (3) The Convenor of the Committee shall record in writing all the suggestions, modifications and alterations recommended by the committee under sub-section (2) and thereafter forward his report to the Director."

9. Section 18 of the Act provides for publication of a development plan; in terms whereof the objections and suggestions in writing are invited with respect thereto. The notice in terms of the said provision is to specify in regard to the draft development plan, *inter alia,* the following particulars :

> "(i) the existing land use maps;
>
> xxx xx xxx
>
> (iv) the provisions for enforcing the draft development plan and stating the manner in which permission for development may be obtained."

10. Section 19 provides for sanction of development plans, sub-section (2) whereof reads as under :

> "(2) Where the State Government approves the development plan with modification the State Government shall, by a notice published in the Gazette, invite objections and suggestions in respect of such modifications within a period of not less than thirty days from the date of publication of the notice in the Gazette."

11. Preparation of zoning plan is envisaged under Chapter V thereof. Section 20 reads as under :

> "20. The Local Authority may on its own motion at any time after the publication of the development plan, or thereafter if so required by the State Government shall, within six months of such requisition, prepare a zoning plan."

12. In the zoning plan more details of land use as indicated in the development plan are to be indicated and, *inter alia,* shall :

> "(c) allocate in detail areas or zones for residential, commercial, industrial, agricultural, and other purposes;

13. Chapter VI of the Act deals with control of development and use of land, provided that the overall control of development and use of land in the State shall vest in the State Government; sub-section (2) of Section 24 reads as under :

> "(2) Subject to the provision of sub-section (1) and the rules made under this Act, the overall control of development and use of land in the planning area shall vest in the Director with effect from such date as the State Government may by notification, appoint in this behalf."

14. Section 25 envisages that the use and development of land shall conform to the provisions of the development plan. Section 38 occurring in Chapter VII provides for establishment of a Town and Country Development Authority, sub-sections (1) and (2) whereof read as under :

> "38(1).-The State Government may, by notification, establish a Town and Country Development Authority by such name and for such area as may be specified in the notification.
>
> (2) The duty of implementing the proposal in the development plan, preparing one or more town development schemes and acquisition and development of land for the purpose of expansion

or improvement of the area specified in the notification under sub-section (1) shall, subject to the provisions of this Act vest in the Town & Country Development Authority established for the said area."

15. Section 49 of the Act envisages that a town development scheme may make provision for the matters specified therein including acquisition of land for the purposes mentioned therein as also any other work of such a nature as would bring about environmental improvements which may be taken up by the authority with the prior approval of the State Government.

16. Sub-sections (1), (2), (3) and (4) of Section 50 of the Act, which are material for our purpose, read as under :

"50.(1) The Town and Country Development Authority may, at any time, declare its intention to prepare a town development scheme.

(2) Not later than thirty days from the date of such declaration of intention to make a scheme, the Town and Country Development Authority shall publish the declaration in the Gazette and in such other manner as may be prescribed.

(3) Not later than two years from the date of publication of the declaration under sub-section (2) the Town and Country Development Authority shall prepare a town development scheme in draft form and publish it in such form and manner as may be prescribed together with a notice inviting objections and suggestions from any person with respect to the said draft development scheme before such date as may be specified therein, such date being not earlier than thirty days from the date of publication of such notice.

(4) The Town and Country Development Authority shall consider all the objections and suggestions as may be received within the period specified in the notice under sub-section (3) and shall after giving a reasonable opportunity to such persons affected thereby as are desirous of being heard or after considering the report of the committee constituted under sub-section (5) approve the draft scheme as published or make such modifications therein as it may deem fit."

17. A proviso has been added thereafter to sub-section (4) by Act of 2004 in terms whereof a draft scheme must be approved within the period of one year from the publication thereof. Section 51 provides for revision of the draft scheme. Section 53 imposes restrictions on land use and land development in the following terms :

> "53. As from the date of publication of the declaration to prepare a town development scheme, no person shall, within the area included in the scheme, institute or change the use of any land or building or carry out any development, save in accordance with the development authorised by the Director in accordance with the provisions of this Act prior to the publication of such declaration."

18. Section 55 provides that land needed for the purpose of town development scheme shall be deemed to be land needed for public purpose Section 72 empowers the State Government to supervise and control the acts and proceedings of the officers appointed under Section 3 and the authorities constituted under the said Act. The State can issue directions in terms of Section 73 of the Act. Section 75 Section provides for delegation of powers.

Notifications :

19. On or about 13.02.1974, the State Government issued a notification under sub-section (1) of Section 13 of the Act constituting Indore Planning Area, the limits whereof were defined in the schedule appended thereto. Indisputably, it constituted only 37 villages. The villages Bicholi and Kanadia, with which we are concerned herein, were not included therein.

20. The State Government in exercise of power conferred upon it under Section 38 of the Act issued a notification establishing the Appellant-Authority, namely, 'Indore Vikas Pradhikaran' from 13.05.1977 in respect of the area specified in the notification dated 13.02.1974.

21. On or about 30.03.1999, the State Government delegated its power under Sections 13 and 47A of the Act in favour of the District Planning Committee and it in exercise of said delegated power by a notification dated 13.11.2000 amended the planning area by adding 115 villages therein which included the said villages Bicholi and Kanadia. By a notification dated 28.06.2002, it, however, further amended the extent of planning area by deleting 62 villages therefrom. Bicholi and Kanadia villages were, however, retained in the said amended notification.

22. Upon compliance of the usual statutory formalities, the appellant published a draft development plan on 27.06.2003. The said plan was in respect of Urban Development Scheme No.164. Objections and suggestions in respect thereof were called for. Allegedly, objections and suggestions having been filed; they were heard by the Development Planning Committee during the period between 25.08.2003 and 03.09.2003. By a resolution adopted in a meeting held on 20.08.2004 a decision in anticipation of approval of the Government under Section 50(1) of the Act was proposed, which included the lands of villages Bicholi and Kanadia, *inter alia*, for

construction of a bye-pass road of 60 metres width. A declaration of intention to prepare a town development scheme in terms of sub-section (2) of Section 50 was issued on 24.08.2004. Indisputably, in terms of sub-section (3) of Section 50 of the Act, the draft town development scheme was to be prepared within a period of two years therefrom. On or about 02.12.2004, Respondent applied for sanction of development plans under Section 29(1) of the Act. We may, however, notice that on 04.01.2005, the said draft development plans were returned by the State of Madhya Pradesh in terms of Section 19(1) of the Act with a direction that the plans be prepared for the projected population as in the year 2021 and the same be placed before the Government for approval as soon as possible.

23. The State of Madhya Pradesh, however, issued a notification in terms of sub-section (1) of Section 38 of the Act, *inter alia,* in respect of the villages in question, namely, Bicholi and Kanadia only on 28.10.2005. Appellant issued a notification on 18.05.2006 inviting objections in respect of the said scheme. A Draft Development Plan-2021 was published on 13.07.2006.

Contentions of the writ petitioner-respondents.

24. Respondents' lands situated in villages Bicholi and Kanadia were within the respective jurisdictions of the Gram Panchayats constituted under the provisions of the Madhya Pradesh Gram Panchayat Act. The said panchayats in terms of the provisions of the Act were 'local authorities'. They submitted applications for grant of building plan in the year 1990 and the same was sanctioned on or about 05.04.1991.

25. Respondents, as noticed hereinbefore, applied for and obtained sanction in terms of the building bye-laws framed by the respective gram panchayats in 1991 for grant of development plans under Section 29(1) on 02.12.2004. The said applications were rejected by the Joint Director, Town and Country Planning in view of the purported publication of the plan under sub-section (2) of Section 50 of the Act. Respondents filed a writ petition against the said order, *inter alia,* praying for issuance of a writ or order in the nature of mandamus directing the said authority to sanction the site plan which had been submitted. The said writ petitions were dismissed by a learned Single Judge by an order dated 17.05.2006. Writ appeals were preferred thereagainst, which have been allowed by the Division Bench of the High Court by its judgment dated 06.03.2007.

High Court Judgment :

26. By reason of the impugned judgment, the High Court struck down the declaration made under Section (2) of Section 50 of the Act, opining :

(i) Unless a development plan for an area is published and comes

into operation, a draft development scheme cannot be published by the Town and Country Development Authority under sub-section (2) of Section 50 of the Act.

(ii) Such a town development scheme cannot by itself without a development plan for the area restrict the right of a person to use his property in the manner he likes.

(iii) Although the notification issued by the Appellant-Authority had been constituted by the State Government only in respect of the area which was covered by the notification dated 13.02.1974, the draft development scheme prepared by it was *ultra vires*, so far as the said two villages are concerned, being beyond its territorial jurisdiction.

Submissions :

27. Mr. K.K. Venugopal, and Mr. S.K. Gambhir, learned Senior Counsel appearing on behalf of the appellant, submitted :

(i) The High Court committed a serious error in interpreting the provisions of Section 50 of the Act, inasmuch : (i) Under the Act an existing land use map has to be published which would indicate broadly the land use proposed in the planning area and the areas or zones of land allocated for the purposes mentioned therein; and (ii) As the scheme covers the villages in question, the same could not have been ignored.

(ii) Having regard to the fact that the scheme provides for construction of a bypass road of 70 feet width, any construction by the builders would lead to haphazard development and, thus, would completely destroy the purpose for which the land was to be reserved for planned development of the residential area.

(iii) Undertaking of haphazard and unplanned development would carry with it a statutory injunction provided for under Section 53 of the Act, in terms whereof, if an existing land use map or a draft development plan or a town development scheme is published, no person is permitted to obtain any permission for carrying out any development contrary thereto or inconsistent therewith.

(iv) The materials on records established that a large number of permissions were obtained by the private developers which if allowed to be implemented shall result in haphazard development of colonies and buildings and, thus, defeat the purpose of the Act.

(v) As Section 50 is not subject to the publication of a final development plan, as would be evident from the words used therein, namely, 'at any time', Section 53 would operate as soon as an intention is expressed by issuance of a notification in terms thereof.

(vi) Section 50 of the Act must be read in the contrast with Section 20 thereof. So read, a town development scheme must be consistent with the provisions of the existing land use map as well as a draft development plan; as otherwise the purport and object for which Section 53 has been enacted would become otiose.

(vii) The Authority constituted under Section 38 being statutorily obligated to implement the development plan, as would appear from Sections 38(2) and 49 of the Act, the power/duty to prevent haphazard by declaring the town development scheme must be held to be vested in the Appellant-Authority.

(viii) The State of Madhya Pradesh having framed rules known as 'Madhya Pradesh Bhumi Vikas Niyam, 1984', (Rules) which are parts of the town development scheme, keeping in view the fact that the scheme provided for 10,000 houses for the low income group wherefor three major roads were required to be built up having a width of 75 metres, 60 metres and 36 metres respectively as also parks, roads, colleges, gardens, playgrounds and green belts, the purposes for which such scheme had been framed would not be subserved, if permissions are granted for haphazard and unplanned development.

(ix) In any event, private interest must be waived to public interest.

(x) The High Court committed a manifest error insofar it failed to take into consideration that the planning area having been extended by a notification issued by the District Planning Committee, the same would subserve the purpose of the notification dated 28.10.2005 issued under sub-section (1) of Section 38 of the Act.

28. Mr. Banthia, the learned counsel appearing on behalf of the State had not made any separate submission before us.

29. Mr. C.A. Sundaram and Mr. Arun Jaitley, learned Senior Counsel appearing on behalf of the respondents in these appeals, on the other hand, would submit :

(i) The land of the respondents being outside the planning area, as notified by the State of Madhya Pradesh constituting the

Appellant-Authority, the purported town development scheme would not be applicable in relation thereto. Only because the planning area has been extended by the District Planning Committee, the same would not ipso fact enlarge the territorial jurisdiction of the Appellant-Authority.

(ii) Safeguard of public interest has sufficiently been taken care of in terms of the Act., as upon issuance of a notification under Section 13 of the Act, the Director only is authorised to sanction a plan for development and carry out other functions as laid down under Sections 15, 16 and 17 of the Act.

(iii) The committee constituted under Section 17-A of the Act is the only authority which can consider and suggest modifications in the draft development plan prepared by the Director under Section 14, whereafter only a draft development plan can be published in terms of Section 18; sub-section (2) whereof in turn envisages consideration of objections, suggestions, etc.

(iv) Only upon completion of the procedures laid down in the said provisions development plan can be sanctioned by the State under

Section 19 and, thus, in the event the State Government has power to make modification in the development plan, the same would come into operation only from the date of publication of the notification in the gazette issued under sub-section (4) thereof.

(v) Procedure laid down in the provisions of the Act having not been fulfilled, the impugned action had resulted in breach of law and, thus, the same had rightly been struck down.

(vi) Chapter V of the Act provides for preparation of zoning plans and the contents thereof having been prescribed, the safeguards envisaged under Sections 18 and 19 of the Act would take care of public interest involved; inasmuch the overall control and development as also land use is vested in the Director and in that view of the matter unless a final development plan comes into being, the Appellant-Authority cannot be held to have any jurisdiction thereover in view of Section 38 of the Act.

(vii) The definition of the 'town development scheme' as contained in Section 2(u) of the Act presupposes existence of a sanctioned development plan prepared as per law, and, thus, in absence thereof a town development scheme under Section 50 cannot be made.

(viii) In view of the fact that the State Government has issued a notification on 28.10.2005 extending the area of operation of the Appellant-Authority, the scheme illegally notified by it would not be invalidated.

(ix) Gram Panchayat of the village being the competent authority at the relevant time having sanctioned the building plan, a vested right had accrued in favour of the first respondent and such a power having been acknowledged and accepted under the provisions of the Act, the same cannot be taken away.

Analysis of the statutory provisions :

30. The Act is divided into several chapters. It proceeds on the basis that steps are required to be taken before a town planning scheme is given effect to. The State Government is in overall control of the matter relating to town and country planning.

31. The Director of Town and Country Planning, however, subject to the control and supervision of the State, exercises such statutory powers which are conferred upon him. A State is divided into several regions. A regional plan is finalised whereupon restrictions on use of land or development thereof can be imposed. Such regional plan is subject to review.

32. Chapter IV of the Act provides for carving out planning areas and preparation of development plans. Development plans are required to be prepared and finalised only in relation to the planning areas. An area, however, which is notified can be sub-divided into planning areas and non-planning areas.

33. Chapter V of the Act deals with the preparation, finalization, review and modifications of the zonal plan wherewith we are not concerned much in these appeals. Chapter VI of the Act provides for control of development and use of land. In terms of Section 24 of the Act, the Director is to control land use. Preparation of development plan, prohibition of development without permission and matters connected therewith and incidental thereto are also dealt with in Chapter VI. Chapter VII of the Act, however, provides for shift of control in respect of land use and development for the hands of the Director and, consequently of the State to the Town and Country Development Authority. Section 38 provides for establishment of Town and Country Development Authority.

34. The Act envisages the following steps which are required to be complied with :

(a) Constitution of a planning area by notification under Section 13.

(b) Compliance of the detailed procedure set out under Sections

14 to 19, leading to sanction of the development plan under Section 19. The said procedure envisages compliance of principles of natural justice.

(c) Section 38 provides for establishment of a Town and Country Development Authority, by notification "for such areas as may be specified in the notification". Under sub-section (2) thereof, duties of implementation of the development plan and preparation of the town development scheme have been cast on the Town and Country Development Authority.

(d) The town development scheme is to be prepared upon following the procedure set out under Section 50. The said scheme can be prepared only when there exists a development plan, prepared in accordance with the procedure prescribed under the Act as envisaged under Sections 14 to 19 and after notification under Section 38(1). In this regard, reference may be also be made to Section 2(u) of the Act, which describes a town development scheme to ean a scheme prepared for implementation of the provisions of the development plan.

35. Before the procedure referred to hereinbefore is applied to the case at hand, it would appear that the notification dated 13.02.1974 issued under Section 13 of the Act extending the planning area would not include the land of the respondents being outside its territorial jurisdiction. By reason of 1977 Notification the villages in question in which the lands of the respondents are situated, Indore Development Plan, 19991 would not have any application thereover. The notification issued under Section 38(1) of the Act on 09.05.1977, would, thus, be limited to the area specified under the notification dated 13.02.1974.

36. A Town and Country Development Authority although may have something to do with the preparation of the draft development plan. It exercises complete control, subject of course to the power of the State Government, to give directions, exercises revisional power, etc. over implementation of the development plan by making town development schemes.

37. Chapter VIII of the Act deals with special areas. Chapter IX, however, envisages power of the State Government of supervision and control as also to issue necessary directions. The State has also the power to review plans for ensuring conformity. It may also delegate its power from time to time. Dissolution of authority at the hands of the State is envisaged under Section 76 of the Act.

38. When a planning area is defined, the same envisages preparation of development plan and the manner in which the existing land use is to be implemented.

A development plan in some statutes is also known as a master plan. It lays down the broad objectives and parameters wherewith the development plan is to deal with. It also lays down the geographical splitting giving rise to preparation and finalization of zonal plans. The zonal plans contain more detailed and specific maters than the master plan or the development plan. Town planning scheme or lay-out plan contains further details on plot-wise basis. It may provide for the manner in which each plot shall be dealt with as also the matter relating to regulations of development.

39. Once, however, the existing land use is in place, subject to certain restrictions contained in the Act, the Director would permit land use in the same manner as is found to be existing.

40. The old laws, in relation thereto, as also the permissions granted by the local authorities which includes a gram panchayat are permitted to operate till new laws are framed and/ or till new building regulations are made.

41. When existing land use is in place, use thereof for purposes other than the existing land use is frozen. However, subject to permission granted by the Director, the development of land is not frozen.

42. When a draft development plan is prepared, the same is subject to grant of approval and/ or modification thereof. We will deal with the matter at some details a little later but at this stage, we may notice that end use of the land is not frozen until a final sanction plan comes into being. A town planning scheme, as would appear from its definition contained in Section 2(4) of the Act, is prepared only for the purpose of implementation of a development plan. Yet again, we would deal with the question as to whether the same would bring within its sweep the draft development plan or only final development plan a little later, but it may be noticed that once a valid town planning scheme comes into force, indisputably, there may be freezing of land use as also freezing of development and, thus, a total embargo is placed except in such cases where the Director had granted permission. Section 53 of the Act, however, in the event a valid town planning scheme is made, places a total embargo both on land use as also the development. Even the Director is denuded of its power to issue any further permission. Existing land use, draft development plan and final development plan envisage two-stage exercise. In drafting or finalizing a zonal plan, a similar exercise is undertaken. In making a town development scheme, however, the process undertaken is a three-stage one inasmuch as an intention therefor is declared which entails serious consequences and, as noticed hereinbefore, by reason thereof, a total embargo is imposed both on land use as also the development. For the said purpose, a time limit within which a draft town planning scheme has to be finalized is provided but the same can be subject to

modification by the State which ordinarily should be with a view to deal with the same in line with the final development plan.

Principal questions :

43. In these appeals, principally, we are beset with two questions:

(i) Whether having regard to notification dated 13.02.1974 vis-a-vis the expansion of the Indore Development Plan, the District Committee in exercise of its delegated power can automatically extend the area of operation of the appellant despite the notification constituting it by the State whereby and whereunder its area of operation was limited to the one covered by the notification dated 13.02.1974 ?

(ii) Whether the appellant authority can declare its intention in terms of Section 50 of the Act before the development attained finality.

Competing Interest :

44. There are two competing interests, viz., one, the interest of the State *vis-a-vis* the general public and, two, to have better living conditions and the right of property of an individual which although is not a fundamental right but is a constitutional andhuman right.

45. Before we embark upon the questions involved in these appeals, we would like to make some general observations.

46. Town and country planning involving land development of the cities which are sought to be achieved through the process of land use, zoning plan and regulating building activities must receive due attention of all concerned. We are furthermore not oblivious of the fact that such planning involving highly complex cities depends upon scientific research, study and experience and, thus, deserves due reverence.

47. Where, however, a scheme comes into force, although it may cause hardship to the individual owners as they may be prevented from making the most profitable use of their rights over property, having regard to the drastic consequences envisaged thereunder, the statute should be considered in such a manner as a result whereof greater hardship is not caused to the citizens than actually contemplated thereby. Whereas an attempt should be made to prevent unplanned and haphazard development but the same would not mean that the court would close its eyes to the blatant illegalities committed by the State and/or the statutory authorities in implementation thereof. Implementation of such land development as also building laws should be in consonance with public welfare and convenience. In United

States of America zoning ordinances are enacted pursuant to the police power delegated by the State. Although in India the source of such power is not police power but if a zoning classification imposes unreasonable restrictions, it cannot be sustained. The public authority may have general considerations, safety or general welfare in mind, but the same would become irrelevant, as thereby statutory rights of a party cannot be taken away. The courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right to hold property, on the other.

48. For the aforementioned purpose, an endeavour should be made to find out as to whether the statute takes care of public interest in the matter vis-a-vis the private interest, on the one hand, and the effect of lapse and/ or positive inaction on the part of the State and other planning authorities, on the other.

49. The courts cannot also be oblivious of the fact that the owners who are subject to the embargos placed under the statute are deprived of their valuable rightful use of the property for a long time. Although ordinarily when a public authority is asked to perform statutory duties within the time stipulated it is directory in nature but when it involves valuable rights of the citizens and provides for the consequences therefor it would be construed to be mandatory in character.

50. In *T. Vijayalakshmi* v. *Town Planning Member*[1], this Court held:

> "15. The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play."

It was further observed:

> "18. It is, thus, now well-settled law that an application for grant of permission for construction of a building is required to be decided in accordance with law applicable on the day on which such permission is granted. However, a statutory authority must exercise its jurisdiction within a reasonable time. (See *Kuldeep Singh* v. *Govt. of NCT of Delhi*)"

51. What would be a public purpose in such a matter has been stated in *Prakash*

(1) (2006) 8 SCC 502.

Amichand Shah v. *State of Gujarat & others*[1] , whereupon the State itself relied upon, in the following terms :

> "19. In order to appreciate the contentions of the appellant it is necessary to look at the object of the legislation in question as a whole. The object of the Act is not just acquiring a bit of land here or a bit of land there for some public purpose. It consists of several activities which have as their ultimate object the orderly development of an urban area. It envisages the preparation of a development plan, allocation of land for various private and public uses, preparation of a Town Planning Scheme and making provisions for future development of the area in question. The various aspects of a Town Planning Scheme have already been set out. On the final Town Planning Scheme coming into force under Section 53 of the Act there is an automatic vesting of all lands required by the local authority, unless otherwise provided, in the local authority. It is not a case where the provisions of the Land Acquisition Act, 1894 have to be set in motion either by the Collector or by the Government."

The impugned provision does not subserve such purpose.

52. It is also not a case like *State of Gujarat* v. *Shantilal Mangaldas & ors.*[2], that when a development is made, the owner of the property not only gets much more than what he would have got, if the same remained undeveloped in the process but also get the benefit of living in a developed town having good town planning.

53. The courts should, therefore, strive to find a balance of the competing interest.

Human Right Issue :

54. The right of property is now considered to be not only a constitutional right but also a human right.

55. The Declaration of Human Rights (1789) enunciates under Article 17 "since the right to property is inviolable and sacred, no-one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it and just and prior indemnity has been paid". Further under Article 217 (IIII) of 10th December, 1948, adopted in the General Assembly Resolution it is stated that : (i) Everyone has the right to own property alone as well as in association with others. (ii) No-one shall be arbitrarily deprived of his property.

56. Earlier human rights were existed to the claim of individuals right to health,

(1) (1986) 1 SCC 581. (2) 1969 (3) SCR 341.

right to livelihood, right to shelter and employment etc. but now human rights have started gaining a multifacet approach. Now property rights are also incorporated within the definition of human rights. Even claim of adverse possession has to be read in consonance with human rights.

57. As President John Adams (1797-1801) put it, :

> "Property is surely a right of mankind as real as liberty." Adding, "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence".

58. Property, while ceasing to be a fundamental right would, however, be given express recognition as a legal right, provisions being made that no person shall be deprived of his property save in accordance with law.

Interpretation of the Act :

59. The Act being regulatory in nature as by reason thereof the right of an owner of property to use and develop stands restricted, requires strict construction. An owner of land ordinarily would be entitled to use or develop the same for any purpose unless there exists certain regulation in a statute or a statutory rules. Regulations contained in such statute must be interpreted in such a manner so as to least interfere with the right of property of the owner of such land. Restrictions are made in larger public interest. Such restrictions, indisputably must be reasonable one. [See *Balram Kumwat* v. *Union of India & Ors.*[1], *Krishi Utpadan Mandi Samiti & Ors.* v. *Pilibhit Pantnagar Beej Ltd. & Anr.*[2] and *Union of India & Ors.* v. *West Coast Paper Mills Ltd. & Anr.*[3]. The statutory scheme contemplates that a person and owner of land should not ordinarily be deprived from the user thereof by way of reservation or designation.

60. Expropriatory legislation, as is well-known, must be given a strict construction.

61. In *Hindustan Petroleum Corporation Ltd.* v. *Daius Shapur Chenai & Ors.*[4], construing Section 5A of the Land Acquisition Act, this Court observed :

> "6. It is not in dispute that Section 5-A of the Act confers a valuable right in favour of a person whose lands are sought to be acquired. Having regard to the provisions contained in Article 300-A of the Constitution, the State in exercise of its power of "eminent domain" may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid.

(1) (2003) 7 SCC 628.
(2) (2004) 1 SCC 391.
(3) (2004) 2 SCC 747.
(4) (2005) 7 SCC 627.

> 7. Indisputably, the definition of public purpose is of wide amplitude and takes within its sweep the acquisition of land for a corporation owned or controlled by the State, as envisaged under sub-clause (iv) of clause (f) of Section 3 of the Act. But the same would not mean that the State is the sole judge therefor and no judicial review shall lie. (See *Jilubhai Nanbhai Khachar* v. *State of Gujarat.*)"

It was further stated :

> "29. The Act is an expropriatory legislation. This Court in *State of M.P.* v. *Vishnu Prasad Sharma* observed that in such a case the provisions of the statute should be strictly construed as it deprives a person of his land without consent. [See also *Khub Chand* v. *State of Rajasthan* and *CCE* v. *Orient Fabrics (P) Ltd.*] There cannot, therefore, be any doubt that in a case of this nature due application of mind on the part of the statutory authority was imperative."

62. In *State of Rajasthan & Ors.* v. *Basant Nahata*[1] , it was opined :

> " In absence of any substantive provisions contained in a parliamentary or legislative act he cannot be refrained from dealing with his property in any manner he likes. Such statutory interdict would be opposed to one's right of property as envisaged under Article 300A of the Constitution of India."

63. In *State of Uttar Pradesh* v. *Manohar*[2], a Constitution Bench of this Court held :

> "Ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f) was deleted by the Forty-fourth Amendment to the Constitution, Article 300-A has been placed in the Constitution, which reads as follows: "300-A. Persons not to be deprived of property save by authority of law. No person shall be deprived of his property save by authority of law." This is a case where we find utter lack of legal authority for deprivation of the respondent's property by the appellants who are State authorities "

64. In *Jilubhai Nanbhai Khachar & Ors.* v. *State of Gujarat and Anr.*[3] , the law is stated in the following terms :

> "The right of eminent domain is the right of the sovereign State,

(1) JT 2005 (8) SC 171. (2) (2005) 2 SCC 126. (3) (1995) Supp. 1 SCC 596.

through its regular agencies, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the State including private property without its owner's consent on account of public exigency and for the public good. Eminent domain is the highest and most exact idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity. It gives the right to resume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires it. The term 'expropriation' is practically synonymous with the term "eminent domain"

It was further observed :

"48. The word 'property' used in Article 300-A must be understood in the context in which the sovereign power of eminent domain is exercised by the State and property expropriated. No abstract principles could be laid. Each case must be considered in the light of its own facts and setting. The phrase "deprivation of the property of a person" must equally be considered in the fact situation of a case. Deprivation connotes different concepts. Article 300-A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law made by Parliament or a State Legislature, a rule or a statutory order having force of law. It is inherent in every sovereign State by exercising its power of eminent domain to expropriate private property without owner's consent. Prima facie, State would be the judge to decide whether a purpose is a public purpose. But it is not the sole judge. This will be subject to judicial review and it is the duty of the court to determine whether a particular purpose is a public purpose or not. Public interest has always been considered to be an essential ingredient of public purpose. But every public purpose does not fall under Article 300-A nor every exercise of eminent domain an acquisition or taking possession under Article 300-A. Generally speaking preservation of public health or prevention of damage to life and property are considered to be public purposes. Yet deprivation of property for any such purpose would not amount to acquisition or possession taken under Article 300-A. It would be by exercise of the police power of the State. In other words, Article 300-A only limits the powers of the State that no person shall be deprived of his property save by authority of law. There has to be no deprivation without any sanction of law. Deprivation by any other mode is not acquisition or taking possession

under Article 300-A. In other words, if there is no law, there is no deprivation. Acquisition of mines, minerals and quarries is deprivation under Article 300-A."

65. Rajendra Babu, J (as the learned Chief Justice then was) in *Sri Krishnapur Mutt, Udupi* v. *N. Vijayendra Shetty and Anr.*[1] observed :

"The restrictions imposed in the planning law though in public interest should be strictly interpreted because they make an inroad into the rights of a private persons to carry on his business by construction of a suitable building for the purpose and incidentally may affect his fundamental right if too widely interpreted "

66. The question has also been addressed by a decision of the Division Bench of this Court in *Pt. Chet Ram Vashist (Dead) by LRs.* v. *Municipal Corporatiopn of Delhi*[2] , wherein R.M. Sahai, J., speaking for the Bench opined :

"6. Reserving any site for any street, open space, park, school etc. in a layout plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned layout plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred to the person in whose favour it is transferred. The resolution of the Committee to transfer land in the colony for park and school was an order for transfer without there being any sanction for the same in law."

(1) 1992 (3) Kar.L.J. 326. (2) (1995) 1 SCC 47.

[See also *Raju S. Jethmalani* v. *State of Maharashtra*[2]].

Application of the Act :

67. While determining the questions involved in these appeals, we are not unmindful that the purpose and object of the town development scheme is a laudable one insofar as it purports to allocate areas covered by Scheme No. 164 for residential purposes and a bypass road of 70 feet wide is to be built along the eastern periphery of the area covered by the Scheme. The question, however, would be as to whether the development can be said to be a haphazard one or would completely destroy the purpose for which the land was to be reserved for planned development of the residential area.

68. The process started in the year 1974. Only 37 villages were included within the planning area. It may be that with the passage of time the requirements for a better planned city were felt, but it is difficult to conceive that the State of Madhya Pradesh while constituting the appellant authority in terms of Section 38(1) of the Act by reason of its notification dated 09.05.1977 was wholly oblivious thereto. When the Act came into force the existing land use was determined. The area for which, thus, land could be put to use was fixed. No land could be used for a purpose which is not envisaged by land use.

69. A Director who is a very high ranking officer and is answerable only to the State is appointed under the Act to put an eye over the development activities; be it by the developers or others. Apart from the fact that gram panchayat which is a local authority within the meaning of the provisions of the Act had the occasion to consider each application for grant of sanction of the building plans which presumably would require to be drawn directly in terms of the building bylaws framed under a statute which in turn gave rise to a presumption that it had received an approval of the State, in the event of any further development the permission of the Director is necessary. The Director, however, being an authority under the Act was statutorily enjoined to perform his duties within the four-corners of the statute. Whereas the said statutory authority is required to apply its mind before an application for grant of development of land is filed, which itself having regard to its wide definition is extensive in nature, to the requirements of law, it cannot unduly withhold such permission if the application otherwise fulfils the statutory conditions. The Act itself envisages that in the event an application is not disposed of within the time specified, a development plan would be deemed to be sanctioned. [See Section 30(5) of the Act] Land use, therefore, is restricted. The manner in which the permission for construction of building is to be granted is also well-defined.

70. Respondents obtained permission for development from the competent

(1) (2005) 4 SCALE 688.

authority for diversion of land use as far back as on 12.01.1989. They had applied for and were granted sanction of building plan by the gram panchayat in the year 1991. No step was taken by the statutory authorities or the appellant herein to notify a draft development plan. It was not notified till 2000. No further step was taken pursuant thereto or in furtherance thereof. Respondents filed an application before the Director for grant of permission only on 2.12.2004 which was rejected by reason of an order dated 14.12.2004 purported to be for the following reason:

> "subjected land of village Bicholi Hapsi has been included in the proposed Development Scheme No. 164 of Indore Development Authority."

71. We may notice two precise submissions of Mr. Venugopal at this stage:

(i) The development plan includes draft development plan;

(ii) Existence of any draft development plan would authorise the appellant authority to declare its intention to prepare a town development scheme at any time.

72. The draft development plan was published on 27.06.2003 although it was sent for consideration of the State in terms of Section 19 of the Act on 9.10.2003. The same was returned to the appellant authority stating that plan to be prepared for the projected population in the year 2021 on or about 4.01.2005. A draft development plan 2021 was published only on 13.07.2007 whereas the declaration by the appellant authority was notified on 20.08.2004. Submission of Mr. Venugopal that a development plan would include a draft development plan is sought to be made as the statute has interchangeably used draft development plan, sanctioned development plan as development plan and, secondly, on the strength of clause (iv) of Sub-section (1) of Section 18 of the Act laying down that a notice shall be issued thereunder containing *inter alia* the particulars, viz., the provisions for enforcing the draft development plan and stating the manner in which permission for development may be obtained.

73. We do not see any force in the said argument. It is possible to enforce a draft development plan in a given case, but the statute must specifically provide for the same. But, a draft development plan which has not attained finality cannot be held to be determinative of the rights and obligations of the parties and, thus, it can never be implemented. Section 50 of the Act explicitly states that the authority may declare its intention to prepare a town development scheme which having regard to Section 2(u) of the Act must be read to mean declaration of its implementation to prepare a scheme for the implementation of the provisions of a development plan.

74. We have come across some legislations, as for example, The Himachal Pradesh Town and Country Planning Act, 1977 where a provision has been made for preparation of an interim development plan. It is not in dispute that legislations relating to town and country planning are somewhat similar. Had the legislature thought of implementation of a draft development plan, they could have also provided for an interim development plan which ipso facto would have been enforceable.

75. A development plan even in ordinary parlance can be implemented only when it is final and not when it is at the draft stage, i.e., susceptible to changes. Not only land use may make geographical change, the other details may also undergo a change. The objections and suggestions invited from the general public as also the persons affected may be accepted. There may be realignment. It may undergo serious modifications. Once the legislature has defined a term in the interpretation clause, it is not necessary for it to use the same expression in other provisions of the Act. It is well-settled that meaning assigned to a term as defined in the interpretation clause unless the context otherwise requires should be given the same meaning.

76. It is also well-settled that in the absence of any context indicating a contrary intention, the same meaning would be attached to the word used in the later as is given to them in the earlier statute. It is trite that the words or expression used in a statute before and after amendment should be given the same meaning. It is a settled law that when the legislature uses the same words in a similar connection, it is to be presumed that in the absence of any context indicating a contrary intention, the same meaning should attach to the words. [See *Lenhon* v. *Gobson & Howes Ltd.*[1], Craies on Statute Law, Seventh Edition, page 141 and G.P. Singh's Principles of Statutory Interpretation, Tenth edition, page 278]

77. In *Venkata Subamma and another* v. *Ramayya and others*[2], it is stated that an Act should be interpreted having regard to its history, and the meaning given to a word cannot be read in a different way than what was interpreted in the earlier repealed section.

78. Land use, development plan and zonal plan provided for the plan at macro level whereas the town planning scheme is at a micro level and, thus, would be subject to development plan. It is, therefore, difficult to comprehend that broad based macro level planning may not at all be in place when a town planning scheme is prepared.

79. Once a final plan comes into force, steps *inter alia* are taken for acquisition of the property. Section 34 of the Act takes care of such a contingency. The town development scheme, as envisaged under Section 49 of the Act, specifically does it. Out of nine clauses contained in Section 49, six relate to acquisition of land for

(1) (1919) AC 709 at 711. (2) AIR 1932 PC 92.

different purposes. Clauses (v), (viii) and (ix) only refer to undertaking of such buildings or construction of work by the authority itself, reconstructions for the purpose of buildings, roads, drains, sewage lines and the similar amenities and any other work of a nature such as would bring about environmental improvements.

80. If the submission of Mr. Venugopal is accepted, a purpose which is otherwise not contemplated under Chapter IV would be brought in by side door in Chapter VII. It is well-settled that would cannot be done directly cannot be permitted to be done indirectly.

81. The purpose of declaring the intent under Section 50(1) of the Act is to implement a development plan. Section 53 of the Act freezing any other development is an incidence arising consequent to the purpose, which purpose is to implement a development plan. If the purpose of declaring such an intention is merely to bring into play Section 53, and thereby freeze all development, it would amount to exercise of the power of Section 50(1) for a collateral purpose, i.e., freezing of development rather than implementation of a development plan. The collateral purpose also will be to indirectly get over the fact that an owner of land pending finalization of a development plan has all attendant rights of ownership subject to the restraints under Section 16. If the declaration of intent to formulate a town development scheme is to get over Section 16 and freeze development activities under Section 53, it would amount to exercise of power for a collateral purpose.

82. A bare perusal of Sections 17 and 49 would show that it is the development plan which determines the manner of usage of the land and the town development scheme enumerates the manner in which such proposed usage can be implemented. It would follow that until the usage is determined through a development plan, the stage of manner of implementation of such proposed usage cannot be brought about. It would also therefore follow that what is contemplated is the final development plan and not a draft development plan, since until the development plan is finalized it would have no statutory or legal force and the land use as existing prior thereto with the rights of usage of the land arising therefrom would continue.

83. To accept that it is open to the town development authority to declare an intention to formulate a town development scheme even without a development plan and *ipso facto* bring into play a freeze on usage of the land under Section 53 would lead to complete misuse of powers and arbitrary exercise thereof depriving the citizen of his right to use the land subject to the permitted land use and laws relating to the manner of usage thereof. This would be an unlawful deprivation of the citizen's right to property which right includes within it the right to use the property in accordance with the law as it stands at such time. To illustrate the absurdity to which such an interpretation could lead it would then become open to

the town development authority to notify an intent to formulate a town development scheme even in the absence of a development plan, freeze all usage of the property by a owner thereof by virtue of Section 53 of the Act, and should no development plan be finalized within 3 years, such scheme would lapse and the authority thereupon would merely notify a fresh intent to formulate a town development scheme and once again freeze the usage of the land for another three years and continue the same ad infinitum thereby in effect completely depriving the citizen of the right to use his property which was in a manner otherwise permitted under law as it stands.

84. The essence of planning in the Act is the existence of a development plan. It is a development plan, which under Section 17 will indicate the areas and zones, the users, the open spaces, the institutions and offices, the special purposes, etc. Town planning would be based on the contents of the development plan. It is only when the development plan is in existence, can a town planning scheme be framed. In fact, unless it is known as to what the contents of a possible town planning scheme would be, or alternatively, whether in terms of the development plan such a scheme at all is required, the intention to frame the scheme cannot be notified.

85. Section 50 of the Act no doubt uses the word "at any time". The question, however, is what that would imply. The town planning scheme, it would bear repetition to state, is made for the purpose of implementation of a development plan. Ordinarily, therefore, it would envisage the time period for coming into force of the development plan and the expiry thereof. Unless such a construction is to be given to the words "at any time", it would lead to manifest injustice and absurdity which is not contemplated by the statute. For giving an effective meaning to the provisions of Section 50 of the Act, the same is required to be read in the context of other provisions of the statute and in particular the interpretation clauses which we have noticed hereinbefore.

86. Section 50(1) of the Act provide for declaration of this intention to prepare town development scheme "at any time". The words "at any time" do not confer upon any statutory authority an unfettered discretion to frame the town development scheme whenever it is so pleases. The words "at any time" are not charter for the exercise of an arbitrary decision as and when a scheme has to be framed. The words "at any time" have no exemption from all forms of limitation for unexplained and undue delay. Such an interpretation would not only result in the destruction of citizens' rights but would also go contrary to the entire context in which the power has been given to the authority.

87. The words "at any time" have to be interpreted in the context in which they are used. Since a town development scheme in the context of the Act is intended to implement the development plan, the declaration of intention to prepare a scheme

can only be in the context of a development plan. The starting point of the declaration of the intention has to be upon the notification of development plan and the outer limit for the authority to frame such a scheme upon lapsing of the plan. That is the plausible interpretation of the words "at any time" used in Section 50(1) of the Act. [See *State of H.P. & Ors.* v. *Rajkumar Brijender Singh & Ors.*[1].

88. For construing a statute of this nature, we are dealing with, rule of purposive construction has to be applied.

89. In Francis Bennion's Statutory Interpretation, purposive construction has been described as under :

> "A purposive construction of an enactment is one which gives effect to the legislative purpose by (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction)."

[See also *Bombay Dyeing and Mfg. Co. Ltd.* v. *Bombay Environmental Action Group and Ors.*[2], and *National Insurance Co. Ltd.* v. *Laxmi Narain Dhut*[3].

90. In *Maruti Udyog Ltd.* v. *Ram Lal and Others*[4], while interpreting the provisions of Industrial Disputes Act, 1947, the rule of purposive construction was followed.

91. In *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd*[5] this Court stated:

> " If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act "

92. In 'The Interpretation and Application of Statutes' by Reed Dickerson, the author at p.135 has discussed the subject while dealing with the importance of context of the statute in the following terms:

(1) (2004) 10 SCC 585. (2) (2006) 3 SCC 434. (3) 2007 (4) SCALE 36.
(4) (2005) 2 SCC 638. (5) (1987) 1 SCC 424.

> "... The essence of the language is to reflect, express, and perhaps even affect the conceptual matrix of established ideas and values that identifies the culture to which it belongs. For this reason, language has been called "conceptual map of human experience".'

[See also *High Court of Gujarat* v. *Gujarat Kishan Mazdoor Panchayat*[1], *Indian Handicrafts Emporium and Others* v. *Union of India and Others*[2], and *Deepal Girishbhai Soni and others* v. *United India Insurance Co. Ltd., Baroda*[3].

Delegation :

93. An area conceived of under the Act, as noticed hereinbefore, consists of both plan area and non-plan area. Development of plan area may be in phases. A master plan may be followed by a zonal plan and a zonal plan may be followed by a town development scheme.

94. The limit of Indore planning area was specified by a notification dated 13.02.1974 in terms of Sub-section (1) of Section 13 of the Act. Appellant Authority was constituted by the State of Madhya Pradesh in exercise of its power under Section 38(1) of the Act for the area comprised within the Indore planning as specified in the notification dated 13.02.1974. The State in exercise of its jurisdiction under Sub-section (1) of Section 75 of the Act delegated its power conferred upon it under Sections 13 and 47A of the Act upon the District Planning Committee. No power under Section 38 was delegated. The District Planning Committee exercises its jurisdiction pursuant to the said delegation in terms of a notification dated 13.11.2000 extending the Indore Development Planning Area to 152 villages. The villages Bicholi and Kanadia were not included in the notification dated 12.08.1977. They were included only in the notification issued by the District Planning Committee.

95. The District Planning Committee, however, issued another notification amending the planning area to 90 villages only and deleting 62 villages from its earlier notification.

96. There cannot be any doubt whatsoever that even a delegatee exercises its power relying on or on the basis of its power conferred upon it by the delegator, its act would be deemed to be that of the principal as has been held by this Court in *State of Orissa and Others* v. *Commissioner of Land Records and Settlement, Cuttack and Others*[4], this Court held:

> "25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the

(1) (2003) 4 SCC 712. (2) (2003) 7 SCC 589.
(3) (2004) 5 SCC 385, para 56. (4) (1998) 7 SCC 162.

> Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand* v. *State of Punjab* 3 . In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the State Government itself and "not an order passed by any officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate."

97. Whether issuance of notification by the delegatee would automatically extend the jurisdiction of the appellant is the question. Before we consider the legal issues involved, we may notice that the appellant filed an application before the High Court wherein it was stated:

> "2. The respondent no. 2 submits that though in 2004 itself the State Government had in principle agreed to extend the area of the Indore Development Authority u/s 38 of the Adhiniyam, the said decision could not be implemented because of certain procedural and other difficulties. Subsequently, when the respondent no. 2 took up the matter with the State Government, it insisted that in the absence of a formal request from the IDA it could not extend its area u/s 38 of the Adhiniyam. Accordingly, the respondent no. 2 had submitted its formal request by its aforesaid letter dated 14/10/ 2005."

98. The State, it is interesting to note, took a similar plea when the appellant authority sought permission for new Transport Nagar Scheme on 265 hectares of land situated in village Mundrla Nayata by its letter dated 23.08.2005 stating:

> "Please refer the reference letter by which the Indore Development Authority sought permission for new Transport Nagar Scheme on 265 hectares of land situated in village Mundrla Nayata.

> (1) In this regard opinion of law department has been received and as per that in the year 1977 the areas of Indore Development Authority was prescribed whereas the questioned scheme is failing beyond the prescribed operational area.
>
> (2) Although as per letter dated 28th June, 2002, the planning area of Indore city is extended but the operational area of Indore Development Authority has not been extended. At present, Indore Development Plan, 1991 is in force and new Development Plan is being prepared.
>
> (3) Thus, the Indore Development Authority is not competent to declare "Town Development Scheme" beyond its prescribed operational area."

99. Yet again, the State in exercise of its power under Section 38(1) of the Act notified planning area confirming to the one identified by the District Planning Committee in terms of its notification dated 28.10.2005.

How State understood it :

100. Application of the principle of executive construction would lead to a conclusion that the State and the appellant themselves proceeded on the basis that in terms of the notification issued by the District Planning Committee, the area of operation of the appellant was not extended.

101. In G.P. Singh's 'Principles of Statutory Interpretation, 10th Edn. at p. 319, it is stated :

> "But a uniform and consistent departmental practice arising out of construction placed upon an ambiguous statute by the highest executive officers at or near the time of its enactment and continuing for a long period of time is an admissible aid to the proper construction of the statute by the Court and would not be disregarded except for cogent reasons. The controlling effect of this aid which is known as 'executive construction' would depend upon various factors such as the length of time for which it is followed, the nature of rights and property affected by it, the injustice result from its departure and the approval that it has received in judicial decisions or in legislation.
>
> Relying upon this principle, the Supreme Court in Ajay Gandhi v. B. Singh having regard to the fact that the President of the Income Tax Appellate Tribunal had been from its inception in 1941 exercising the power of transfer of the members of the Tribunal to the places

where Benches of the Tribunal were functioning, held construing sections 251(1) and 255(5) of the Income Tax Act that the President under these provisions has the requisite power of transfer and posting of its members. The court observed :

"For construction of a statute, it is trite, the actual practice may be taken into consideration."

Contemporary official statements throwing light on the construction of a statute and statutory instruments made under it have been used as contemporanea expositio to interpret not only ancient but even recent statute both in England and India."

[See also *S.B. Bhattacharjee* v. *S.D. Majumdar & Ors.*[1], Civil Appeal arising out of S.L.P. (Civil) No. 3413 of 2006, disposed of today].

Exercise of delegated power - effect of :

102. The State exercises its different power for different purposes. Issuing notification of a planning area, whether named or not, for the purpose of Section 13(1) is different from the one for which a development authority is created within the meaning of Section 38(1) of the Act. The State in a given situation may appoint more than one authority for the same planned area. The State delegated its power upon the District Planning Authority under Section 38 of the Act. The appellant authority was created for a definite purpose. Its jurisdiction was limited to the area notified. When so creating, although 1974 notification was referred to, the same was only for the purpose of limiting the area of operation of the appellant authority. The principle of legislation by incorporation was applied and not the principle of legislation by reference.

103. The difference between the two principles is well-known. Whereas in the case of the former, a further notification amending the ambit or scope of the statute would be necessary, if the statute incorporated by reference is amended, in the latter it would not be necessary.

104. In *Rakesh Vij* v. *Dr. Raminder Pal Singh Sethi and Ors.*[2], this Court observed:

"9. Adopting or applying an earlier or existing Act by competent Legislature to a later Act is an accepted device of Legislation. If the adopting Act refers to certain provisions of an earlier existing Act, it is known as legislation by reference. Whereas if the provisions of another Act are bodily lifted and incorporated in the Act, then it

(1) Civil Appeal arising out of S.L.P. (Civil) No. 3413 of 2006. (2) AIR 2005 SC 3593.

> is known as legislation by incorporation. The determination whether a legislation was by way of incorporation or reference is more a matter of construction by the courts keeping in view the language employed by the Act, the purpose of referring or incorporating provisions of an existing Act and the effect of it on the day-to-day working. Reason for it is the courts' prime duty to assume that any law made by the Legislature is enacted to serve public purpose.."

105. It is furthermore a well-settled principle of law that a delegatee must exercise its jurisdiction within the four-corners of its delegation. If it could not exercise its delegated power for the purpose of creation of the appellant authority or extended its jurisdiction, in our opinion, it cannot be done by amendment of a notification issued under Section 13(1) of the Act.

106. We may at this juncture notice the effect of the notifications issued by the authority :

> * It is a matter of record that the notification issued on 13.02.1974 under Section 13 notifying the planning area, did not include land of Respondent No. 1.
>
> * It is also a matter of record that the Indore Development Plan, 1991 notified in 1975 does not admittedly include the village in which the land of Respondent No. 1 is situate.
>
> * The notification issued under Section 38(1) of the Act on 09.05.1977 is also limited to the area specified in the notification dated 13.02.1974 and admittedly does not include the land of Respondent No. 1.

107. Admittedly, the villages in question had been included by the State in its notification issued on 28.10.2005. Prior thereto, the said villages having not been included within the area of operation of the appellant authority, any action taken either by way of its intention to frame a town planning scheme or otherwise shall be wholly illegal and without jurisdiction. It would render its act in relation to the said villages a nullity.

108. It is, therefore, difficult for us to accept the submission of Mr. Venugopal and Mr. Gambhir that the notification dated 13.11.2000 subsumes in the notification dated 12.08.1977.

109. For the reasons aforementioned, we do not have any other option but to uphold the impugned judgment of the High Court.

110. We may, however, observe that several other contentions, as noticed

hereinbefore, have been raised before us but we do not find any necessity to go thereinto.

Should we issue Mandamus ?

111. Before parting, however, we must notice a submission of Mr. C.A.Sundaram, learned counsel appearing on behalf of the respondents, to the effect that the High Court committed a manifest error insofar as it limited its direction only to the following:

> " The impugned order dated 17.5.2006 of the learned Single Judge in W.P. No. 4 of 2005 is set aside and the notification dated 24.8.2004 of the Indore Development Authority insofar as it applies to village Bicholi Hapsi and the communication of the Joint Director, Town and Country Planning, Indore to the appellant that he cannot approve the plan for construction of the house of the appellant because of the publication of the Draft Scheme No. 164 U/s. 50(2) of the Adhiniyam are quashed and the Director is directed to reconsider the application of the petitioner for permission to undertake construction of the house in accordance with the provisions of the Adhiniyam and the observations in this judgment "

112. The learned counsel would submit that the said direction is not correct as the High Court should have directed the Director to consider the respondents' application in accordance with the law as it existed at the relevant point of time. We do not subscribe to the said view as it is now well-known that that where a statute provides for a right, but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned.

113. In *Director of Public Works* v. *Ho Po Sang*[1] , the Privy Council considered the said question having regard to the repealing provisions of the Landlord and Tenant Ordinance, 1947 as amended on 9-4-1957. It was held that having regard to the repeal of Sections 3-A to 3-E, when applications remained pending, no accrued or vested right was derived stating :

> "In summary, the application of the second appellant for a rebuilding certificate conferred no right on him which was preserved after the repeal of Sections 3-A to 3-E, but merely conferred hope or expectation that the Governor-in-Council would exercise his executive or ministerial discretion in his favour and the first appellant would thereafter issue a certificate. Similarly, the issue by the first appellant of notice of intention to grant a rebuilding certificate

(1) 1961 AC 901 : (1961) 2 All ER 721.

conferred no right on the second appellant which was preserved after the repeal, but merely instituted a procedure whereby the matter could be referred to the Governor-in-Council. The repeal disentitled the first appellant from thereafter issuing any rebuilding certificate where the matter had been referred by petition to the Governor-in-Council but had not been determined by the Governor."

[See also *Lakshmi Amma* v. *Devassy*[1]].

114. The question again came up for consideration in *Howrah Municipal Corpn.* v. *Ganges Rope Co. Ltd.*[2], wherein this Court categorically held :

"The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to ownership or possession of any property for which the expression vest is generally used. What we can understand from the claim of a vested right set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a legitimate or settled expectation to obtain the sanction. In our considered opinion, such settled expectation, if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such settled expectation has been rendered impossible of fulfilment due to change in law. The claim based on the alleged vested right or settled expectation cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such vested right or settled expectation is being sought to be enforced. The vested right or settled expectation has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a settled expectation or the so-called vested right cannot be countenanced against public interest and convenience which are sought to be

(1) 1970 KLT 204. (2) (2004) 1 SCC 663.

served by amendment of the Building Rules and the resolution of the Corporation issued thereupon."

115. In *Union of India v. Indian Charge Chrome*[1], yet again this Court emphasized :

"The application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration."

116. In *S.B. International Ltd. v. Asstt. Director General of Foreign Trade*[2], this Court repelled a contention that the authorities cannot take advantage of their own wrong viz. delay in issuing the advance licence, stating :

"We have mentioned hereinbefore that issuance of these licences is not a formality nor a mere ministerial function but that it requires due verification and formation of satisfaction as to compliance with all the relevant provisions."

[See also *Kuldeep Singh* v. *Govt. NCT of Delhi*[3].

117. For the reasons aforementioned, there is no merit in these appeals which are dismissed accordingly. There shall, however, be no order as to costs.

Appeals dismissed.

I.L.R. [2007] M.P., 1014
SUPREME COURT OF INDIA
Before Mr. Justice Arijit Pasayat & Mr. Justice B. P. Singh
13 June, 2007

STATE OF MADHYA PRADESH ....Appellant*
v.
SEWA SINGH ...Respondent.

Penal Code, Indian (XLV of 1860)–Section 304 Part II–Deceased while in custody was slapped and hit on testicles by S.H.O.–No external or internal injury found in postmortem–Cause of death shown as unknown–Ethyl Alcohal found in viscera–Respondent convicted by Trial Court but acquitted by High Court–Held–If deceased had been subjected to beating internal or external injuries should have been found–Statement of witness unreliable as she had not deposed during investigation that accused kicked on the thigh–Although in case of custodial death there is less possibility of direct

*Cr. A. No. 1275/2001.
(1) (1999) 7 SCC 314. (2) (1996) 2 SCC 439. (3) (2006) 5 SCC 702.

evidence but no external or internal injury was found–Accused rightly acquitted by High Court–Appeal dismissed.

Two factors weighed with the High Court in directing acquittal i.e. (a) apparent contradictions in the evidence of PW-6 and (b) her version being at variance with the medical evidence. The post-mortem was conducted by a team of doctors. It was noted that there was no external or internal injury and the cause of death is unknown. On forensic examination presence of Ethyl Alcohol was noticed. If the deceased had been subjected to kicks on vital parts or slapped as was stated by PW-6 there certainly would have been marks of injury. Doctor's evidence clearly rules this out. Further the evidence of PW-6 was rightly held to be unreliable by the High Court. During investigation she has stated that the accused had slapped the deceased. There was no mention about the kick on the thigh or that the accused kicked the deceased after he fell down. Further the evidence of PW-2 (brother of PW-6) was to the effect that PW-6 had told him that the deceased was assaulted by Sub Inspector Pandey and the accused. Evidence of PW-6 is entirely different. It is true that in the case of custodial violence there would be less possibility of getting direct evidence, and direct independent witness. This was the position as indicated by this Court in *State of M.P.* v. *Shyamsunder Trivedi and ors.*;1995 (4) SCC 262. (Para 6)

Case Referred :

State of M.P. v. *Shyamsunder Trivedi and ors.*;1995 (4) SCC 262.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by ARIJIT PASAYAT, J. :–The State of Madhya Pradesh is in appeal against the judgment of Madhya Pradesh High Court, Jabalpur, directing acquittal of the respondent. Respondent, who had been convicted for offence punishable under Section 304 Part II of the Indian Penal Code, 1860 (in short the 'IPC') and sentenced to undergo RI for five years and to pay a fine of Rs.5,000/-, preferred an appeal against the judgment of learned Additional Sessions Judge, Tikamgarh. The High Court accepted the appeal and directed acquittal of the respondent.

2. The background facts in a nutshell are as follows :

Achelal (hereinafter referred to as the 'deceased'), while in custody, was slapped and kicked on his testicles by the accused, who was the S.H.O., and that resulted in his death. The autopsy on the body of Achelal was conducted by a panel of three doctors on 14.12.1987. The post mortem report is Ex. P-1A. According to this report no external or internal injury was found on the dead body. The cause of death

has been shown as 'unknown'. The viscera of the dead body was preserved. It was sent to the Forensic Science Laboratory, Sagar and as per report Ex.P-21, the presence of Ethyl Alcohol was detected therein.

3. The respondent took the plea that he had not assaulted the deceased. Placing reliance on the evidence of Kusum (PW-6) who claimed to be witness, conviction was recorded by the Trial Court and sentence was imposed as noted above. The High Court found that the evidence of PW-6 was not reliable and in any event the medical evidence completely ruled out the version presented by PW-6.

4. In support of the appeal, learned counsel for the appellant-State submitted that the High Court has erroneously directed acquittal of the respondent. Evidence of PW-6 should have been accepted and there was no contradiction between medical evidence and the ocular evidence.

5. There is no appearance on behalf of the respondent in spite of service of notice.

6. Two factors weighed with the High Court in directing acquittal i.e. (a) apparent contradictions in the evidence of PW-6 and (b) her version being at variance with the medical evidence. The post-mortem was conducted by a team of doctors. It was noted that there was no external or internal injury and the cause of death is unknown. On forensic examination presence of Ethyl Alcohol was noticed. If the deceased had been subjected to kicks on vital parts or slapped as was stated by PW-6 there certainly would have been marks of injury. Doctor's evidence clearly rules this out. Further the evidence of PW-6 was rightly held to be unreliable by the High Court. During investigation she has stated that the accused had slapped the deceased. There was no mention about the kick on the thigh or that the accused kicked the deceased after he fell down. Further the evidence of PW-2 (brother of PW-6) was to the effect that PW-6 had told him that the deceased was assaulted by Sub Inspector Pandey and the accused. Evidence of PW-6 is entirely different. It is true that in the case of custodial violence there would be less possibility of getting direct evidence, and direct independent witness. This was the position as indicated by this Court in *State of M.P.* v. *Shyamsunder Trivedi and ors.*[1]. There were injuries on the body of the deceased in that case. In the present case medical evidence clearly shows that there was no external or internal injury.

7. Above being the position, the judgment of acquittal passed by the High Court does not suffer from any infirmity to warrant interference.

8. The appeal is dismissed.

Appeal dismissed.

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(1) 1995 (4) SCC 262.

I.L.R. [2007] M.P., 1017

FULL BENCH

Before Mr. A. K. *Patnaik, Chief Justice, Mr. Justice Dipak Misra and Mr. Justice K. K. Lahoti*

10 July, 2007

ARVIND KUMAR JAIN & ors. ....Appellants*

v.

STATE OF M. P. & ors. ...Respondents.

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M. P. 2005–Section 2(1)–Interlocutory Order/Judgment–Question whether Section 2(1) bars an appeal to Division Bench or order can be assailed regard being had to nature, tenor, effect and impact of order referred to larger bench in view of contrary views–Held–Interlocutory orders which decide matter of moment or affect vital and valuable rights of parties and which cause serious injustice to party has character of finality and must be treated as judgment–Section 2(1) of Adhiniyam doesnot create absolute bar to prefer an appeal–Appeal can be preferred against an order regard being had to nature, tenor, effect and impact of order passed by Single Judge–Decisions rendered in *Nav Nirman Milan Deria and Tejpal Singh* enunciate correct law–Decision rendered in *Arvind Kumar Jain* overruled–Reference answered accordingly.

Their Lordships expressed the opinion that every interlocutory order cannot be regarded as a Judgment but only those orders which decided the matter of moment or affect the vital and valuable rights of the parties and which cause serious injustice to the party concerned. Their Lordships further held that when an interlocutory order causes injustice who is deprived of valuable right till such interlocutory order continues has the attributes or character of finality and must be treated as a judgment within the meaning of Letters Patent.

In view of the aforesaid premised reasons we proceed to record our conclusions in seriatim :

(a) The decision rendered in the case of *Arvind Kumar Jain* (supra) does not lay down the law correctly and is hereby overruled.

(b) Any decision treading on the same path has to be deemed to have been overruled.

(c) The decisions rendered in *Nav Nirman (Milan) deria* (supra) and *Tejpal Singh* (supra) enunciate the law correctly.

*W. A. No. 163/2007. (J)

(d) The proviso to Section 2(1) of M. P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 does not create an absolute bar to prefer an appeal to the Division Bench.

(e) An appeal can be preferred against an order regard being had to the nature, tenor, effect and impact of the order passed by the learned single Judge. (Paras 20 & 31)

Cases Referred :

Nav Nirman (Milan) Deria v. *State of M. P.*, W. A. No. 69/2007, *Shri Tejpal Singh & anr. v. Central Bank of India & ors.*; W. A. No. 671/2007, *Commissioner of Income-Tax, Mysore v. The Indo Mercantile Bank Ltd.*, AIR 1959 SC 713, *Madhu Gopal v. VI Additional District Judge & ors.*, AIR 1989 SC 155, *J. K. Industries Ltd. v. Chief Inspector of Factories & Boilers*, (1996) 6 SCC 665, *Director of Education (Secondary) & anr. v. Pushpendra Kumar & ors.*; AIR 1966 SC 2230, *K. Venkatachalam v. A. Swamickan & anr.*; AIR 1999 SC 1723, *Dwarka Nath v. Income-Tax Officer, Special Circle, D Ward, Kanpur & anr.*; AIR 1998 SC 81, *L.I.C. of India v. Asha Goel*; AIR 2001 SC 549, *Director of Settlements, A. P. & ors. v. M. R. Apparao & anr.*; (2002) 4 SCC 638, *Roshan Deen v. Preeti Lal*; AIR 2002 SC 33, *Shah Babulal Khimji v. Jayaben D. Kania & anr.*; AIR 1981 SC 1786, *Central Mine Planning and Design Institute Ltd. v. Union of India & anr.*; (2001) 2 SCC 588, *Deoraj v. State of Maharashtra & ors.*; (2004) 4 SCC 697, *Liverpool & London S. P. & I Association Ltd. v. M. V. Sea Success I an anr.*; (2004) 9 SCC 512, *Subal Paul v. Malina Paul*; (2003) 10 SCC 361.

Case Relied upon :

Mindnapore Peoples's Co-operative Bank Ltd. v. Chunilal Nanda; (2006) 5 SCC 399.

Case Overruled :

Arvind Kumar Jain & ors. v. State of M. P. & ors.; W. A. No. 1318/2006.

R. P. Agrawal, alongwith *Sanjay Agrawal*, for the appellants.
Sanjay K. Agrawal, Dy. Advocate General for the respondents Nos. 1 & 2.
V. S. Shroti alongwith *A. P. Shroti*, for the respondent No. 3.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–On a preliminary objection advanced by the learned counsel for the respondents that the writ appeal preferred against the order dated 12.1.2007 passed by the learned Single Judge in W. P. No. 17241/2006 is not maintainable being hit by the proviso to sub-section (1) of Section 2 of the M.P. Uchcha Nyayalaya

(Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for brevity 'the Act') a Division Bench hearing the appeal noticed that there are two sets of decisions pertaining to maintainability of an appeal under the Act in respect of interlocutory orders: (i) one holding that the appeals are maintainable under certain circumstances and (ii) the other holding that no writ appeal would lie against any interlocutory orders as the bar created by the proviso appended to Section 2 of the Act would come into play. Because of this situation the Division Bench has referred the following question for adjudication by a larger Bench;-

> "Whether the proviso of Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 absolutely bars an appeal to the Division Bench or such an order can be assailed in an appeal regard being had to the nature, tenor, effect and impact of the order passed by the learned Single Judge ?"

In the aforesaid factual matrix, the matter has been placed before us.

2. In *[Nav Nirman (Milan) deria* v. *State of M. P.*[1],] a Division Bench has expressed the opinion as under:-

> "A preliminary objection has been raised by the respondents to the maintainability of the appeal saying that under the Proviso to sub-section (1) of Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, no appeal shall lie against an interlocutory order passed by learned Single Judge. In *Shah Babulal Khimji v. Jayaben D. Kania and another*[2], the Supreme Court while considering the maintainability of appeals against judgment and interlocutory orders, considering a series of decisions of different Courts rendered on the subject, held that every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matter of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. After laying down the aforesaid law, the Supreme Court held that in that case, the order of the Trial Judge was one refusing to appoint a receiver or to grant an *ad interim* injunction and such an order undoubtedly was a judgment within the meaning of the Letters Patent. Applying the aforesaid law to the facts of the present case, we hold that the refusal of an interim order for staying the order of removal under Section 41-A of the Act passed against the appellant would cause serious injustice to the appellant, inasmuch as he would stand removed from the office of the President of the

(1) W. A. No. 69/2007 (decided on 15.1.2007). (2) AIR 1981 SC 1736.

Nagar Panchayat. We are, thus, of the view that the impugned order passed by the learned single Judge refusing to grant *ad-interim* prayer was not an interlocutory order and could be challenged in a writ appeal and the objection to the maintainability of appeal has no merit and is rejected."

3. In [*Shri Tejpal Singh and another v. Central Bank of India and others*[1]], another Division Bench referred to certain decisions of the Apex Court and expressed the opinion as under:-

"In our considered opinion, the learned Single Judge has really passed an order which materially affects the final decision in the main case and has vital impact on the case. Hence, we hold that the appeal against the said order is maintainable."

4. In [*Arvind Kumar Jain and others v. State of M. P. and others*[2]], the contrary view has been expressed on following terms:-

"In fact, we are indeed greatly surprised at the vehemence with which learned Sr. Counsel has argued the matter knowing fully well that an appeal against an interim order passed by the learned Single Judge would not be maintainable. In fact we had expected, in all fairness, learned Sr. Counsel would submit that the appeal is hit by the proviso contained in Section 2(1) of Adhiniyam 2005, but instead it was argued with full force.

In this view of the matter, we have no doubt in our mind that against such an interim order Writ appeal would not be maintainable as the bar created by proviso appended to section 2 of the Adhiniyam would come into play. We, accordingly, hold so. The appeal is, accordingly, hereby dismissed."

5. In view of the cleavage of opinion, the question, as indicated before, was framed.

6. We have heard Mr.R.P. Agrawal, learned senior counsel alongwith Mr. Sanjay agrawal for the appellants, Mr. sanjay K. Agrawal for the respondents No. 1 and 2 and Mr. V. S. Shroti, learned senior counsel alongwith Mr. A. P. Shroti for the respondent No. 3.

7. Mr. R. P. Agrawal, learned senior counsel has raised the following submissions:-

(1) W. A. No. 671/2007 (decided on 25.4.2007).
(2) W.A.No.1318/2006(decided on 02.1.2007).

(i) The main part of section 2 of the act incorporates two terms, namely, 'judgment' and 'order' and the conception of an order under Article 226 is of wide amplitude and does not always convey that it is an order passed finally but includes an order which has the trappings and characteristics of finality.

(ii) True it is, the proviso to section 2(1) has used the words 'interlocutory order', but the same cannot be read in absolute terms. The proviso in its basic essentiality carves out an exception which gives rise to the natural presumption that the provision would have been attracted but for the exclusion made in the proviso, however, it cannot be so interpreted in all circumstances.

(iii) Though there is manifest exclusion of an appeal against an interlocutory order but if every interlocutory order is treated as an order which is not final the purpose of the use of the term 'order' in the main part of the enactment would stand annihilated and destroy the normative purpose which is never the intention of the proviso.

(iv) An interlocutory order can have many a spectrum and contour and there can be many a category of order which would have tremendous immediate impact and effect leaving nothing to be adjudicated in the pending writ petition, for an executed order in all circumstances cannot put things in the same situation as relegation to the original factual matrix would not always be efflux of time or irretrievable damage being done.

(v) The courts of law have never interpreted an interlocutory order in *'stricto sensu'* regard being had to the nature, character and the impact of the order, for the basic purpose of law is *'jus civile'* 'to do justice' and it should not be allowed to foundered.

8. Mr. V. S. Shroti, learned senior counsel appearing for the contesting respondents, per contra, advanced the following proponements:

(a) When there is a bar under the proviso qua interlocutory orders it has to be treated as a bar for all purposes as the ligislative intendment is absent for entertaining an appeal against such an order.

(b) The proviso has curtailed what has been conferred on the main part of the provision and, therefore, by interpretative process, an appeal cannot be held to be maintainable as that would defeat and frustrate the intention of the legislature.

(c) The concept of order under Article 226 of the Constitution of India has the final base and an interlocutory order has to be treated as an order of interim nature or *ad interim* one and, therefore, no appeal would lie.

(d) The writ court while exercising extraordinary jurisdiction may or may not exercise its inherent and equitable jurisdiction and such kind of orders cannot be put into the framework of judgment or order and hence, the decision rendered in *Arvind Kumar Jain* (supra).is absolutely impeccable and does not require reconsideration.

9. To appreciate the rivalised submissions raised at the Bar it is apposite to reproduce Section 2 of the Act. It reads as under:-

"**2. Appeal to the Division Bench of the High Court from a Judgment or order of one Judge of the High Court made in exercise of original jurisdiction.**– (1) An appeal shall lie from a Judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, to a Division Bench Comprising of two Judges of the same High Court:

Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

(2) An appeal under sub-section (1) shall be filed within 45 days from the date of the order passed by a single Judge:

Provided that any appeal may be admitted after the prescribed period of 45 days, if the petitioner satisfies the Division Bench that he had sufficient cause for not preferring the appeal within such period.

Explanation.–The fact that the petitioner was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this sub-section.

(3) An appeal under sub-section (1) shall be filed, heard and decide in accordance with the procedure as may be prescribed by the High Court."

On a studied scrutiny of the said provision it is manifest that an 'order' is appealable. What is curtailed by the proviso is an interlocutory order. The basic rule

of understanding a proviso as has been held by their Lordships in *Commissioner of Income-tax, Mysore v. The Indo Merchantile Bank Ltd.*[1], is as under:–

> "Ordinarily the effect of an excepting or a qualifying proviso is to carve something out of the preceding enactment or to qualify something enacted therein which but for the proviso would be in it and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

10. In *Madhu Gopal v. VI Additional District Judge and others*[2], a two Judge Bench of the Apex Court has held that it is a well settled principle of construction that unless clearly indicated, a proviso would not take away substantive rights given by the Section or the sub-section.

11. In *J. K. Industries Ltd. v. Chief Inspector of Factories & Boilers*[3], their Lordships have held as under:–

> "33. A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the court is required to carefully scrutinise and find out the real object of the proviso appended to that provision.It is not a proper rule of interpretation of a proviso that the enacting part of the main part of the section be construed first without reference to the proviso and if the same is found to be ambigous only then recourse may be had to examine the proviso as has been canvassed before us. On the other hand an accepted rule of interpretation is that a section and the proviso thereto must be construed as a whole, each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially.
>
> 34. A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A proviso should not be read as if providing something by way of addition to the main provision which is foreign to the main provision itself.
>
> 35. Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision and if it is so, it would be *ultra vires* of the main provision and struck down. As a general rule in

(1) AIR 1959 SC 713. (2) AIR 1989 SC 155. (3) (1996) 6 SCC 665.

construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view to justify its necessity."

12. In the case of *Director of Education (Secondary) and another v. Pushpendra Kumar and others*[1], the Apex Court has ruled thus:–

"8....An exception cannot subsume the main provision to which it is an exception and thereby nulify the main provision by taking away completely the right conferred by the main provision....."

13. We have referred to the aforesaid decisions only to highlight that in the main part of sub-section (1) the word 'order' has been used. Article 226(1) of the Constitution confers power on the High Court to issue 'orders' or writs including writs in the nature of habeas corpus, mandamus, prohibition, *quo warranto* and *certiorari* or any one of them. In the case of *K. Venkatachalam v. A. Swamickan and another*[2], it has been held that Article 226 is couched in widest possible term and unless there is a clear bar to the jurisdiction of the High Court, its powers under Art. 226 of the Constitution can be exercised when any act is committed which is against any provision of law or violative of constitutional provisions.

14. It is worth noting that in the case of *Dwarka Nath v. Income-tax Officer, Special Circle, D Ward, Kanpur and another*[3], it has been held that powers of the High Court under Article 226 are not confined to the prerogative writs and the High Court can issue directions, orders or writs under Article 226 and can mould the reliefs to meet the peculiar requirements.

15. In *L.I.C. of India v. Asha Goel*[4], the Apex Court has held that power under Article 226 of the Constitution of India is wide and expansive. The constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court and, therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain writ petition under Article 226 of the Constitution to enforce a claim under life insurance policy.

16. In *Director of Settlements, A. P. And others. v. M. R. Apparao and another*[5], while explaining the meaning of the expression "for any other purpose" it has been ruled as under:-

"It appears that the Constitution empowers the High Court to issue writs, directions or orders in the nature of habeas corpus,

(1) AIR 1998 SC 2230. (2) AIR 1999 SC 1723. (3) AIR 1966 SC 81.
(4) AIR 2001 SC 549. (5) (2002) 4 SCC 638

mandamus, prohibition, *quo warranto* and *certiorari* for the enforcement of any of the rights conferred by Part III and for any other purpose under Article 226 of the Constitution of India. It is, therefore, essentially a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression "for any other purpose." The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised alone the recognized lines and subject to certain self-imposed restrictions. The expression "for any other purpose" in Article 226 makes the jurisdiction of the High Courts more extensive but yet the courts must exercise the same with certain restraints and within some parameters."

17. In *Roshan Deen v. Preeti Lal*[1], their Lordships have observed thus:–

"...Time and again this court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

18. regard being had to the aforesaid fundamental concept of the term 'order' it has to be understood that the statute permits an order to be appealed against. The proviso stipulates that no appeal would lie against an interlocutory order. But an eloquent and pregnant one, when an interlocutory order has the semblance of final order or affect the rights of the parties, it can be treated as an order for all practical purposes. The said exception cannot be treated in absolute terms to nullify the enactment. Therefore, the order has to be a final order by way of final disposal. It cannot be regarded as the correct interpretation of the proviso in entirety, for a writ court can issue directions or pass orders in its inherent jurisdiction which can assume the colour and contour of finality and, at an interim stage, can vitally affect the rights of the parties or destroy the rights or create a situation by which the relegation to the original stage would become impossible.

(1) AIR 2002 SC 33.

19. At this juncture, we would like to address ourselves how the Apex Court dealt has with the concept of interlocutory order while dealing with the appeals preferred under the Letters Patent. We are conscious that the appeals under the Letters Patent are different than the appeals provided under this statute, but the decisions rendered by the Apex Court are instructive to understand the nature and character of an interlicutory order.

20. In *Shah Babulal Khimji v. Jayaben D. Kania and another*[1], the Apex Court while dealing with Clause 15 of the Letters Patent of the Bombay High Court dealt with the scope, meaning and the purport of the judgment and the test to determine as to when the order passed by the learned trial Judge can be said to be a judgment. Their Lordships expressed the opinion that every interlocutory order cannot be regarded as a Judgment but only those orders which decide the matter of moment or affect the vital and valuable rights of the parties and which cause serious injustice to the party concerned. Their Lordships further held that when an interlocutory order causes injustice who is deprived of valuable right till such interlocutory order continues has the attributes or character of finality and must be treated as a judgment within the meaning of Letters Patent. It is worth noting here that the Apex Court gave certain instances and held that the instances would constitute sufficient guidelines to determine whether or not the order passed by the learned trial Judge is judgment within the meaning of Letters Patent. Their Lordships further opined that the instances given are illustrative and not exhaustive.

21. In *Central Mine Planning and Design Institute Ltd. v. Union of India and another*[2], while dwelling upon Clause 10 of the Letters Patent of Patna High Court their Lordships referred to case of *Shah Babulal Khimji* (supra) and in the ultimate eventuate opined that to determine the question whether an interlocutory order passed by one Judge of the High Court falls within the meaning of "judgment" for purposes of Letters Patent, the test is whether the order is a final dertermination affecting the vital and valuable rights and obligations of the parties concerned and the same has to be ascertained on the facts of each case. Be it noted that in the said case the learned Single Judge had allowed the application under Section 17-B of the Industrial Disputes Act, 1947 and directed management to pay the workman full wages last drawn by them on the date of termination of their services. The Division Bench of the High Court had held that the Letters Patent Appeal was not maintainable. The apex Court came to the conclusion that the appeal was maintainable and remitted the matter to the High Court for fresh adjudication on merits.

22. In *Deoraj v. State of Maharashtra and others*[3], it was held that there may be few cases which would not call for the court's leaning not in favour of maintaining the *status quo* and still lesser in percentage are the cases when an order tantamounting to a mandamus is required to be issued even at an interim

(1) AIR 1981 SC 1786. (2) (2001) 2 SCC 588. (3) (2004) 4 SCC 697.

stage. It was observed that there are matters of significance and of moment posing themselves as moment of truth and such cases do cause dilemma and put the wits of any judge to test. It was also laid down therein that in certain situations grant of interim relief would tantamount to granting of final relief itself and there may be converse cases where withholding of an interim relief would tantamount to dismissal of main petition itself, for by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour.

23. In *Liverpool & London S. P. & I Association Ltd. v. M. V. Sea Success I an another*[1], it was held as under:-

> "124. Clause 15 of the Letters Patent is not a special statute. Only in a case where there exists an express prohibition in the matter of maintainability of an intra-court appeal, the same may not be held to be maintainable. But in the event there does not exist any such prohibition and if the order will otherwise be a "judgment" within the meaning of clause 15 of the Letters Patent, an appeal shall be maintainable."

24. In *Subal Paul v. Malina Paul*[2], it has been held as under :-

> "32. While determining the question as regards clause 15 of the Letters Patent, the court is required to see as to whether the order sought to be appealed against is a judgment within the meaning thereof or not. Once it is held that irrespective of the nature of the order, meaning thereby whether interlocutory or final, a judgment has been rendered, clause 15 of the Letters Patent would be attracted."

25. In *Mindnapore Peoples' Co-operative Bank Ltd. v. Chunilal Nanda*[3], it has been held as under:-

> 15. Interim orders/interlocutory orders passed during the pendency of a case, fall under one or the other of the following categories:
>
> (i) Orders which finally decide a question or issue in controversy in the main case.
>
> (ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case.
>
> (iii) Orders which finally decide a collateral issue or question which is not the subject-matter of the main case.
>
> (iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.

(1) (2004) 9 SCC 512. (2) (2003) 10 SCC361. (3) (2006) 5 SCC 399.

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties."

16. The term "judgment" occuring in clause 15 of the Letters Patent will take into its fold not only the judgments as defined in Section 2(9) CPC and orders enumerated in Order 43 Rule 1 CPC, but also other orders which though may not finally and conclusively determine the rights of parties with regard to all or any matters in controversy, may have finality in regard to some collateral matter, which will affect the vital and valuable rights and obligations of the parties. Interlocutory orders which fall under categories (i) to (iii) above, are, therefore, "judgment" for the purpose of filing appeals under the Letters Patent. On the other hand, orders falling under categories (iv) and (v) are not "judgments" for the purpose of filing appeals provided under the Letters Patent."

26. From the aforesaid enunciation of law there remains no scintilla of doubt that interlocutory orders on certain circumstances, could be appealed against under the Letters Patent. Despite the fact they are interlocutory in nature they can be put into the compartment of judgment if it affects the merits of the case between the parties by determining some rights or liabilities. There can be three categories of judgments, final judgment, preliminary judgment and intermediary judgment or interlocutory judgment. If the order finally decides the question and directly affects the decision in the main case or an order which decides the collateral issue or the question which is not the subject matter of the main case or which determines the rights and obligation of the parties in a final way indubitably they are appealable.

27. In the case of *(Nav Nirman (Milan) Deria v. State of M. P. and ors.)*[1] the Division Bench had taken note of the decision rendered in the case of *Shah Babulal Khimji* (supra) and expressed the opinion that the refusal of the interim order had caused serious injustice to the appellants and hence, the appeal was maintainable.

28. In *Tejpal Singh* (supra) the Division Bench has scanned the order and concluded that the Single Judge has really passed an order which materially affects the final decision in the main case and has vital impact on the case and hence, the appeal against the said order was maintainable.

29. In our considered opinion, the said decisions are in consonance with the law laid down by the Apex Court in various cases and also in accord with the proper interpretation placed on the proviso.

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(1) W. A. No. 69/2007.

30. In *Arvind Kumar Jain* (supra) the Division Bench has held that against an interim order no writ appeal would be maintainable as bar has been created by the proviso appended to Section 2(1) of the Act. The said decision is not in concordance with the decisions of the Apex Court. That apart, in the said decisions erroneous interpretation has been placed on the proviso to sub-section (1) of Section 2 of the Act and, therefore, we conclude and hold that the said decision does not lay down the law correctly.

31. In view of the aforesaid premised reasons we proceed to record our conclusions in seriatim :

(a) The decision rendered in the case of *Arvind Kumar Jain* (supra) does not lay down the law correctly and is hereby overruled.

(b) Any decision treading on the same path has to be deemed to have been overruled.

(c) The decisions rendered in *Nav Nirman (Milan) dèria* (supra) and *Tejpal Singh* (supra) enunciate the law correctly.

(d) The proviso to Section 2(1) of M. P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 does not create an absolute bar to prefer an appeal to the Division Bench.

(e) An appeal can be preferred against an order regard being had to the nature, tenor, effect and impact of the order passed by the learned single Judge.

(f) The guidelines given in the cases of *Shah Babulal Khimji* (supra), *Central Mine Planning and Design Institute Ltd.* (supra), *Deoraj* (supra), *Liverpool & London S. P. & I Association Ltd.* (supra), *Subal Paul* (supra) and *Mindnapore Peoples' Co-operative Bank Ltd.* (supra) are to be kept in view while deciding the maintainability of an appeal.

(g) It should be borne in mind that instances given in the aforesaid decisions are not exhaustive but illustrative in nature, because various kinds/categories of orders may be passed in exercise of jurisdiction under Article 226 of the Constitution of India.

(h) The facts in each case, the nature and the character of the order are to be scrutinised to appreciate the trappings of the same.

32. Let the matter be placed before the Division Bench for adjudication.

I.L.R. [2007] M.P., 1030

FULL BENCH

Before Mr. A. K. Patnaik, Chief Justice, Mr. Justice Dipak Misra and Mr. Justice K. K. Lahoti

19 July, 2007

Dr. JAIDEV SIDDHA & ors. ....Appellants*

v.

JAIPRAKASH SIDDHA & ors. ...Respondents.

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M. P., 2005–Section 2(1)–Bar of appeal against order passed under Article 227–Held–Pleadings in writ petition, nature, character and contour of order, directions issued, nomenclature given and jurisdictional prospective are to be perceived–Merely because order under challenge emerges from inferior tribunal or subordinate courts cannot be treated for all purposes to be under Article 227–Phraseology used in exercise of original jurisdiction under Article 226 cannot be given restricted meaning–Division Bench while entertaining appeal under Section 2 shall satisfy that Single Judge exercised original jurisdiction under Article 226 by looking into pleadings, relief prayed and order or judgment passed by Single Judge–Judgment passed in *M/s Ram and Co.* doesnot lay correct law and is overruled.

From the aforesaid enunciation of law it is quite vivid and luminescent that the pleadings in the writ petition, nature of the order passed by the learned Single Judge, character and the contour of the order, directions issued, nomenclature given, the jurisdictional prospective in the constitutional context are to be perceived. It cannot be said in a hyper tecnical manner that an order passed in a writ petition, if there is assail to the order emerging from the inferior tribunal or subordinate courts has to be treated all the time for all purposes to be under Article 227 of the Constitution of India. Phraseology used in exercise of original jurisdiction under Article 226 of the Constitution in Section 2 of the Act cannot be given a restricted and constricted meaning because an order passed in a writ petition can tantamount to an order under Articles 226 or 227 of the Constitution of India and it would depend upon the real nature of the order passed by the learned Single Judge.

K.K. LAHOTI, J. :–To sum up, the Division Bench while entertaining an appeal under Section 2 of the Adhiniyam of 2005, in particular the matters arrising out of the order passed by the Courts or Tribunals, shall satisfy that the Single Judge exercised original jurisdiction under Article 226 of the Constitution of India. While considering it, the Division Bench shall look into the pleadings, relief prayed and order or judgment passed by the Single Judge exercising the jurisdiction. In case the Division Bench is satisfied that the Single Judge has not exercised his original jurisdiction under Article

*W. A. No. 699/2007. (J)

226 of the Constitution in such a case, no writ appeal will be entertained.

(Paras 17 & 12)

Cases Referred :

Smt. Shiva Dubey (Jheera) v. Sumit Ranjan Dubey (Jheera); W. A. No. 310/06, *Lakhan Lal Sonkar v. Gun Carriage Factory;* 2007 (1) MPHT 335, *State of M. P. v. M/s Wakankar;* (2007) 1 MPLJ 99, *Hari Vishnu Kamath v. Ahmad ishaque & ors;* AIR 1955 SC 233, *Umaji Keshao Meshram and ors. v. Smt. Radhikabai & anr;* AIR 1986 SC 1272, *Sushilabai Laxminarayan Mudliayar & ors. v. Nihalchand Waghajibhai Shaha & ors;* AIR 1993 Suppl.(1)SC 11, *Ratnagiri District Central Co-operative Bank Ltd. v. Dinkar Kashinath Warve;* C. A. No. 520/1989, *Mangalbhai & ors. v. Dr. Radhyshyam;* AIR 1993 SC 806, *Lokmat Newspaper Pvt. Ltd. v. Shankarprasad;* (1999) 6 SCC 275, *Surya Dev Rai v. Ram Chander Rai & ors;* AIR 2003 SC 3044, *Custodian of Evacuee Property, Banglore v. Khan Saheb Abdul Shukoor etc.;* (1961) 3 SCR 855, *Nagendra Nath Bora and anr. v. Commissioner of Hills Division & Appeals;* AIR 1958 SC 440, *T. C. Basappa v. T. Nagappa & anr;* AIR 1954 SC 440, *Rupa Ashok Hurra v. Ashok Hurra & anr;* AIR 2002 SC 1771, *Kishorilal v. Sales Officer, District Land Development Bank & ors;* (2006) 7 SCC 496, *Balkrishna Das v. Perfect Pottery Col Ltd;* AIR 1985 M. P. 42, *Jamshed N. Guzdar v. State of Maharashtra;* (2005) 2 SCC 591, *Ramesh v. Gendalal Motilal Patni;* AIR 1966 SC 1445, *L. Chandra Kumar v. Union of India & ors;* (1997) 3 SCC 261.

Case Relied upon :

Umaji Keshao Meshra v. Radhikabai; 1986 (Supp.) SCC 401.

Case Overruled :

M/s Ram and Co. v. State of M. P. & anr; W. A. 342 /06.

R. S. Jaiswal and *K. K. Gautam*, for the appellants.

R. K. Verma, for the respondent.

Cur. adv. vult.

ORDER

Dipak Misra, J. :–(For himself and on behalf of Hon'ble the Chief Justice)-Perceiving two conflicting views, one expressed in *Smt. Shiva Dubey (Jheera) v. Sumit Ranjan Dubey (Jheera)*[1], *Lakhan Lal Sonkar v. Gun Carriage Factory*[2] and *State of M. P. v. M/s Wakankar*[3] and the other in *M/s Ram and Co. v. State of M. P. & anr.*[4], pertaining to the maintainability of writ appeal under the provision of the MP Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for brevity 'the Act') the Division Bench referred the matter to the larger bench to put the controversy to rest and further to have the certitude in the filed on

(1) (W. A. No. 310/06).
(2) 2007 (1) MPHT 335.
(3) (2007) 1 MPLJ 99.
(4) (W. A. 342 /06).

certain parameters. Be it placed on record that the cavil relates to the bar provided under the proviso to Sub-section (1) to Section 2 of the Act as regards the entertainability and acceptability of an appeal from an order passed under Article 227 of the Constitution of India. In this factual backdrop the matter has been placed before us.

2. At the outset it is condign to mention that there is no necessity for advertence to the facts since the only question that has spiralled for delineation is when the Act by way of incorporation of the proviso to Section 2 of the Act creates a bar for entertaining an appeal from an order passed under Article 227 of the Constitution, and further there is employment of the expression "in exercise of original jurisdiction" in the main part of the said Section whether the appeal has to be restricted to an order passed under Article 226 of the Constitution exclusively.

3. Mr. R. S. Jaiswal, learned senior counsel appearing for the appellants has submitted that the law laid down in the cases of *Smt. Shiva Dubey* (supra) and *Lakhan Lal Sonkar* (supra) is absolutely correct inasmuch as the said decisions are in consonance with the view expressed by the Apex Court in many a judgment. It is urged by him that the phraseology used 'in exercise of its original jurisdiction' cannot be interpreted in isolation to convey and mean only an order under Article 226 of the Constitution in the sense that the order under challenge is not from the inferior forums or tribunals in exercise of supervisory jurisdiction. It is his submission that the pleadings as a whole in the writ petition are to be scrutinised and the nature and various aspects of the order passed by the learned Judge are to be scanned to find out whether it is an order under Article 226 or under Article 227 of the Constitution for there cannot be a straightjacket formula or a mechanical process to treat an order passed by a learned single Judge to be one under Articles 226 or 227 of the Constitution as there can be overlapping and inter-linking.

4. Mr. R. K. Verma, learned counsel appearing for the contesting respondent No. 1, sounding a contra note, canvassed that when the language of the statute is absolutely unambiguous and clear, the same has to be followed in letter and spirit and by the interpretative process nothing should be incorporated to convey or place a different meaning. It is argued by him that there is a significant distinction between an order under Article 226 and one under Article 227 of the Constitution and if an order arising from a civil Court or a tribunal or any other statutory forum is challenged in a writ petition, the order passed in the writ petition has to be exclusively regarded as one under Article 227 of the Constitution and no other concept is invited. It is his further submission that in the decision rendered in the case of *Ram K. Co.* (supra) there has been apposite analysis of the terminology 'in exercise of original jurisdiction' and, therefore, the said decision should be given the stamp of approval and concurred with by the larger bench.

5. To appreciate the rivalised submissions raised at the Bar, it is apposite to reproduce Section 2 of the Act dealing with an appeal :

> **"2. Appeal to the Division Bench of the High Court from a Judgment or order of one Judge of the High Court made in exercise of original jurisdiction-**(1) An appeal shall lie from a judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India to a Division Bench Comprising of two judges of the same High Court :
>
> Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.
>
> (2). An appeal under sub-section (1) shall be filed within 45 days from the date of order passed by a single Judge :
>
> Provided that any appeal may be admitted after the prescribed period of 45 days if the petitioner satisfies the Division Bench that he had sufficient cause of not preferring the appeal within such period.
>
> **Explanation.**–The fact that the petitioner was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed may be sufficient cause within the meaning of this sub-section.
>
> (3) An appeal under sub-section (1) shall be filed, heard and decided in accordance with the procedure as may be prescribed by the High Court."

6. In *M/s. Rama and Company* (supra) the Division Bench has held as under :

> "22. Learned counsel for the appellant has also cited two judgments of the Division Bench of this Court, which were delivered after coming into force of Adhiniyam, 2005 and in which the Division Bench has held that an appeal shall lie against the judgment passed by the learned Single Judge against the order passed by the Tribunal. These two judgments cited by learned counsel for the appellant are in the case of *State of M. P. v. M. S. Wakankar*[1] and in the case of *Smt. Shiva Dubey (Jhira) v. Sumit Ranjan Dubey*[2].

(1) 2007 (1) MPLJ 99.

(2) W. A. No. 310/2006 decided on 14.8.2006.

23. After perusing both these judgments, we find in both cases that Division Bench has held that an appeal shall lie against the order passed by the learned Single Judge against the order passed by the Tribunal, but while deciding these cases language of Section 2 of the Adhiniyam was not brought to the notice of the Division Bench that appeal shall lie only against the order passed by the learned Single Judge in exercise of original jurisdiction.

24. The argument raised by learned counsel for the appellant that appeal is maintainable against every order passed by the learned Single Judge in exercise of powers under Article 226 of the Constitution of India is not supported by the language of Section 2 of the Adhiniyam, because of the said interpretation is made, the exercise of original jurisdiction will become redundant. The legislature by use of the words "in exercise of its original jurisdiction" has made its intention clear that an appeal shall lie only if the learned Single Judge has exercised its original jurisdiction. The words "in exercise of its original jurisdiction" qualifies for the words "Article 226 of the Constitution of India."

25. Thus, it is clear that even though an appeal against an order passed by the learned Single Judge in exercise of jurisdiction under Article 226 will lie only if the learned Single Judge has exercised power as an original jurisdiction and not under supervisory jurisdiction. The supervisory jurisdiction of the High Court cannot be equated with original jurisdiction. In such circumstances, even if the learned Single Judge has exercised its jurisdiction under Article 226 of the Constitution of India and issued a writ of *certiorari* against an order passed by any Tribunal or a Court, then an appeal will not lie.

26. In the case at hand the State Government has filed a writ petition under Articles 226/227 of the Constitution of India praying for a writ of *certiorari* against the order passed by the Board of revenue, which is a final Court of fact and thus has invoked the supervisory jurisdiction of the High Court, which is akin to appellate revisional or corrective jurisdiction that means not original jurisdiction. Hence, above mentioned appeals are not maintainable."

7. Thus, from the aforesaid ratiocination it is perceptible that the Division Bench has understood that the phraseology "in exercise of original jurisdiction" has inseparable nexus with Article 226 of the Constitution of India. It is evincible that if the learned single Judge has passed an order in exercise of jurisdiction under Article 226 of the

Constitution of India, such power has been exercised by way of an original jurisdiction and then only an appeal would lie. It is further manifest that the Division Bench has expressed the view that the supervisory jurisdiction of the High Court cannot be equated with the original jurisdiction and even if the learned single Judge has exercised the jurisdiction under Article 226 of the Constitution of India and issued a writ of *certiorari* against the order of any tribunal or Court, then an appeal would not lie.

8. In *Hari Vishnu Kamath v. Ahmad Ishaque and others*[1], the Apex Court has held that the High Court while issuing a writ of *certiorari* under Article 226 of the Constitution of India can only annul a decision of a tribunal whereas under Article 227 it can issue further directions as well.

9. In *Umaji Keshao Meshram and others v. Smt. Radhikabai and another*[2], the Apex Court has ruled thus :

> "106....In our opinion, where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substaintial part of the order sought to be appealed against is under Article 226. Such was the view taken by the Allahabad High Court in *Aidal Singh v. Karan Singh*[3] and by the Punjab High Court in *Raj Kishan Jain v. Tulsi Dass*[4] and *Barham Dutt v. Peoples' Co-operative Transport Society Ltd.,New Delhi*[5] and we are in agreement with it."

10. *Sushilabai Laxminarayan Mudliayar and others v. Nihalchand Waghajibhai Shah and others*[6], the Apex Court referred to an unreported judgment passed in *Ratnagiri District Central Co-operative Bank Ltd. v. Dinkar Kashinath Watve*[7], wherein it has been held as under :

> "Even when in the cause title of an application both Article 226 and Article 227 of the Constitution have been mentioned, the learned single Judge is at liberty to decide, according to facts of each particular case, whether the said application ought to be dealt with

(1) AIR 1955 SC 233. (2) AIR 1986 SC 1272. (3) AIR 1957 All 414 (FB).
(4) ,AIR 1959 Punj. 291. (5) AIR 1961 Punj. 24. (6) AIR 1993 Suppl. (1) SCC 11.
(7) (C. A. No. 520 of 1989 decided on 27.1.1989)

only under Article 226 of the Constitution. For determining the question of maintainability of an appeal against such a judgment of the Single Judge the Division Bench has to find out whether in substance the judgment has been passed by the learned Single Judge in exercise of the jurisdiction under Article 226 of the Constitution. In the event in passing his judgment on an application which had mentioned in its cause title both Articles 226 and 227, the Single Judge has in fact invoked only his supervisory powers under Article 227, the appeal under clause 15 would not lie. The clause 15 of the Letters Patent expressly bars appeals against orders of Single Judges passed under revisional or supervisory powers. Even when the learned Single Judge's order has been passed under both the articles, for deciding the maintainability against such an order what would be relevant is the principal or main relief granted by the judgment passed by learned Single Judge and not the ancillary directions given by him. The expression 'ancillary' means, in the context, incidental or consequential to the main part of the order.

Thus, the determining factor is the real nature of the principal order passed by the Single Judge which is appealed against and neither the mentioning in the cause title of the application of both the articles nor the granting of ancillary orders thereupon made by learned Single Judge would be relevant. Thus, in each case, the Division Bench may consider the substance of the judgment under appeal to ascertain whether the Single Judge has mainly or principally exercised in the matter his jurisdiction under Article 226 or under Article 227. In the event in his judgment the learned Single Judge himself had mentioned the particular article of the Constitution under which he was passing his judgment, in an appeal under clause 15 against such a judgment it may not be necessary for the appellate bench to elaborately examine the question of its maintainability. When without mentioning the particular article the learned Single Judge decided on merits the application, in order to decide the question of maintainability of an appeal, against such a judgment, the Division Bench might examine the relief granted by the learned Single Judge, for maintainability of an appeal, the determination would be the main and not the ancillary relief. When a combined application under Articles 226 and 227 of the Constitution is summarily dismissed without reasons, the appeal court may consider whether the facts alleged warranted filing of the application under Article 226 or under Article 227 of the Constitution."

11. Thereafter their Lordships explained the ratio laid down in the case of *Umaji* (supra) and expressed thus :

> "....In Umaji case it was clearly held that where the facts justify a party in filing an application either under article 226 or 227 of the Constitution of India and the party chooses to file his application under both these articles in fairness of justice to party and in order not to deprive him of valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under clause 15 of the Letters Patent where the substaintial part of the order sought to be appealed against is under Article 226. Rule 18 of the Bombay High Court Appellate Side Rules read with clause 15 of the Letters Patent provides for appeal to the Division Bench of the High Court from a judgment of the learned Single Judge passed on a writ petition under Article 226 of the Constitution. In the present case the Division Bench was clearly wrong in holding that the appeal was not maintainable against the order of the learned Single Judge."

12. In *Mangalbhai and others v. Dr. Radhyshyam*[1], a two Judge-Bench of the Apex Court after reproducing certain paragraphs from *Umaji Keshao Meshram* (supra) proceeded to state as under :

> "6. The learned single Judge in his impugned judgment dated 11.12.1987 nowhere mentioned that he was exercising the powers under Article 227 of the Constitution. The learned Single Judge examining the matter on merit and set aside the orders of the Rent Controller as well as the Resident Deputy Collector on the ground that the aforesaid judgments were perverse. The findings of the Rent Controller and Resident Deputy Collector were set aside on the question of habitual defaulter as well as on the ground of *bona fide* need. Thus in the totality of the facts and circumstances of the case, the pleadings of the parties in the writ petition and the Judgment of the learned single Judge leaves no manner of doubt that it was an order passed under Article 226 of the Constitution and in that view of the matter the Letters Patent Appeal was maintainable before the High Court...."

13. In *Lokmat Newspapers Pvt. Ltd. v. Shankarprasad*[2], the Apex Court took note of the fact situation where an order passed by the Labour Court under Section

(1) AIR 1993 SC 806. (2) (1999) 6 SCC 275.

28 of the Maharashtra (Recognition of Trade Unions and Prevention of Unfair Labour Practices) Act, 1971 was confirmed by the Industrial Tribunal under Section 44 of the said enactment. Both the Courts held that retrenchment of the respondent did not amount to any 'unfair labour practice' on the part of the appellant. The said orders were challenged by the respondent by filing a writ petition under articles 226 and 227 of the Constitution of India before the High Court of Judicature at Bombay, Nagpur Bench and the learned single Judge dismissed the writ petition. Their Lordships took note of the fsct that the order passed by the learned single Judge showed that he was considering the writ petition of the respondents which was moved before him invoking jurisdiction under Articles 226 and 227 of the Constitution of India and thereafter their Lordships adverted to the averments made in the writ petition and eventually came to express the view as under :

> "16. It is, therefore, obvious that the writ petition invoking jurisdiction of the High Court both under Articles 226 and 227 of the Constitution had tried to make out a case for the High Court's interference seeking issuance of an appropriate writ of *certiorari* under Article 226 of the Constitution of India. Basic averments for invoking such a jurisdiction were already pleaded in the writ petition for the High Court's consideration. It is true, as submitted by learned counsel for the appellant, that the order of the learned Single Judge nowhere stated that the Court was considering the writ petition under Article 226 of the Constitution of India.It is equally true that the learned Single Judge dismissed the writ petition by observing that the courts below had appreciated the contentions and rejected the complaint. But the said observation of the learned Single Judge did not necessarily mean that the learned Judge was not inclined to interfere under Article 227 of the Constitution of India only. The said observation equally supports the conclusion that the learned Judge was not inclined to interfere under Articles 226 and 227. As seen earlier, he was considering the aforesaid writ petition moved under Article 226 as well as Article 227 of the Constitution of India. Under these circumstances, it is not possible to agree with the contention of learned counsel for the appellant that the learned Single Judge had refused to interfere only under Article 227 of the Constitution of India when he dismissed the writ petition of the respondent...."

14. In the case of *Surya Dev Rai v. Ram Chander Rai and others*[1], a two Judge Bench of the Apex Court after referring to the established principles relating to the constitutional jurisdiction conferred on the High Court under Articles 226 and

(1) AIR 2003 SC 3044.

227 of the Constitution of India and after referring to the basic spectrum inhered in writ of *certiorari* and further referring to the decisions rendered in *Custodian of Evacuee Property, Banglore v. Khan Saheb Abdul Shukoor etc.*[1], *Nagendra Nath Bora and another v. Commissioner of Hills Division and Appeals*[2], *T. C. Basappa v. T. Nagappa and another*[3] and *Rupa Ashok Hurra v. Ashok Hurra and another*[4], expressed the opinion in paragraph 19 as under :-

> "19. Thus, there is no manner of doubt that the orders and proceedings of a judicial Court subordinate to High Court are amenable to writ jurisdiction of High Court under Article 226 of the Constitution."

15. Thereafter, their Lordships dwelled upon the supervisory jurisdiction under Article 227 of the constitution of India and the difference between the writ of *certiorari* under Article 226 and supervisory jurisdiction under Article 227 and opined as under :-

> "25. Upon a review of decided cases and a survey of the occasions wherein the High Courts have exercised jurisdiction to command a writ of *certiorari* or to exercise supervisory jurisdiction under Article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labeling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions. Firstly, the writ of *certiorari* is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate revisional or corrective jurisdiction. Secondly, in a writ of *certiorari*, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in

(1) (1961) 3 SCR 855. (2) AIR 1958 SC 398.
(3) AIR 1954 SC 440. (4) AIR 2002 SC 1771

which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised *suo motu* as well."

16. In *Kishorilal* v. *Sales Officer, District Land Development Bank and others*[1], the Apex Court was dealing with an order whereby the learned single Judge had reversed the finding of the Board of Revenue. An LPA was preferred and the Division Bench dismissed the same holding that it was not maintainable on the premises that the learned single Judge had exercised the jurisdiction under Article 227 of the Constitution of India. Their Lordships while dealing with the maintainability of the appeal before the Division Bench expressed thus:

> "13. The learned Single Judge of the High Court, in our opinion committed an error in interfering with the findings of fact arrived at by the Board of Revenue. The Division Bench of the High Court also wrongly dismissed the LPA without noticing that an appeal would be maintainable if the writ petition was filed under Articles 226 and 227 of the Constitution of India as was held by this Court in *Sushilabai Laxminarayan Mudliyar v. Nihalchand Waghajibhai Shaha."*

17. From the aforesaid enunciation of law it is quite vivid and luminescent that the pleadings in the writ petition, nature of the order passed by the learned Single Judge, character and the contour of the order, directions issued, nomenclature given, the jurisdictional prospective in the constitutional context are to be perceived. It cannot be said in a hyper tecnical manner that an order passed in a writ petition, if there is assail to the order emerging from the inferior tribunal or subordinate courts has to be treated all the time for all purposes to be under Article 227 of the Constitution of India, Phraseology used in exercise of original jurisdiction under Article 226 of the Constitution in Section 2 of the Act cannot be given a restricted and constricted meaning because an order passed in a writ petition can tantamount to an order under Articles 226 or 227 of the Constitution of India and it would depend upon the real nature of the order passed by the learned Single Judge. To elaborate: whether the learned Single Judge has exercised his jurisdiction under Article 226 or under Article 227 or both would depend upon various aspects and

(1) (2006) 7 SCC 496.

many a facet as has been emphasized in the aforequoted decisions of the Apex Court. The pleadings, as has been indicated hereinabove, also assume immense significance. As has been held in the case of *Surya Dev Rai (supra)* a writ of *certiorari* can be issued under Article 226 of the Constitution against an order of a tribunal or an order passed by the subordinate court. In quintessentiality, it cannot be put in a straitjacket formula that any order of the learned Single Judge that deals with an order arising from an inferior tribunal or the subordinate court is an order under Article 227 of the Constitution of India and not an order under Article 226 of the Constitution. It would not be an overemphasis to state that an order in a writ petition can fit into the subtle contour of Articles 226 and 227 of the Constitution in a composite manner and they can co-inside, co-exit, overlap or imbricate. In this context it is apt to note that there may be cases where the learned single Judge may feel disposed or inclined to issue a writ to do full and complate justice because it is to be borne in mind that Article 226 of the Constitution is fundamentally a repository and reservior of justice besed on equity and good conscience. It will depend upon factual matrix of the case.

18. In view of our aforesaid analysis we are disposed to hold that the law laid down in the cases of *Lakhan Lal Sonkar (supra), M/s. Wakankar (supra) and Smt. Shiva Dubey (Jheera) (supra)* lay down the law correctly being in consonance and accord of the decisions of the Apex Court and the decision rendered in *M/s. Ram and Co. (supra)* does not lay down the law soundly and accordingly the same is hereby overruled.

19. Let the matter be listed before the appropriate Division Bench.

PER K. K. LAHOTI, J.:–

I have had the benefit of going through the judgment prepared by my learned brother Dipak Misra J. I would like to add few more words in respect of writ appeal jurisdiction of Division Bench under Section 2 of Adhiniyam of 2005, in particular, in respect of matters arising out of orders passed by the Courts and Tribunals.

(2) The M.P. Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 (hereinafter referred to 'Adhiniyam, 2005)' has come into force with effect from the first date of July, 1981. This Adhiniyam received the assent of his Excellency the President of India on 28th March, 2006. The assent was first published in the Madhya Pradesh Gazette (Extra-ordinary) dated 5.4.2006. Before the enactment of Adhiniyam, 2005, Letter Patent Appeal was provided under Clause 10 of Letters Patent. The aforesaid clause was providing an appeal to the High Court from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of the decree or order made in the exercise of the appellate jurisdiction by a Court subject to the superintendence of the High Court and not being an order

made in the exercise of revisional jurisdiction) of one judge of the High Court to the Division Bench. The aforesaid provision was providing appeal from the order and judgment of single judge to the Division Bench but excluding an appeal in respect of the judgment and orders passed under the power of superintendence.

(3) By M.P. Uchcha Nyayalaya (Letters Patent Appeal Samapti) Adhiniyam, 1981 which was enacted in the year 1981, under Section 2, right of letters patent appeal was abolished. A Full Bench of this Court considered the vires of this Letters Patent Appeal Samapti Adhiniyam in *Balkrishna Das* v. *Perfect Pottery Co.Ltd.*[1], held that the law affecting the inherent jurisdiction of High Court which was conferred by the Letters Patent, while constituting and organising the High Court, could not be taken away by a law passed in exercise of powers under Entry 11A (as introduced by the 42nd Amendment) of the Constitution. But the Full Bench judgment of the High Court has been set aside by the Apex Court in *Jamshed N. Guzdar* v. *State of Maharashtra*[2]. Thereafter, the State enacted the Adhiniyam of 2005. Section 2 provides an appeal to the Division Bench of the High Court from a judgment and order of one judge of the High Court made in exercise of the original jurisdiction under Article 226 of the Constitution of India. The proviso of Section 2 provides that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. For ready reference relevant Sec.2(1) is reproduced as under:-

> "2(1) An appeal shall be from a judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India to a Division Bench comprising of two judges of the same High Court;
>
> Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India."

Section 2 though provides an appeal against an order or judgment passed by single judge of the High Court in exercise of original jurisdiction under Article 226, but excludes any appeal against the supervisory jurisdiction under Article 227. So to decide whether against any order passed by the single judge, an appeal is entertainable, the determinative factor would be that the order should have been passed in exercise of the original jurisdiction under Article 226 and should not have been passed in exercise of supervisory jurisdiction under Article 227.

(4) Now in the light of aforesaid position, Article 226 of the Constitution may be seen, which provides that every High Court shall have power, throughout the

(1) AIR 1985 M.P. 42=(1985 JLJ 14-1985 MPLJ 32) (2) (2005) 2 SCC 591 (Para 94)

territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, *mandamus,* prohibition, *quo warranto* and *certiorari,* or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. Aforesaid powers are vest in the High Court and is basic structure of the Constitution and there is no *iota* of doubt that for issuance of any writ in the nature of habeas corpus, *mandamus,* prohibition, *quo warranto* or *certiorari,* the High Court is vested with original jurisdiction and while issuing such a writ, the High Court exercises its original jurisdiction. Article 227 provides that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. From the perusal of the aforesaid both the Articles, it is apparent that by Article 226, the Constitution provides writ against any person or authority or Government, while by Article 227, the Constitution provides exercise of power of superintendence over courts and tribunals.

(5) The Apex Court in *Ramesh* v. *Gendalal Motilal Patni*[1], considering this aspect held that the jurisdiction conferred on the High Court by Article 226 can be exercised in respect of any proceeding before any court or tribunal within jurisdiction of the High Court by issuing writs of *certiorari, mandamus* and prohibition.

(6) The Apex Court in *L.Chandra Kumar* v. *Union of India & others*[2] considering the jurisdiction conferred on the High Court under Article 226/227 held that it is a part of the basic structure of the Constitution and judicial review is permissible of judicial decision. The power of judicial review vested in the High Court under Article 226 is an integral and essential feature of the Constitution. The power vested in the High Court under Article 227 to exercise judicial superintendence over the decision of all courts and tribunals within their respective jurisdiction is also a part of the basic structure of the Constitution. The Apex Court considering the question of the power of superintendence of High Court over the tribunals held that all decisions of the tribunals rendered in the cases for which they are specifically empowered to adjudicate upon by virtue of their parent statutes will also be subject to scrutiny before a Division Bench of their respective High Courts. However, the tribunals will continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted, and it will not be open for litigants to directly approach the High Courts by overlooking the jurisdiction of the Tribunal. The Apex Court held that the High Courts would have writ jurisdiction under Article 226/227 of the Constitution over the tribunals constituted under Articles 323-A and 323-B of the Constitution. In para 99 of the judgment it is held that the tribunals will, nevertheless, continue to act like courts of first instance in respect of

(1) AIR 1966 SC 1445 (2) (1997) 3 SCC 261

the areas of law for which they have been constituted.

(7) Article 227 of the Constitution provides wide power of superintendence over all courts and Tribunals with the jurisdiction of High Court. So the litigant who is not provided with a remedy of appeal or revision against an order passed by any subordinate Court or tribunal, can invoke powers of the High Court under Article 226 or under Article 227, provided no appeal or revision is provided against such an order or judgment to the High Court. The exercise of jurisdiction under Article 226 of the Constitution is no doubt is an exercise of original jurisdiction of the High Court while exercise of jurisdiction under Article 227 is an exercise of power of superintendence.

(8) The Adhiniyam of 2005 provides an appeal against exercise of original jurisdiction under Article 226 of the Constitution but has specifically excluded any appeal, if the High Court (Single Judge) exercises supervisory jurisdiction under Article 227. So where a person invokes powers of the High Court under Article 226 of the Constitution of India, praying for a writ of *mandamus,* prohibition or *certiorari* and on exercise of such original jurisdiction by the High Court, an appeal is provided under the Adhiniyam, 2005. Similarly, in a case where a person invokes the power of supervisory jurisdiction of the High Court under Article 227 and on exercise of such supervisory jurisdiction by the High Court under Article 227, no such appeal is provided.

But when a composite petition under Article 226 and 227 is filed, and on passing an order or judgment in the aforesaid writ petition, then determinative factor will be real nature of exercise of jurisdiction by the single judge against which an appeal is filed. If nature of the order is such that the High Court exercised its original jurisdiction under Article 226, writ appeal is entertainable, but in case from the perusal of the order, it is clear that power of superintendence has been exercised under Article 227, writ appeal cannot be entertained.

(9) In *Umaji Keshao Meshram* v. *Radhikabai*[1], the Apex Court considering the question held thus:-

> "where the facts justify a party in filing an application either under Article 226 or 227, and the party chooses to file his application under both these articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the

(1) 1986 (Supp) SCC 401

Letters Patent where the substantial part of the order sought to be appealed against is under Article 226."

In *L.Chandra Kumar (supra)*, the Apex Court held thus:-

"93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

99. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Courts under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Articles 323-A and Article 323-B of the Constitution are possessed of the competence to test the

constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated." (emphasis supplied)

(10) The Apex Court in *Surya Dev Rai* v. *Ram Chander Rai and others*[1], considering a similar question held thus:-

29. The Constitution Bench in L. Chandra Kumar v. Union of India 15 dealt with the nature of power of judicial review conferred by Article 226 of the Constitution and the power of superintendence conferred by Article 227. It was held that the jurisdiction conferred on the Supreme Court under Article 32 of the Constitution and on the High Courts under Articles 226 and 227 of the Constitution is a part of the basic structure of the Constitution, forming its integral and essential feature, which cannot be tampered with much less taken away even by constitutional amendment, not to speak of a parliamentary legislation. A recent Division Bench decision by the Delhi High Court (Dalveer Bhandari and H.R. Malhotra, JJ.) in Govind v. State (Govt. of NCT of Delhi) 16 makes an in-depth survey of decided cases including almost all the leading decisions by this Court and holds:

" 74 . The powers of the High Court under Article 226 cannot be whittled down, nullified, curtailed, abrogated, diluted or taken either by judicial pronouncement or by the legislative enactment or even by the amendment of the Constitution. The power of judicial review is an inherent part of the basic structure and it cannot be abrogated without affecting the basic structure of the Constitution."

The essence of constitutional and legal principles, relevant to the issue at hand, has been correctly summed up by the Division Bench of the High Court and we record our approval of the same.

34. We are of the opinion that the curtailment of revisional jurisdiction

(1) (2003) 6 SCC 675

of the High Court does not take away - and could not have taken away - the constitutional jurisdiction of the High Court to issue a writ of *certiorari* to a civil court nor is the power of superintendence conferred on the High Court under Article 227 of the Constitution taken away or whittled down. The power exists, untrammelled by the amendment in Section 115 CPC, and is available to be exercised subject to rules of self-discipline and practice which are well settled.

The Apex Court in para 38 of the judgment summed up the conclusions in nut shell as under:-

"(3) *Certiorari,* under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of *certiorari* or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of *certiorari* and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of *certiorari* or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of *certiorari* and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of *certiorari*, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

The Apex Court found that orders passed by the sub-ordinate courts are continued to be subject to *certiorari* and supervisory jurisdiction of the High Court. The Apex Court also pointed out the circumstances in which the writ jurisdiction

under Article 226 of *certiorari* and of Article 227 is exercised. In this regard, it will be profitable to refer paras 24 & 25 of the judgment which reads thus:-

> 24. The difference between Articles 226 and 227 of the Constitution was well brought out in *Umaji Keshao Meshram v. Radhikabai* (supra). Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.
>
> 25. Upon a review of decided cases and a survey of the occasions, wherein the High Courts have exercised jurisdiction to command a writ of *certiorari* or to exercise supervisory jurisdiction under Article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labelling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions. Firstly, the writ of *certiorari* is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate, revisional or corrective jurisdiction. Secondly, in a writ of *certiorari*, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings

and then do no more. In exercise of supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, maybe, by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised *suo motu* as well.

(11) In view of the settled position of the law, in the matter of orders or judgment passed by the Court below or tribunals, if the Single Judge has exercised the jurisdiction under Article 226 for a writ of *certiorari,* and for this purpose record of the proceedings having been certified and sent up by the inferior Court or tribunal to the High Court and the Single Judge inclined to exercise its jurisdiction has simply annul or quash the proceedings and thereafter do no more, then it is the exercise of power under Article 226 for a writ of *certiorari.* But in case, the High Court has not only quash or set aside the impugned proceedings, judgment or orders but has also made such directions as facts and circumstances of the case may warrant, may be by way of guiding the inferior Court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court, then this is an exercise of power of superintendence and in that regard, no writ appeal lies.

(12) At this juncture, it would be appropriate to mention a fact that we are not considering the power of High Court under Article 226 or under Article 227, but are considering the scope of Section 2 of Adhiniyam of 2005 specifically the matters arising out of order passed by Courts or Tribunals. The remedy of appeal has been provided under Section 2. The aforesaid provision specifically provides two circumstances, one of original exercise of the jurisdiction under Article 226 of the Constitution and another supervisory jurisdiction under Article 227 of the Constitution. In first case, the right of appeal is available while in latter, the aforesaid right is not available. In the appeal matter is to be examined in the facts and circumstances of the each case and in case original jurisdiction is not exercised by the High Court under Article 226, right of appeal is not available.

To sum up, the Division Bench while entertaining an appeal under Section 2 of the Adhiniyam of 2005, in particular the matters arising out of the order passed by the Courts or Tribunals, shall satisfy that the Single Judge exercised original jurisdiction

under Article 226 of the Constitution of India. While considering it, the Division Bench shall look into the pleadings, relief prayed and order or judgment passed by the Single Judge exercising the jurisdiction. In case the Division Bench is satisfied that the Single Judge has not exercised his original jurisdiction under Article 226 of the Constitution in such a case, no writ appeal will be entertained.

I.L.R. [2007] M.P., 1051

WRIT APPEAL

Before Mr. A. K. *Patnaik, Chief Justice & Mr. Justice R.S. Jha*

25 January, 2007

THE PUNJAB & SIND BANK & ors. ....Appellants*

v.

GURMIT SINGH ...Respondent.

A. Constitution of India, Articles 226, 311–Scope of Judicial Review in Departmental Enquiry–High Court does not sit as an appellate authority–Scope of interference is to the extent that whether enquiry was conducted by competent authority, whether principles of natural justice have been followed and whether there is some evidence which will reasonably support that delinquent officer is guilty.

B. Constitution of India, Article 311–Departmental Enquiry–Petitioner working as teller in nationalized bank–Charge that Petitioner had withdrawn some amount from the account of dead account holder after forging signatures–Petitioner was dismissed from service by disciplinary authority–Writ Petition allowed by Single Judge holding that report of handwriting expert was not supplied and no evidence on record that it was within knowledge of petitioner that account holder is dead-Held-High Court does not sit as appellate authority over finding of disciplinary authority–Conclusion reached by disciplinary authority could be interfered with only if there is no evidence–Copy of handwriting expert report which was relied upon by disciplinary authority not supplied to delinquent officer–Re-instatement of delinquent officer cannot be directed because matter which ought not to have been considered by Disciplinary Authority was considered–Matter should be remanded to record fresh finding after excluding such material–Order of reinstatement quashed–Matter remitted back to disciplinary authority to record finding afresh excluding report of handwriting expart.

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* W.A. No. 901/2006

Thus in a proceeding under Article 226 of the Constitution, the High Court does not sit as the Court of appeal over the authorities holding the departmental enquiry and its limited function is to see whether the departmental enquiry was held by an authority competent in that behalf, whether the enquiry has been held in accordance with the procedure prescribed in that behalf and whether the rules of natural justice have been followed and whether there is some evidence collected during the enquiry which will reasonably support that the delinquent officer is guilty of the charge.

Where the disciplinary authority takes into account a material which ought not to have been taken into consideration under the law, the Court will not exonerate the delinquent officer from the charges and direct his reinstatement but will remit the matter to the disciplinary authority to exclude the material which ought not to have been taken into consideration and record fresh finding whether the delinquent officer was guilty of the charges or not on the basis of other evidence.

It is not disputed before us that the report of the handwriting expert was taken into consideration by the disciplinary authority while recording his finding of guilt against the respondent in the order dated 29-2-1996. It, however, appears from the order dated 29-2-1996 of the disciplinary authority that the opinion of the handwriting expert was obtained because of the objection of the respondent that the signatures on the exhibited documents were not put by the respondent and the disciplinary authority held in the order dated 29-2-1996 that the opinion of the handwriting expert that the signatures on the documents were put by the respondent corroborates the finding of the Inquiry Officer on the charge. Thus, the opinion of the handwriting expert was not the sole basis on which the disciplinary authority had come to the conclusion that the signatures on the exhibited documents were put by the respondent. Besides the opinion of the handwriting expert the Inquiry Officer had also given the finding that the signatures on the relevant documents were put by the respondent. Since copy of the report of the handwriting expert was not made available to the respondent and the handwriting expert is not available for cross-examination, the opinion of the handwriting expert has to be left out of the consideration. Accordingly, we direct that the disciplinary authority will exclude the report of the handwriting expert and will record a finding afresh as whether or not the signatures on the relevant documents were put by the respondent or whether the respondent was guilty of any of the charges.

(Paras 9, 11& 12)

Cases Referred:

U.P. State Agro Industrial Corporation Ltd. v. *Padamchand Jain;* 1995 (4) SLR 742, *State of Andhra Pradesh* v. *Sree Rama Rao*; AIR 1963 SC 1723, *Yoginath D. Bagde* v. *State of Maharashtra*; (1999)7 SCC 739, *State of U.P.* v.

Batuk Deo Pati Tripathi; (1978)2 SCC 102, *Registrar, High Court of Madras* v. *Rajiah*; (1988) 3 SCC 211, *Central Bank of India* v. *Prakash Chand Jain*; AIR 1969 SC 983, *Bharat Iron Works* v. *Bhagubhai Balubhai Patel;* (1976) (1) SCC 518.

Ajay Mishra & Mrs. Divyakeerti Bohrey, for the appellants.

Sanjay Sanyal, for the respondent.

Cur. adv. vult:

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice** :–This is an appeal against the order dated 21.6.2005 passed by the learned single Judge in W.P.No.901 of 2006.

2. The facts briefly are that the respondent was working as a teller in the appellant bank at its Napier Town branch at Jabalpur. Disciplinary proceedings were initiated against the respondent by Zonal Manager of the bank, who was the disciplinary authority, on the charges that one Nand Singh had opened SB Account No. 41 in the Napier Town Branch of the bank on 13-7-1981 and Nand Singh died on 27-12-1981, but after his death on 17-2-86, 14-4-86, 15-4-86 and 17-4-86 some amounts were withdrawn by instruments containing signatures of the deceased Nand Singh alleged to have been forged by the respondent. The Inquiry Officer conducted the departmental enquiry against the respondent and examined some witnesses on behalf of the management of the appellant bank. On the basis of evidence as adduced both oral and documentary, the Inquiry Officer submitted his report that the charges against the respondent stood proved. The respondent was then given an opportunity to show cause why the Inquiry Officer's report should not be accepted and the respondent submitted his reply on 19-2-1996 and 26-2-1996 to the disciplinary authority. In his reply, the respondent contended that the findings of the Inquiry Officer were arbitrary, perverse and one sided and were given in violation of the principles of natural justice. The Disciplinary Authority after considering the Inquiry Officer's Report as well as the reply of the respondent agreed with the finding of the Inquiry Officer and held that the charges against the respondent were proved and awarded the punishment of dismissal from service. Aggrieved, the respondent filed an appeal against the order of dismissal but the appeal was dismissed by the appellate authority. Then, the respondent filed W.P. No. 2515/97 and by the impugned order dated 21-6-2005, the learned Single Judge quashed the order of dismissal dated 29-2-1996 passed by the Disciplinary Authority as well as the order passed by the appellate authority and directed the appellant to reinstate the respondent. Aggrieved by the impugned order, the appellant has filed this appeal.

3. Mr. Ajay Mishra, learned counsel for the appellant submitted that the first ground on which the learned Single Judge has quashed the order of punishment is that a copy of the report of handwriting expert which was taken into consideration

by the Disciplinary Authority for holding the respondent guilty of the charges was not supplied to the respondent. He submitted that the report of handwriting expert was not relied on by the Inquiry Officer for recording of his finding in the Inquiry Officer report that the respondent was guilty of charges. He submitted that the respondent took a stand before the Disciplinary Authority that the signatures on the instruments including the cheques through which the amounts were withdrawn from the account of deceased Nand Singh were not forged by the respondent. The Disciplinary Authority referred the instruments to the handwriting expert for his opinion and the handwriting expert gave his opinion that the signatures have been put on the instruments by the respondent. He submitted that if the report of the handwriting expert had not been furnished to the respondent, the Court could at best direct the authority to record his findings afresh without taking into account the report of handwriting expert but the Court could not exonerate the respondent from all charges and direct his reinstatement in service. In support of his submission, he relied on the decision of the Supreme Court in *Municipal Corporation, Delhi v. Ramprakash and in U.P. State Agro Industrial Corpn. Ltd. v. Padamchand Jain*[1].

4. Mr. Mishra submitted that the second ground on which the learned Single Judge has quashed the order of dismissal of the respondent is that there was no evidence before the Disciplinary Authority regarding the date on which the endorsement was made in the ledger sheet of Saving Bank Account No.41 of Nand Singh that Nand Singh had died on 27-12-1991 and unless there was evidence to show that the respondent had knowledge about the date of death of Nand Singh, he could not be held guilty of the charges. He submitted that the evidence of MW 1 IPS Candak is that he served in the Napier Town Branch of the appellant bank between 1981 and 1983 and that he had made the endorsement in the ledger of the bank that Nand Singh died on 27-12-1981. He submitted that the withdrawals through the instruments by the respondent as per the charges were made in February and April 1986 and therefore the findings of the learned Single Judge that there is no evidence regarding the date on which the endorsement in the ledger sheet of the appellant bank was made that Nand Singh died on 27-12-1981 and that there is no evidence that the respondent had knowledge of the death of Nand Singh when the withdrawals were made in 1986 were contrary to record.

5. Mr. Mishra next submitted that the learned Single Judge also held that a copy of the ledger sheet though demanded by the respondent was not supplied to the respondent and, therefore, the departmental inquiry was vitiated. He submitted that the copy of the ledger sheet which was demanded by the respondent was not relied on by the Inquiry Officer or by the Disciplinary Authority for holding the respondent guilty of the charges and, therefore, the order of punishment cannot be held to be vitiated for not supplying a copy of the ledge sheet.

(1) 1995 (4) SLR 742.

6. Mr. Mishra next submitted that the learned Single Judge has relied on a letter of handwriting expert addressed to the Superintendent of Police, Jabalpur mentioning that the disputed vouchers did not contain the signature of the deceased Nand Singh, and for this reason no definite opinion can be given that the signatures were made by the respondent. He submitted that this letter of the handwriting expert was annexed by the respondent as Annexure P-37 to the writ petition and was not a part of the record of the departmental enquiry and, therefore, should not have been taken into account by the learned Single Judge.

7. Finally Mr. Mishra cited the decision of Supreme Court in *State of Andhra Pradesh v. Sree Rama Rao*[1], for the proposition that the High Court in a petition under Article 226 of the Constitution of India does not sit as a Court of appeal over the authority of the departmental enquiry and hence cannot re-appreciate the evidence as an appellate authority and record its own finding in regard to guilt of delinquent officer. He submitted that the decision of the Supreme Court in case of *Shree Rama Rao* makes it clear that so long as there is some material before the disciplinary authority to support a finding of guilt, the Court will not interfere with the order of the disciplinary authority of the finding of the guilt on the ground that the material before the disciplinary authority was not adequate or was not reliable.

8. Mr. Sanjay Sanyal, learned counsel for the respondent, on the other hand, submitted that the learned Single Judge has taken a correct view in the impugned order because there was no evidence whatsoever to show that respondent had knowledge that Nand Singh had died on 27-12-1981 particularly when the date on which the endorsement in ledger that Nand Singh had died on 27-12-1981 was not mentioned. He further submitted that in 1981 the respondent was posted at Mumbai and was not aware about the death of Nand Singh on 27-12-1981. He submitted that the letter of the handwriting expert addressed to the Superintendent of Police would show that the signatures on the vouchers or instruments through which the amounts were withdrawn in the year 1986 were not those of the respondent. He also submits that since a copy of the report of handwriting expert on the basis of which the disciplinary authority held that the signatures on the vouchers were put by the respondent were not furnished to the respondent, the finding of the disciplinary authority holding the respondent guilty on the basis of the report of the handwriting expert is against the principles of natural justice. He further submitted that the letter of the handwriting expert which was annexed to the writ petition was filed by the appellant before the appellate authority and hence was the part of the record. He submitted that the respondent has been out of service on account of the order of dismissal since 1996 and if the matter is remitted to the disciplinary authority, he would suffer immense injury.

(1) AIR 1963 SC 1723.

9. We have considered the submissions of Mr. Mishra and Mr. Sanyal and we find that the scope of judicial review in respect of disciplinary proceedings is very limited. The scope of judicial review against the order passed by the authority holding a departmental enquiry has been explained by the Supreme Court in *State of Andhra Pradesh v. Sree Rama Rao* (supra) :

> " The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant, it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence."

Thus in a proceeding under Article 226 of the Constitution, the High Court does not sit as the Court of appeal over the authorities holding the departmental enquiry and its limited function is to see whether the departmental enquiry was held by an authority competent in that behalf, whether the enquiry has been held in accordance with the procedure prescribed in that behalf and whether the rules of natural justice have been followed and whether there is some evidence collected during the enquiry which will reasonably support that the delinquent officer is guilty of the charge.

10. As has been reiterated by the Supreme Court in *Yoginath D. Bagde v. State of Maharashtra*[1], the Court in exercise of powers of judicial review cannot sit in appeal over the findings recorded by the disciplinary authority or the Inquiry Officer in the departmental enquiry but can interfere with the conclusions reached by the disciplinary authority or the Inquiry officer if there is no evidence to support the finding or a finding recorded is such as could not be recorded by a prudent man. (See also *State of U.P.* v. *Batuk Deo Pati Tripathi*[2], Registrar, High Court of *Madras* v. *Rajiah*[3], *State of Andhra Pradesh* v. *Sree Rama Rao* (supra), Central *Bank of India* v. *Prakash Chand Jain*[4], *Bharat Iron Works* v. *Bhagubhai Balubhai Patel*[5].

11. Where the disciplinary authority takes into account a material which ought not to have been taken into consideration under the law, the Court will not exonerate the delinquent officer from the charges and direct his reinstatement but will remit

(1) (1999) 7 SCC 739. (2) (1978) 2 SCC 102. (3) (1988) 3 SCC 211.
(4) AIR 1969 SC 983. (5) (1976) 1 SCC 518.

the matter to the disciplinary authority to exclude the material which ought not to have been taken into consideration and record fresh finding whether the delinquent officer was guilty of the charges or not on the basis of other evidence. Para 6 of the judgment of the Supreme Court in *U.P. State Agro Industries Corpn. Ltd. v. Padam Chand Jain* (supra) is quoted :

> " 6. The other reason given by the High Court for quashing the order of termination of service passed by the Managing Director does appear to be correct even though the direction given thereafter cannot be sustained. The High Court rightly took the view that the decision of the Managing Director was vitiated on account of the fact that it was influenced by some extraneous material in the form of adverse comments of another Accounts Officer. Having correctly taken that view, the direction in the circumstances was to require the disciplinary authority to decide the matter afresh only on the basis of the relevant material excluding from consideration the extraneous material in the form of adverse comments of the other Accounts Officer. In our opinion, this is the appropriate direction to give in the present case."

12. It is not disputed before us that the report of the handwriting expert was taken into consideration by the disciplinary authority while recording his finding of guilt against the respondent in the order dated 29-2-1996. It, however, appears from the order dated 29-2-1996 of the disciplinary authority that the opinion of the handwriting expert was obtained because of the objection of the respondent that the signatures on the exhibited documents were not put by the respondent and the disciplinary authority held in the order dated 29-2-1996 that the opinion of the handwriting expert that the signatures on the documents were put by the respondent corroborates the finding of the Inquiry Officer on the charge. Thus, the opinion of the handwriting expert was not the sole basis on which the disciplinary authority had come to the conclusion that the signatures on the exhibited documents were put by the respondent. Besides the opinion of the handwriting expert the Inquiry Officer had also given the finding that the signatures on the relevant documents were put by the respondent. Since copy of the report of the handwriting expert was not made available to the respondent and the handwriting expert is not available for cross-examination, the opinion of the handwriting expert has to be left out of the consideration. Accordingly, we direct that the disciplinary authority will exclude the report of the handwriting expert and will record a finding afresh as whether or not the signatures on the relevant documents were put by the respondent or whether the respondent was guilty of any of the charges.

13. Since we are remitting the matter to the Disciplinary Authority, we would not

like to express any opinion on the other findings of the Disciplinary Authority which have not found favour with the learned Single Judge in the impugned order. The fact remains that witnesses have been examined in the enquiry on various charges against the respondent and some documents have been produced and the Disciplinary Authority has to record a fresh finding whether or not the charges against the respondent stand proved. Suffice it to say that the learned Single Judge has exceeded his jurisdiction under Article 226 of the Constitution inasmuch as he has re-appreciated the evidence and has come to the conclusion that the charges against respondent have not been proved. As has been held by the Supreme Court in *State of Andhra Pradesh v. Sree Rama Rao and Yoginath D. Bagde v. State of Maharashtra* (supra), the High Court while exercising its power of judicial review under Article 226 of the Constitution does not sit as an appellate authority over the finding of the disciplinary authority or the Inquiry Officer and conclusion reached by the disciplinary authority or the Inquiry Officer could be interfered with only if there is no evidence on record in support of the conclusion.

14. For the aforesaid reasons, we set aside the impugned order dated 21-6-2005 of the learned Single Judge in W.P.No.2515/97 and quash the order dated 29-2-1996 of the Disciplinary Authority and the order dated 6-2-97 of the appellate authority and remit the matter to the Disciplinary Authority to record a finding on the charges against the respondent after excluding the opinion of the handwriting expert and after affording an opportunity to the respondent to make further representation against the findings of the Inquiry Officer in the enquiry. Since the respondent has remained out of service since 1996, this exercise will be completed by the Disciplinary Authority within a period of three months from the date of receipt of the certified copy of this order from the respondent. The appeal is accordingly disposed of.

Appeal accordingly disposed of.

I.L.R. [2007] M.P., 1059

WRIT APPEAL

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice K.K. Lahoti

11 April, 2007

SMT. KAMLA PATEL .... Appellant *

v.

STATE OF M.P. & ors. .... Respondents

Medical Council Act, Indian (CII of 1956)–Sections 2(f), 15(2), 25–Sah Chikitsa Parishad Adhiniyam, M.P., 2000, Sections 2(b)(c), 44–Petitioner having diploma in Medical Laboratory Technology running Pathology Laboratory–On inspection no qualified Doctor was found therefore, Chief Medical and Health Officer directed to close down Laboratory–Order of C.M.H.O. was recalled on certificate given by Doctor that Petitioner was working as Lab Assistant under his supervision–Learned Single Judge held that Pathology Laboratories can be run by qualified Pathologist and not by Laboratory Technicians–Held–Pathology comes within definition of medicine as defined under Section 2(f) of Adhiniyam–Person not registered as medical practitioner in State Medical Register can practice in pathology and cannot sign certificate or report relating to pathology–Paramedical practitioner can only assist pathologist but cannot sign or authenticate any pathological report–Order of Single Judge modified to the extended indicated above.

The aforesaid analysis of the provisions of the law prescribing the profession or technical qualifications necessary for the practice of medicine and the law prescribing the qualifications for running a pathology laboratory would show that laboratory technicians registered as a paramedical practitioner under the Adhiniyam 2000, cannot sign or authenticate any pathological test/report or certificate and he can only assist the pathologist registered in the State Medical Register as a medical practitioner in carrying out the technical tests in the pathology laboratory. In other words, a laboratory technician registered as a paramedical practitioner under the Adhiniyam 2000 can only assist the pathologist in the technical tests in a pathology laboratory in the State of Madhya Pradesh, but he cannot sign or authenticate any certificate or test report relating to pathology and such certificate or test report can only be signed and authenticated by a pathologist having the required qualification such as MBBS, MD or other degrees as mentioned in the Act, 1956, and also registered as a Medical Practitioner in the State Medical Register under the Adhiniyam, 1987.

(Para 13)

* W.A. No. 1440/2006

Rajendra Tiwari with Udyan Tiwari, for the appellant

Sanjay K. Agrawal, Dy. A.G. for the respondents/State.

Smt. Indira Nair, Senior Advocate with *Miss. Chana,* for the respondent/ Medical Council of India.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :– In these batch of cases, the common question to be decided is whether Laboratory Technicians can run pathological laboratories without engaging the services of a Pathologist having MBBS degree or any higher degree.

2. The relevant facts briefly are that the appellant in WA No. 1440/2006 was running Maruti Pathology Laboratory in Panagar. The Chief Medical and Health Officer, Jabalpur, issued an order on 29.6.2002 asking her to close the Maruti Pathology Laboratory failing which action would be taken against her in accordance with law. The appellant filed Writ Petition No. 3721/2002 before the learned Single Judge challenging the order dated 29.6.2002 of the Chief Medical & Health Officer.

3. The respondents/State filed return in WP No. 3721/2002 stating *inter alia* that Smt. Kamla Patel was a student of Arts and had procured Diploma in Medical Laboratory Technology (for short 'DMLT') on the basis of which she was running the Maruti Laboratory at Panagar and when Laboratory was inspected by the Chief Medical and Health Officer on 29.6.2002, it was found that there was no qualified doctor or pathologist in the Laboratory. Subsequently, however, since a certificate was issued by Dr. B.M. Agrawal that Smt. Kamla Patel was working as a Lab Technician under his guidance and supervision, the order dated 29.6.2002 issued by the Chief Medical and Health Officer Jabalpur, was recalled on 5.8.2002. Despite the aforesaid statement in the return filed by the respondents in WP No. 3721/2002 that the order dated 29.6.2002 asking Smt. Kamla Patel to close down the pathology laboratory had been recalled, the learned Single Judge delivered orders on 13.1.2003 directing that the pathology laboratories will be run by the pathologist who is qualified under the Madhya Pradesh Ayurvigyan Parishad Adhiniyam, 1987, and who fulfils the requirement of Sections 13 and 24 of the Adhiniyam 1987, and no laboratory technician will be allowed to run the laboratory and he/she can only work in the laboratory which is actually run by a qualified pathologist. Aggrieved by the order dated 13.1.2003 of the learned Single Judge in WP No. 3721/2002, Smt. Kamla Patel has filed Writ Appeal No. 1440/2006.

4. Pursuant to the order dated 13.1.2003 of the learned Single Judge in WP No. 3721/2002, the respondents took action to close down various pathology laboratories

run without a pathologist. When the pathology laboratories run by Ramesh Kumar Mishra and four others were similarly ordered to be closed because pathologist had not been engaged by them in their pathology laboratories, they filed WP No.15891/ 2006 and following the order dated 13.1.2003 in Writ Petition No. 3721/2002 (Smt. *Kamla Patel v. State of M.P. & others)* the learned Single Judge held in his order dated 13.11.2006 that no laboratory technician shall be allowed to run the laboratory and he can only work in the laboratory which is actually run by a qualified pathologist and as Ramesh Kumar Mishra and four others were not qualified pathologist, they cannot be allowed to run their pathology laboratories even under the supervision of doctors and they can, at best, work in the pathology laboratory which is actually run by a qualified pathologist. Aggrieved by the order dated 13.11.2006 of the learned Single Judge in WP No. 15891/2006, Ramesh Kumar Mishra and four others have filed Writ Appeal No. 1418/2006.

5. Pursuant to the order dated 13.1.2003 passed by the learned Single Judge in WP No. 3721/2002 *(Smt. Kamla Patel v.State of M.P. & others),* the respondents took action and closed down other pathology laboratories in the State which were being run without pathologist and Sanjay Singh Chauhan and Smt. Shashi Mishra have filed WP No. 13151/2006 and WP No. 3332/2007 challenging the action of the respondents in closing down the pathology laboratories which were being run without pathologist.

6. Mr. Rajendra Tiwari learned senior counsel appearing for the appellant (s) in WA No. 1440/2006 and WA No. 1418/2006 and Mr. A.P. Singh, learned counsel appearing for the petitioner(s) in WP No. 13151/2006 and WP No. 3332/2007, submitted that under Article 19(1)(g) of the Constitution, the appellant(s)/ petitioner(s) had fundamental rights to practice any profession, or to carry on any occupation, trade or business and that restrictions on such fundamental right can be imposed by the State by law under Article 19(6) of the Constitution and such restrictions include prescribing the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business. They submitted that under the Madhya Pradesh Sah Chikitsiya Parishad Adhiniyam, 2000, (for short 'the Adhiniyam 2000') laboratory technicians have been included amongst the paramedical personnel. They submitted that those who are running pathology laboratories, have also been registered as paramedical practitioners under the Adhiniyam 2000 and, therefore, they can carry on the profession or occupation or business to run pathology laboratories.

7. Mr. Sanjay K. Agrawal learned Deputy Advocate General appearing for the respondents/ State and Smt. Indira Nair, learned senior counsel appearing for the Indian Medical Council respectively, on the other hand, submitted that under the Adhiniyam 1987, laboratory technicians are not registered as medical practitioners. They submitted that the definition of 'paramedical' in Section 2(b) of the Adhiniyam

2000 would show that the paramedical personnel can only help in the practice of medicine and they cannot themselves practice medicine. They submitted that the word 'medicine' is wide enough to include the pathology and, therefore, laboratory technicians can assist only a pathologist and cannot practice pathology as such. They further submitted that under Section 15 of the Indian Medical Council Act, 1956 (for short 'the Act'), only those persons possessing qualifications in the Schedules to the Act canbe enrolled on any State Medical Register. They referred to the provisions of Sections 11, 12, 13 and 14 of the Adhiniyam 1987 to show the manner in which a person possessing recognized medical qualification is registered in the State Medical Register. They referred to the provision of Section 21 of the Adhiniyam 1987 which states that save as provided in the Act or the Indian Medical Council Act, 1956, no person shall practice or hold himself out, whether directly or indirectly as practicing medicine within the State. They also referred to Section 24 of the Adhiniyam 1987 which provides that if any person whose name is not enrolled on the State Medical Register practices as a Registered Medical Practitioner, he shall be punishable with rigorous imprisonment for a term which may extend to three years and with fine which may extend to five thousand rupees.

8. We have considered the aforesaid submisisions of the learned counsel for the parties and we find that under Article 19(1)(g) of the Constitution every citizen has the freedom to carry on any occupation, profession, trade or business. Clause (6) of Article 19 of the Constituion states that nothing in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any law imposing in the interests of the general public, reasonable restrictions on the exercise of the right conferred by sub-clause (1)(g) of Article 19 of the Constitution and in particular nothing is in sub-clause (6) of Article 19 will prevent the State from making any law relating to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business.

9. The Acts which have been made by the State of Madhya Pradesh laying down the professional and technical education necessary for the practice of medicine and the practice of any paramedical subject are the Adhiniyam 1987 and the Adhiniyam 2000. Since the learned counsel for the appellant(s)/petitioner(s) have relied on the Adhiniyam 2000, we may first deal with the relevant provisions of Adhiniyam 2000.

10. Section 2(b)(i) of the Adhiniyam 2000 is quoted hereinbelow :

> "S.2 (b) "Paramedical" means any personnel qualified in paramedical subject and who helps in teaching or practice of :
>
> (i) medicine within the meaning of clause (i) of Section 2 of the Indian Medical Council Act, 1956."

Thus, in section 2(b) of the Adhiniyam 2000, 'paramedical' has been defined to mean any personnel qualified in paramedical subject and who helps in teaching or practice of medicine within the meaning of Clause (i) of Section 2 of the Act. Section 2(c) defines 'paramedical subject' to mean a subject mentioned in the schedule to the Adhiniyam 2000 and one of the subjects mentioned in the schedule to the Adhiniyam 2000 is laboratory technician (various types). The Adhiniyam 2000 has made elaborate provisions regarding recognition of paramedical qualifications and registration of paramedical practitioners. Section 44(1) the Adhiniyam 2000 states that save as provided in the Adhiniyam 2000, no person shall practice or hold himself out, whether directly or indirectly as practicing habitually for personal gain as a paramedical practitioner within the State. Section 44(2) of the Adhiniyam 2000 provides that any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment which may extend to six months or with fine which may extend to five thousand rupees or with both. Considering the aforesaid provisions of the Adhiniyam 2000, unless a laboratory technician is registered as a paramedical practitioner in accordance with the provisions of the Adhiniyam 2000, he cannot practice or hold himself out whether directly or indirectly as practicing habitually for personal gain as a paramedical practitioner within the State.

11. The next question to be decided is whether the laboratory technician, who is a registered as a paramedical practitioner in accordance with the provisions of the Adhiniyam 2000 can run a pathology laboratory. Section 2(b) of the Adhiniyam 2000 defines paramedical personnel to mean that a person qualified in paramedical subjects and who helps in practice of medicine within the meaning of Clause (i) of Section 2 of the Act. Clause (f) of Section 2 of the Act is quoted hereinbelow :

> "S.2. Definitions,--In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx
>
> (f) 'medicine' means modern scientific medicine in all its branches and includes surgery and obstetrics, but does not include veterinary medicine and surgery."

Thus, 'medicine' as defined in Section 2(f) of the Act, means modern scientific medicine in all its branches. Obviously, pathology being a branch of modern scientific medicine will come within the meaning of medicine as defined in Section 2(f) of the Act. Sub-section (2) of Section 15 of the Act states that save as provided in Section 25, no person other than a medical practitioner enrolled on a State Medical Register shall be entitled to sign or authenticate a medical or fitness certificate or any other certificate required by any law to be signed or authenticated by a duly qualified medical practitioner. Section 25 of the Act deals with registration of medical practitioners in the State Medical Register.

12. The State Medical Register is prepared and maintained under the Adhiniyam 1987 and provides for compulsory registration of all medical practitioners in the State of Madhya Pradesh. Section 21 of the Adhiniyam 1987 states that save as provided in this Act or the Indian Medical Council Act, 1956, no person shall practice or hold himself out, whether directly or indirectly as practicing medicine within the State. Since we have held that pathology is a branch of medicine a person who is not registered in the State Medical Register as a medical practitioner, cannot practice in pathology and cannot sign any certificate or report relating to pathology.

13. The aforesaid analysis of the provisions of the law prescribing the profession or technical qualifications necessary for the practice of medicine and the law prescribing the qualifications for running a pathology laboratory would show that laboratory technicians registered as a paramedical practitioner under the Adhiniyam 2000, cannot sign or authenticate any pathological test/report or certificate and he can only assist the pathologist registered in the State Medical Register as a medical practitioner in carrying out the technical tests in the pathology laboratory. In other words, a laboratory technician registered as a paramedical practitioner under the Adhiniyam 2000 can only assist the pathologist in the technical tests in a pathology laboratory in the State of Madhya Pradesh, but he cannot sign or authenticate any certificate or test report relating to pathology and such certificate or test report can only be signed and authenticated by a pathologist having the required qualification such as MBBS, MD or other degrees as mentioned in the Act, 1956, and also registered as a Medical Practitioner in the State Medical Register under the Adhiniyam, 1987.

14. The impugned order dated 13.1.2003 of the learned Single Judge in Writ Petition No. 3821/2002 and the impugned order dated 13.11.2006 of the learned Single Judge in WP No. 15891/2006 are accordingly modified and the Writ Appeal No. 1440/2006, Writ Appeal No. 1418/2006, Writ Petition No. 13151/2006 and Writ Petition No. 3332/2007 are allowed to the extend indicated above. The State/respondents will now act as per the law laid down in this Judgment. Considering the facts and circumstances of the case, the parties shall bear their own costs.

Petiton allowed.

I.L.R. [2007] M.P., 1065

WRIT APPEAL

Before Mr. Justice Dipak Misra & Ms. Justice S.R. Waghmare
17 April, 2007

MEDICAL COUNCIL OF INDIA .... Appellant *

v.

NITIN MANTRI & ors. .... Respondents

Chikitsa Sanstha, (Niyantran) Adhiniyam, M.P., 1973, Section 10, Disabilities Act, Section 2(i) 39, M.P. Medical And Dental Undergraduate Entrance Examination Rules, 2006, 2.6,3, 5.1–Reservation of seat for visually handicapped candidate–Petitioner having no vision in right eye and having vision of 6/7 in left eye–Claimed reservation under the category reserved for handicapped persons–Petition allowed by learned Single Judge–Writ Appeal filed by Medical Council–Held–Disability defined under Rule 2(i) of Disabilities Act includes blindness and low vision–Purposive interpretation has to be given to the word disability–3% Reservation would not cover all categories of disabled candidates in all courses–Persons with visual disability have not been made entitled as per guidelines issued by Medical Council–Decision of Medical Council donot run counter to provisions of Act and Rules–Expert opinion passed on the basis of practical wisdom cannot be marginalized–Visually handicapped persons cannot be brought into categories of handicapped persons for medical course–Writ Appeal allowed.

What is mandated by Section 39 is that educational institutions should reserve seats for persons with disabilities. On a first glance it may appear that three percent reservation should cover disability of all kindness. But a purposive interpretation has to be given. Section 2(i), dictionary clause has to be read with in the backdrop of section 39 of the Act. There has to be 3% reservation but that does not necessarily mean 3% reservation should cover all categories of disabled candidates in all courses.

If the guidelines issued by the Medical Council of India are understood in proper perspective, there can be no trace of doubt that there has been apposite deliberation by the expert body and it has formed an opinion that visually handicapped persons are not suitable for the medical course. The expert body has thought it seemly to state that the said category would not fall within the physical handicapped category for the specific purpose. The said guidelines do not run counter to the provisions of the Act and the rules made by the State Government. It is an expert opinion which is passed on the basis of absolute practical wisdom and its opinion

* W.A.No. 1276/2007 (M)

cannot be marginalized. By no stretch of imagination, it can be held that the said guidelines supplant any of the provisions. It works in the purposive functionalism of the rules. The expert body has found that visually handicapped persons cannot be brought into the categories of handicapped persons for the medical course. The learned Single Judge has expressed the opinion that in the absence of the regulations or rules the same cannot be given effect to. In our considered opinion, the said view is neither correct nor sound inasmuch as the fixation of standard with regard to physical disabilities *vis-a-vis* the standard of the medical studies rests with the Medical Council of India. (Paras 12 and 19)

Cases Referred:

Deputy Secretary, Deptt. of Health v. *Sanchita Biswas*; Civil Appeal No. 4694/2000, *Ku Rekha Tyagi's case*, Civil Appeal No. 7892/2001.

Mrs. Indira Nair with Ms. Jasmit Chana; for the appellant.

Uttam Maheshwari, for the respondent No.1.

T.S. Ruprah, Addl. Advocate General, for the respondent No.2.

B.K. Mishra, for the respondent.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–Calling in question the defensibility and pregnability of the order dated 26-9-2006 passed by the learned Single Judge in W.P.No. 10648/2006 the appellant, Medical Council of India has preferred this Appeal under Section 2(1) of the Madhya Predesh Uchcha Nyayalaya (Khand Nyaypeeth to Appeal) Adhiniyam, 2005 [for brevity 'the Act'].

2. The facts which are essential to adumbrated are that the respondent No.1 invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India for issue of a writ of *mandamus* to the respondents commanding them to allot a seat in MBBS Course to him in the handicapped category. It was pleaded that he is a handicapped person of unreserved category as per the certificate issued vide Annexure-P/4. The said certificate indicates 40% blindness in the right eye with no vision and the left eye has been found with the vision of 6/7. Regard being had to the no vision in the right eye of the respondent No.1 he was not allotted a seat for admission to the Course of MBBS at the time of counselling. The said decision was taken on the bedrock of the letter dated 5-7-2001 issued by the Medical Council of India.

3. It was contended before the learned Single Judge that the Professional Examination Board had conducted a Pre-Medical Entrance Examination under M.P.

Medical and Dental Undergraduate Entrance Examination Rules, 2006 [hereinafter referred to as 'PMT Rules'] in which there is no restriction specifying exclusion of such category for admission. In paragraph 5.1, 3% reservation has been provided for physically handicapped persons in Scheduled Castes, Scheduled Tribes, OBC and unreserved category and reservation has been specified to be horizontal and compartmentalized. The relevant provision stipulates that a candidate claiming admission in handicapped class shall file a certificate from District Medical Board and eligibility certificate from the Superintendent Vocational Rehabilitation Centre for Physically Handicapped, Government of India, Ministry of Labour, Napier Town, Jabalpur and the writ petitioner had submitted a certificate to the respondents whereby he was found to be eligible to prosecute the study in the MBBS course. It was also put forth that under Rule 3 there is no restriction debarring the petitioner from the course.

4. The claim put forth by the respondent No.1 was combatted by the State as well as the Medical Council of India contending, *inter alia,* that the Professional Examination Board and the State of M.P. are bound by the instructions issued by the Medical Council of India and as per the directions of the Medical Council of India contained in letter dated 5-7-2001 the person who is visually handicapped is not entitled for admission in the MBBS Course and on that ground the writ petitioner had been denied the admission to the MBBS Course.

5. Be it placed on record, on behalf of the Medical Council of India reliance was placed on the decisions rendered by the Apex Court in the cases of *Deputy Secretary, Deptt. of Health* v. *Sanchita Biswas*[1] and *Ku. Rekha Tyagi's case*[2]. Reliance was also placed on the letter dated 14-7-2003, Annexure-R/1, which was issued by the Council in the light of the judgment rendered by the Apex Court.

6. The learned Single Judge referred to the provisions contained in Section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 [for brevity the Disabilities Act']and analysing the decision rendered in the cases of *Sanchita Biswas (supra) and Ku. Rekha Tyagi (supra)* came to hold that the Apex Court has not expressed any opinion as regards the resolution dated 5-7-2001 passed by the Medical Council of India. The learned Single Judge observed that the said decisions were rendered with regard to the question pertaining to applicability of Section 39 of the Disabilities Act in educational institution and their Lordships have held that the aforesaid provision is applicable equally in respect of admission in educational institution. The learned Single Judge has also observed that before the Apex Court the question was not for consideration whether visually handicapped persons are entitled for admission or not though there is a reference to the resolution dated 5-7-2001 of the Medical Council of India.

(1) (Civil Appeal No. 4694/2000). (2) Civil Appeal No. 7892/2001).

7. In view of the aforesaid analysis the learned Single Judge expressed the opinion that the said decisions do not create any impediment or remora. After expressing the said opinion the learned Single Judge adverted to the M.P. Chikitsa Shiksha Sanstha (Niyantran) Adhiniyam, 1973 [hereinafter referred to as 'the 1973 Act']. Section 10 of the aforesaid Act empowers the State Government to make rules for carrying out the purpose of the said Act. In pursuance of the power conferred under the Act PMT Rules, 2006 have been framed. The learned Single Judge quoted the relevant Rule and after adverting to Rule 5.1 came to hold that the said rule lays a postulate who would fall in the handicapped category and in the said Rule there is no qualifying provision excluding the visual handicapped persons and in the absence of the same the said rule has to apply in equal force to all categories of handicapped persons. The learned Single Judge did not accept the stand and stance of the Medical Council of India that Rule 3.0 that there is provisions that the rules and regulations in force at the time of entrance examination conducted by the MCI/DCI shall be applicable in the case on the foundation that there is neither any rule nor regulation which has come into force excluding the visually handicapped persons for admission in MBBS course and until and unless some rule or regulation is framed or placed on record, the resolution passed on 5-7-2001 cannot be regarded creating any kind of obstacle in granting the benefit to the visually handicapped persons who is suffering from visual deficiency. It was also held by the learned Single Judge that the resolution has not been adopted by the State Government and hence, the writ petitioner should not be regarded as ineligible to be called for counselling. Being of this view the learned Single Judge allowed the writ petition and directed the respondent No.1, the writ petitioner to participate in the counselling and issue command to the respondent to consider his case for counselling as per the parameters.

9. We have heard Mrs. Indira Nair, learned Senior Counsel along with Miss Jasmit Chana for the appellant, Mr. Uttam Maheshwari, learned counsel for the respondent No.1, Mr. T.S. Ruprah, learned Additional Advocate General for the State and Mr. B.K. Mishra, learned counsel for the respondent No.3.

10. It is submitted by Mrs. Nair, learned senior counsel for the appellant that the learned Single Judge has faulted in his appreciation of the decisions rendered in *Ku. Rekha Tyagi (supra) and Sanchita Biswas (supra)*. It is contended by her that the Apex Court has taken note of exclusionary part in its order and would go a long way to show what was the perception of the Apex Court with regard to handicapped persons, but the learned counsel further submitted that the 1973 Act and the PMT Rules 2006 do not provide specifically for visually handicapped persons, but the learned Single Judge has erroneously held that in the absence of any exclusionary provision visually handicapped persons should be deemed to have been

included. It is further propounded by her that the learned Single Judge has fallen into grave error in holding that in the absence of any rules required by the MCI excluding the visually handicapped persons the letter written by the Medical Council of India to the Chief Commissioner, Disabilities would have no applicability. It is her further contention that the letter does not run counter to the rule but the learned Single Judge has interpreted it as if the same contravenes the rules.

11. Mr. Uttam Maheshwari, learned counsel for the respondent No. 1, *per contra*, contended that the order passed by the learned Single Judge is absolutely impeccable and does not warrant any interference. It is his submission that the decisions rendered in the cases of *Sanchita Biswas (supra) and Ku. Rekha Tyagi (supra)* have rightly been distinguished by the learned Single Judge. It is contended by him that the PMT Rules, 2006 does not prohibit visually handicapped persons and in the absence of any kind of prohibition interpretation placed by the learned Single Judge on the said rules cannot be faulted. Lastly, it is put forth by him that the learned Single Judge has referred to the provisions of the Medical Council Act and the overriding effect as that would find mention under Rule 3 but in the absence of any statutory rule or regulation holding the field the letter cannot be override the effect of the rules framed by the State.

12. To appreciate the submissions raised at the Bar, it is apposite to refer to Section 2(i) of the Disabities Act which defines "disability". It reads as under:-

> (i) "disability" means-
>
> (i) blindness;
>
> (ii) low vision;
>
> (iii) leprosy-cured;
>
> (iv) hearing impairment;
>
> (v) locomotor disability;
>
> (vi) mental retardation;
>
> (vii) mental illness;"

Section 39 of the Act reads as under:-

> "39. All educational institutions to reserve seats for persons with disabilities.- All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent, seats for persons with disabilities.'

What is mandated by Section 39 is that educational institutions should reserve seats for persons with disabilities. On a first glance it may appear that three percent reservation should cover disability of all kindness. But a purposive interpretation has to be given. Section 2(i), dictionary clause has to be read with in the backdrop of section 39 of the Act. There has to be 3% reservation but that does not necessarily mean 3% reservation should cover all categories of disabled candidates in all courses. For example, a total blind person cannot be admitted to an engineering course. Similarly, a man with no vision in one eye and 6/7 in second eye may come within the conception of disability as per the difinition clause but he may not be able to prosecute the medical studies. That would depend upon the decision of the expert body. To elaborate; section 39 and section 2(i) have to be purposively construed to bring the effect of the provision. To further elaborate there cannot be less of reservation as provided in the statute but there can be compartmentalization of reservation depending upon the fact sitaution.

13. In this factual backdrop, it is apposite to refer to rule 2.6 and 5.1 of the PMT Rules, 2006. The same read as under:

> "2.6. "Class" means Military Personnel (M.P.), Freedom Fighter (FF) NO CLASS (X) and FEMALE (F) as specified and laid down by government of Madhya Pradesh. Physically Handicapped (PH) means as specified and laid down by Ministry of Labour, Government of India for vocational Rehabilitation of Physically Handicapped."
>
> xx xx xx
>
> 5.1 For Physically Handicapped who are *bonafide* residents of Madhya Pradesh belonging to ST, SC, OBC and Unreserved category three per cent (3%) seats are reserved for admission to MBBS/BDS course. Reservation shall be horizontal and compartmentalized.
>
> The candidate claiming admission against these seats shall have to produce a certificate in the prescribed form from District Medical Board and eligibility certificate from Superintendent Vocational Rehabilitation Centre for Physically Handicapped, Govrnment of India, Ministry of Labour, Napier Town, Jabalpur."

14. In *Ku. Rekha Tyagi* (supra) their Lordships of the Apex Court heave held as under:

> "It may be noticed that the Medical Council of India (MCI) who issues guidelines for admission to the medical courses in the country,

in fact, had taken a decision on 5-11-1999 indicating that there cannot be any reservation for admission into the MBBS course and Post-Graduate Medical Course for disabled persons, as provided in Section 39 of the Act. This decision, however, appears to have been reversed by the subsequent resolution of MCI dated 5-7-2001. Under the resolution dated 5-7-2001 it has been unequivocally indicated that 3% reservation for physically handicapped persons for admission into the medical courses should be followed excluding, however, for those who are visually handicapped and hearing defects."

15. Rule 3.0 of the PMT Rules reads as under:

"3. General-

(i) Under Graduates Courses in MBBS and BDS shall be governed and regularised by MCI, DCI, University, Autonoumous Society of the college, State Government, Government of India under the rules and regulations in force at the time of entrance examination, allotment, admission, amended from time to time."

16. The letter issued by the Medical Council of India dated 5-7-2001 states thus:

".....The provisions of Section 39 of the Act were carefully studied and based on this an agreement was reached to follow 3% reservation for physically Handicapped for admission to medical course also. The categories of people under disabilities as classified under the Act covers the following three categories:-

1.Visually Handicapped

2. Persons suffering from hearing defects

3.Physically handicapped with the locomotory disorders.

The 3% of reservation under the above 3 categories has been apportioned as 1% under each category u/s 33 of the 1995 Act. It was also noted that the Govt. of Tamil Nadu in their G.O. No. 137 dated 29-1-1990 had also fixed the same percentage of reservation for these categories for admission to MBBS/Engineering etc. course.

The Council further noted that the Sub-Committee in the same meeting had also noted that the Hon'ble High Court of Calcutta in

its judgment (cases No. MAT No. 3105 of 1998 & C.A. No. 7514 of 1998) had also agreed upon the apportioning of the reservation under the above three categories in respect of the posts under Government. The same logic is applied for reservation for educational institutions also and taking the guidelines adopted by the Govt. of Tamil Nadu, the Committee was of the opinion that such apportioning of reservation is both logical and sustainable in the Court of Law.

> The Committee has concluded that the visually handicapped is not in a position to pursue the medical course and do the internship as corrected vision is absolutely necessary for the study and for the practice of Medicines.
>
> The hearing impairment will interfere with the training in medical education since the process of hearing of various sings and auscultation is absolutely essential to pursue the medical training and to follow the medical practice.
>
> In view of the above observations the visually handicapped and hearing disable should be deleted from this category and they should be considered invalid for admisssion in the MBBS."

17. It is borne on record that the General Body of the Council on 20-10-2003 the expert body did not include visual disability. As per the guidelines issued by the MCI the persons with visual disability have not been made entitled for the benefit of 3% reservation of physically handicapped persons.

18. In *State of Kerala* v. *T.P. Roshna*[1], it has been held as under:

> "The Indian Medical Council Act, 1956 has constituted the Medical Council of India as an expert body to control the minimum standards of medical education and to regulate their observance. Obviously, this high-powered Council has power to prescribe the minimum standards of medical education. It has implicit power to supervise the qualifications or eligibility standards for admission into medical institutions. Thus, there is an overall in vigilation by the Medical Council to prevent sub-standard entrance qualifications for medical courses."

19. If the guidelines issued by the Medical Council of India are understood in proper perspective, there can be no trace of doubt that there has been apposite

((1) (1979) SCC 580.

deliberation by the expert body and it has formed an opinion that visually handicapped persons are not suitable for the medical course. The expert body has thought it seemly to state that the said category would not fall within the physical handicapped category for the specific purpose. The said guidelines do not run counter to the provisions of the Act and the rules made by the State Government. It is an expert opinion which is passed on the basis of absolute practical wisdom and its opinion cannot be marginalized. By no stretch of imagination, it can be held that the said guidelines supplant any of the provisions. It works in the purposive functionalism of the rules. The expert body has found that visually handicapped persons cannot be brought into the categories of handicapped persons for the medical course. The learned Single Judge has expressed the opinion that in the absence of the regulations or rules the same cannot be given effect to. In our considered opinion, the said view is neither correct nor sound inasmuch as the fixation of standard with regard to physical disabilities vis-a-vis the standard of the medical studies rests with the Medical Council of India.

20. In view of the aforesaid analysis, we allow the writ appeal and set aside the order passed by the learned Single Judge. There shall be no order as to costs.

Appeal allowed.

I.L.R. [2007] M.P., 1073
WRIT APPEAL

Before Mr. Justice Dipak Misra and Mr. Justice R.S. Jha
19 June, 2007

SMT. HARBHAJAN KAUR .... Appellant *
v.
STATE OF M.P. & ors. .... Respondents

Forest Act, Indian (XVI of 1927)–Sections 2(3), 2(4), 42 & 55–Transit (Forest Produce) Rules, M.P., 2000, Rules 3, 14 and 22–Confiscation–Arjun Tress were being loaded on trucks with the help of crane–Eight and four logs were already loaded in two trucks–Police seized logs together with crane and trucks–Authorized officer issued show cause notice for confiscation of crane–Petitioner took stand that crane was used to lift the truck which had fallen in nallah–Authorized officer came to conclusion that crane was used for lifting and loading Arjun Trees for transportation without transit pass–Order of confiscation challenged in writ petition that Arjun Trees were lifted from

*W.A. No. 513/2007(J)

revenue land and not from forest land, therefore, no offence under Section 41 of Forest Act made out–Held–Rule 3 of Rules provides that no forest produce shall be moved into or outside the State or within State without a transit pass–Forest produce includes timber whether found in, or brought from forest land or not–Transportation has to be given proper meaning and once timber is loaded it is meant for transportation and if there is no transit pass offence under Section 41 of the Act is committed–No evidence that petitioner had no knowledge that vehicle is being used for commission of forest offence–Appeal Dismissed.

The anatomy of Rule 3 makes it clear as noon day that no forest produce shall be moved into or out side the State or within the State except in the manner provided thereunder without a transit pass in Form A, B or C annexed to the said rules and the transit passes shall be issued by a Forest Officer or Gram Panchayat or a person duly authorised to issue such passes.

The dictionary clause which defines forest produce under the 1927 Act clearly stipulates that it includes timber whether found in, or brought from, a forest or not. Thus, the timber, even if it is assumed not brought from a forest or found in the forest, is regarded as forest produce. Hence, the definition has a larger and broader spectrum. The investigating party had found that the crane was loading the timber in trucks. Section 42 provides for penalty for breach of rules made under Section 41. Rule 22 of the rules provides for penalty for breach of rules. The trucks were found loaded with timber and the crane was loading the timber. The authorised officer, as is patent, has found that the crane was used for commission of forest offence. As is perceptible, the timber was being loaded with the crane.

If the cumulative effect of the said rules are understood in proper perspective, there can be no trace of doubt that the word 'transportation' has to be given proper meaning and once the timber is loaded it is meant for transportation and if there is no transit pass, the offence under Section 41 is constituted. In our considered opinion, the view expressed by the learned single Judge is absolutely impeccable.

(Paras 16 and 17)

A.K. Jain, for the appellant.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–Questioning the correctness of the soundness of the order dated 13.3.2007 passed on 13.3.2007 by the learned single Judge in Writ Petition No. 5320/2006 the appellant petitioner has preferred this intra-court appeal under Section 2(1) of the MP Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

2. The facts which are requisite to be adumbrated are that the appellant petitioner invoked the extra-ordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India calling in question the pregnability of the order dated 13.3.2006 passed in Criminal Revision NO. 42/2005 whereby the learned Second Additional Sessions Judge had declined to accept the stance and stand of the appellant, the revisionist therein that the order of confiscation of the crane bearing registration No. CPD 8253 passed by the Authorized Officer and affirmation thereof by the appellate authority was erroneous. The appellant is the owner of the aforesaid crane and it was seized on 9.5.1999 by the competent authority of the police station, Jabera, District Damoh on the base that it was being used in the commission of a forest offence. There were complaints at the police station, Jabera that a large number of Arjun trees (Koha trees) were being felled and transported in illegal manner at the bank of a deep Nallah passing in Government land near village Badera, District Damoh. Patwari of that village made a complaint on 9.1.1999 at the police station, Jabera in regard to the said illegal felling and transportation of the Koha trees. The police party raided the spot and found that huge quantity of Koha trees were being lifted and loaded in two trucks with the help of the crane of the petitioner. It was found that in those trucks eight and four such logs had already been loaded with the help of the crane. The police seized the logs together with the crane and trucks as they were used in committing the offence. After due investigation the police filed the charge sheet in the Court of Judicial Magistrate who, in turn, informed the authorized forest officer about the forest offence and eventually a proceeding under Section 52 of the Indian Forest Act, 1927 (in short 'the 1927 Act') was initiated for confiscation of the seized property.

3. The authorized officer, as is manifest, issued a notice in writing to the petitioner calling upon her to file her show-cause against the proposed confiscation. In pursuance of the notices, the petitioner took the stance that the crane was used to lift the truck which had fallen in the nallah and was not involved in the forest offence. Alternatively, it was put forth that she had no knowledge that the crane was used in the commission of a forest offence. The Department to substantiate its stance examined Head Constable-Suresh Pradhan, Head Constable-Dilli Path, Sarpanch Ramrani, Kotwar Ramdin and Assistant Sub-Inspector V.K. Dubey of Police Station, Jabera. The petitioner chose not to examine any witness to substantiate her plea but filed an affidavit of her son Sukhvinder, driver Pawan and transporter Atmajeet Singh.

4. The authorized officer appreciating the factual matrix and the material brought on record returned a finding that the crane was used for lifting and loading of the Arjun trees for transportation without any transit pass. The authorized officer by order dated 23.8.2003 directed for confiscation of the crane as it was used in the commission of the forest offence under Section 41 of the Act.

5. Being aggrieved by and dissatisfied with the order passed by the authorized officer, the petitioner preferred an appeal before the appellate authority who dismissed the same by order dated 15.7.2005. Thereafter Criminal Revision was filed before the learned Additional Sessions Judge which paved the path of unsuccess. Thereafter, as has been indicated hereinabove, the appellant petitioner preferred the writ petition.

6. Before the learned single Judge it was contended that the order of confiscation and affirmation thereof by the superior authority was sensitively susceptible as the logs of. Arjun trees were lifted from revenue land and not from forest land and, therefore, by no stretch of imagination it can be held that any offence under Section 41 of the Forest Act is made out. On behalf of the functionaries of the State it was contended that logs of Arjun trees come within the meaning of timber as defined in the Act and as they were being loaded in the trucks for transportation without transit pass, the ingredients of the Forest Act stood satisfied. The learned single Judge appreciating the provisions contained under the 1927 Act, the material brought on record, analysis made by the authorized officer and other superior authorities, the concept of transit pass and lackadaisical attitude shown by the appellant to substantiate her defence dismissed the writ petition by affirming the order passed in the criminal revision.

7. We have heard Mr. A.K. Jain, learned counsel for the appellant on the question of admission.

8. It is contended by Mr. Jain that the learned single Judge has fallen into grave error by holding that offence has been committed under Section 41 of the Forest Act though no forest offence is committed by the appellant. It is urged by him that the learned single Judge has erroneously placed reliance on MP Transit (Forest Produce) Rules, 2000 (in short 'the Rules') which has no nexus even remotely with the lifting of logs by crane if the entire factual matrix is appreciated. The learned counsel has urged that the timber, as alleged by the department, was lifted from the revenue land and unless there is a notification treating the said land to be the forest land, conception of forest offence is not attracted and as a sequitur thereof no confiscation could be made.

9. To appreciate the submissions put forth by Mr. Jain we have carefully perused the order of the learned single Judge and the anatomy of the Act and the Rules.

10. Section 2(3) defines 'forest-offence' which reads as under:

> "2.(3) "forest-offence" means an offence punishable under this Act or under any rule made thereunder,"

11. Section 2(4) defines forest produce. It is as under:

"2(4) "forest-produce" includes-

(a) the following whether found in, or brought in, or brought from, a forest or not, that is to say:-

timber, charcoal, caoutchouc, catechu, would-oil, resin, natureal varnish, bark, lac, shellac, gum, mahua flowers, mahua seeds, tendu leaves, kuth and myrobalans, and

(b) the following when found in, or brought from a forest, that is to say:-

(i) tress and leaves, flowers and fruits, and all other parts or produce not herein before mentioned, of trees.

(ii) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,

(iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey, and wax, and all other parts of produce of animals, and

(iv) peat, surface soil, rock, and minerals (including lime-stone, laterite, mineral oils and all other products of mines and quarries;

(v) standing agricultural crops"

12. Section 41 empowers the State Government to make rules to regulate transit of forest-produce. Section 42 provides for penalty for breach of rules made under Section 41. The said provision is worth reproducing:

> **"42. Penalty for breach of rules made under Section 41.-** (1) The State Government may by such rules prescribe as penalties for the contravention thereof imprisonment for a term which may extend to one year, or fine which may extend to one thousand rupees, or both.
>
> (2) Such rules may provide that penalties which are double of those mentioned in Sub-section (1) may be inflicted in cases where the offence is committed after sunset, and before sunrise, or after preparation for resistance to lawful authority, or where the offender has been previously convicted of a like offence."

13. Section 76 which occurs in Chapter XII confers additional powers on the State Government to make rules. At this juncture it is apposite to reproduce Sections 3 and 4:

> **"3. Power to reserve forests..**-The State Government may constitute any forest-land or waste-land which is the property of

Government or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest in the manner hereinafter provided.

4. Notification by State Government.-(1) Whenever it has been decided to constitute any land a reserved forest, the State Government shall issue a notification in the Official Gazette-

(a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying, as nearly as possible, the situation and limits of such land; and

(c) appointing an officer (hereinafter called 'the Forest Settlement Officer') to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest-produce, and to deal with the same as provided in this Chapter.

Explanation.-For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, bridges or other well- known or readily intelligible boundaries.

(2) The officer appointed under clause (c) of sub-section (1) shall ordinarily be a person not holding any forest-office except that of Forest Settlement-officer.

(3) Nothing in this section shall prevent the State Government from appointing any number of officers not exceeding three, not more than one of whom shall be a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement officer under this Act."

14. The gravamen of the matter is whether the forest offence has been committed. Rule 3 of the Rules deals with transit of forest produce by means of passes. It is apt to reproduce the said rule:

"**3. Regulation of Transit of forest produce by means of passes.**-No forest produce shall be moved into or out side the State of within the State of Madhya Pradesh except in the manner as hereafter provided without a transit pass in Form A, B or C annexed to these rules. The transit pass will be issued by a Forest Officer or Gram Panchayat or a person duly authorised under these rules to issue such pass:

Provided that no trnsit pass shall be required for the removal:-

(a) Of any forest produce which is being removed for *bonafide* domestic consumption by any person or in exercise of privilege granted in this behalf by the State Government or of a right recognised under the Act within the limits of a village in which it is produced.

(b) Of such forest produce as may be exempted by the State Government from the operation of these rules by notifiction in the Official Gazette.

(c) Of forest produce covered by Money receipts/Rated passes/ Forest produce passes/carting challan issued by competent authority in accordance with the rules made in this behalf for the time being force.

(d) Of minor forest produce from forest to the local market or to the collection Centre or for *bonafide* domestic consumption.

(e) Of mineral from forest for which transit pass is not compulsory under these rules."

15. Rule 22 deals with the penalties for breach of rules. It is as under:

"**22. Penalties for breach of rules.**-(1) Whoever contravenes any of the provisions of these rules or issues transit passes without authority or in contrayention of the provision of these rules, shall be punishable with imprisonment for a term, which may extend to one year or with fine, which may extend to Rs. Ten Thousand or with both.

(2) In cases where offence is committed after sunset and before sunrise, after preparation for resistence to lawful authority or where the offender has been previously convicted of a like offence, the penelty to be inflicted shall be double of those mentioned in sub-rule (1) above."

16. The anatomy of Rule 3 makes it clear as noon day that no forest produce shall be moved into or out side the State or within the State except in the manner provided thereunder without a transit pass in Form A, B or C annexed to the said rules and the transit passes shall be issued by a Forest Officer or Gram Panchayat or a person duly authorised to issue such passes. The said rule also stipulates that no transit pass shall be required for removal of forest produce which is being removed for *bonafide* domestic consumption by any person or in exercise of privilege granted in that behalf by the State Government or of a right recognised under the

Act or if the forest produce is excepted by the State Government from the operation of the rules by notification in the official gazette or of removal, of forest produce covered by Money receipts/Rated passes/Forest produce passes/carting challan issued by competent authority in accordance with the rules made in this behalf for the time being force, of minor forest produce from forest to the local market or to the collection Centre or for *bonafide* domestic consumption or of mineral from forest for which transit pass is not compulsory. There is no iota of doubt that the timber does not come under any exceptions. The dictionary clause which defines forest produce under the 1927 Act clearly stipulates that it includes timber whether found in, or brought from, a forest or not. Thus, the timber, even if it is assumed not brought from a forest or found in the forest, is regarded as forest produce. Hence, the definition has a larger and broader spectrum. The investigating party had found that the crane was loading the timber in trucks. Section 42 provides for penalty for breach of rules made under Section 41. Rule 22 of the rules provides for penalty for breach of rules. The trucks were found loaded with timber and the crane was loading the timber. The authorised officer, as is patent, has found that the crane was used for commission of forest offence. As is perceptible, the timber was being loaded with the crane. Learned single Judge has observed that the movement of timber pieces began from the moment they were lifted by using the crane for transportation. Section 41 deals with the power of the State Government to make rules to regulate transit of forest produce. The timber, without any trace of doubt, is a forest produce. Rule 3 categorically and unequivocally lays a postulate that no forest produce should be moved into or out side the State or within the State without transit pass. Rule 6 deals with the contents of the transit pass. Rule 7 provides for separate passes for each load. Rule 8 postulates that passes are not to be tampered with. Rule 14 provides for property and transit marks to be affixed to timber. The said rule reads as under:

> **"14. Property and Transit marks to be affixed to timber.**-No timber shall be moved from or within any district of Madhya Pradesh unless it bears a Government transit mark or Gram Panchayat Property marks, of such design as shall be prescribed from time to time in this behalf by the Divisional Forest Officer."

17. Rule 15 prescribes for registration of property marks. If the cumulative effect of the said rules are understood in proper perspective, there can be no trace of doubt that the word 'transportation' has to be given proper meaning and once the timber is loaded it is meant for transportation and if there is no transit pass, the offence under Section 41 is constituted. In our considered opinion, the view expressed by the learned single Judge is absolutely impeccable.

18. The next aspect arises for consideration is the plea taken by the appellant

that it was not within her knowledge that the vehicle was being used for commision of the forest offence. No evidence has been adduced to that effect. Only affidavits have been filed. The appellant chose not to file her affidavit. The authorities below did not give credence to such plea. Learned single Judge analysing the material brought on record arrived at the conclusion that there is no reliable evidence that she had no knowledge that her vehicle was used for forest offence. We see no reason to differ with the same.

19. Consequently, the writ appeal is dismissed in limine.

Appeal dismissed.

I.L.R. [2007] M.P., 1081

WRIT APPEAL

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh

9 July, 2007

KU. AKANKSHA RAJPUT .... Appellant *

v.

STATE OF M.P. & ors. .... Respondents

Medical and Dental Undergraduate Entrance Examination Rules, M.P. 2006–Rule 2.1, 3.5, 3.6–Two seats reserved for O.B.C. female category candidates–Two candidates secured equal marks in Pre Medical Test–Petitioner placed at serial no. 91 in waiting list which was top position in waiting list of O.B.C. Female Category Candidates–One candidate alloted seat in 1st Counselling–2nd seat reserved for O.B.C. female category candidate diverted for O.B.C. freedom finghter category therefore, petitioner was not allotted seat in 2nd counselling–Held–2nd seat reserved for O.B.C. female category candidate cannot be diverted for O.B.C. freedom fighter category candidate–No Direction by High Court to divert the seat as pleaded by respondents–Petitioner already taken admission in BDS–Rule 3.5, 3.6 provides candidate once admitted to a particular course not entitled to change the course on any ground–Rules do not apply where candidate was denied admission in one course and was compelled to take admission in subject contrary to merit position–Respondents directed to admit petitioner in MBBS Course–However petitioner will have to forego the BDS Course undertaken by her.

By Rules 3.5 and 3.6, a candidate admitted to particular subject, course or

* Writ Appeal No. 851/2006 (J)

college shall not be entitled to change the course on any ground. This will apply when the candidate is offered a seat in a subject, course and college in accordance with her merit position and the Rules and she accepts the offer and she is admitted to such subject, course and college. But where a candidate is denied a seat in the subject, course and college as per her merit position and in accordance with the Rules and she is compelled to take admission in a subject, course and college, contrary to her merit position and the Rules, the respondents cannot be allowed to take a stand before the Court that such a candidate who has been admitted to a subject, course and college cannot now claim a seat in a subject, course or college which was her first choice. If the stand taken by the respondent is accepted then in no case the Court can give relief to a party who has been denied admission to a subject, course or college as per her choice in accordance with her merit position and the Rules.

(Para 6)

Case Referred:-

Medical Council of India v. *Naina Verma & ors.*; C.A. No. 451/2005 decided on 12.9.2005

D.K. Tripathi, for the petitioner.
Samdarshi Tiwari, Govt. Adv., for the respondent Nos. 1, 2 & 4.
Mrs. Indira Nair with Miss Jasmeet Chana, for the respondent No.5

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice** :– The appellant appeared in the Pre Medical Test 2006, conducted by the Professional Examination Board, Bhopal for admissions to the State Medical and Dental Colleges in Madhya Pradesh. In the Pre Medical Test 2006, she secured 168.47 marks out of 200 marks and was placed at Serial No.91 in the waiting list for OBC candidates, which was the top position in the waiting list of OBC female category candidates. Another OBC female category candidate namely Nishat Shaikh also secured 168.47 marks. The admission to the State Medical and Dental Colleges in Madhya Pradesh were to be governed by the Madhya Pradesh Medical and Dental Undergraduate Entrance Examination Rules, 2006 (for short "the Rules"). In the table 2.1 annexed to the Rules, the category and class wise distribution of State Quota Seats in Autonomous Medical College were shown. In this table 2.1, two seats were shown to be reserved for OBC female category in S.S. Medical College, Rewa. Against one of these two seats reserved for female category, Nishat Shaikh was given admission at the stage of first round of counselling. The appellant was expecting that in the next counselling she will be allotted the

second seat reserved for OBC female category. But in the advertisement dated 26.8.2006 of the second counselling, no seat for OBC female category was shown and instead a seat was shown to have been reserved for OBC freedom fighter category and a candidate was given admission from OBC freedom fighter category to a seat in the M.B.B.S. course in S.S.Medical College, Rewa.

2. Aggrieved, the appellant filed W.P.No.12596/2006 and by order dated 26.9.2006, the learned single Judge disposed of the writ petition with a direction that if a seat is available in OBC female category and if the appellant is found entitled for the allotment of the seat on the date of first counselling, the respondents shall consider the case of the appellant. Aggrieved by the order dated 26.9.2006, of the learned Single Judge, in W.P.No.12596/2006, the appellant has filed this writ appeal.

3. Mr.D.K.Tripathi, learned counsel for the appellant submitted that the learned single Judge should have directed the respondents to admit the appellant in a seat in the new academic session 2007-2008 because the second seat of OBC female category in S.S.Medical College, Rewa had been diverted by the respondents for OBC freedom fighter category contrary to the Rules and table 2.1 appended thereto.

4. Mr. Samdarshi Tiwari, learned Government Advocate on the other hand submitted relying on the return filed by the respondent nos. 1,2 and 4 that pursuant to the directions of the learned single Judge of this Court passed in *Sourabh Namdeo vs. State of M.P. & others*[1], Sourabh Namdeo was given admission in the M.B.B.S. course under OBC freedom fighter category in S.S.Medical College, Rewa after diverting the second seat reserved for OBC female category. He submitted that for this reason the appellant could not be given admission to the second seat of OBC female category. He further submitted that in the second counselling, the appellant opted for taking admission in B.D.S. course and she was accordingly selected for B.D.S. course and she had joined the B.D.S. course at Indore. He submitted that under Rule 3.5, a candidate so admitted to a particular subject, course and college shall not be entitled for any change on any ground and under 3.6 of the Rules, a candidate once allotted/admitted to MBBS or BDS course shall not be entitled to change the course on any ground.

5. The Rules 3.5 and 3.6 on which Mr. Samdarshi Tiwari, learned Government has relied upon are quoted herein below :

> "3.5 :- A candidate so admitted to a particular subject, course and college shall not be entitled for any change on any ground. Only mutual transfer applications may be submitted on or before 15-9-2006 on which decision shall be taken after consideration before 25-9-2006.

(1) W.P.No. 9880/2006.

3.6 :- A candidate once allotted and/or admitted to M.B.B.S. or B.D.S. course shall not be entitled to change the course on any ground."

6. By Rules 3.5 and 3.6, a candidate admitted to particular subject, course or college shall not be entitled to change the course on any ground. This will apply when the candidate is offered a seat in a subject, course and college in accordance with her merit position and the Rules and she accepts the offer and she is admitted to such subject, course and college. But where a candidate is denied a seat in the subject, course and college as per her merit position and in accordance to the Rules and she is compelled to take admission in a subject, course and college, contrary to her merit position and the Rules, the respondents cannot be allowed to take a stand before the Court that such a candidate who has been admitted to a subject, course and college cannot now claim a seat in a subject, course or college which was her first choice. If the stand taken by the respondent is accepted then in no case the Court can give relief to a party who has been denied admission to a subject, course or college as per her choice in accordance with her merit position and the Rules.

7. In the present case, the appellant's first choice seems to have been M.B.B.S. course and not B.D.S. course and as per her merit position she was entitled to the second seat reserved for OBC female category in accordance with table 2.1 appended to the Rules and she was expecting that in the second counselling, she will be allotted this seat more particularly when in the first counselling another candidate by the name of Nishat Shaikh who had secured the same marks as the appellant, was given admission into the first seat reserved for the OBC female category. The respondent nos. 1 and 2 instead of giving the appellant admission into the second seat in M.B.B.S. course reserved for OBC female category in accordance with table 2.1 appended to the Rules diverted the second seat of OBC female category to OBC freedom fighter category and admitted Sourabh Namdeo in the said seat.

8. The plea taken by the respondent nos. 1 and 2, for such diversion of the second seat of M.B.B.S. course reserved for OBC female category in table 2.1 appended to the Rules and for admitting Saurabh Namdeo in the seat is that the directions of the Court in the order dated 11.8.2006 in W.P.No.9880/2006 filed by Saurabh Namdeo had to be complied with. The order dated 11.8.2006 of the learned single Judge of this Court passed in W.P.No.9880/2006 filed by Saurabh Namdeo is quoted herein below:-

"Shri N.S.Kale, Sr. Advocate with *Shri Abhijit Bhowmik Adv.* For the petitioner.

Shri Sanjay Yadav, Dy.A.G. for the State.

Learned counsel for the State submits that the State Government has issued an order dated 11.8.2006 by which one post for freedom fighter O.B.C. category has been found available at Rewa Medical College, Rewa. It is further submitted by Shri Yadav that respondents are considering the petitioner for the aforesaid seat. Though, learned counsel for petitioner submits that in view of the statement made by the respondents, the petitioner be allotted the aforesaid seat as the petitioner is in merit and is placed at No.1 in the waiting list.

Considering the contention made by Shri Yadav, no direction is needed from this Court, as the respondents has shown their willingness to consider the case of the petitioner for the vacant seat which is available at Rewa Medical College, Rewa. This petition is finally disposed of in terms of the statement made by Shri Yadav.

No order as to costs.

C.C.as per rules."

9. It will be clear from the aforesaid order dated 11.8.2006 passed in the case of Sourabh Namdeo in W.P.No. 9880/2006, that the learned single Judge has not directed the respondents to admit Sourabh Namdeo in a so called seat for freedom fighter OBC category. On the other hand the respondent nos. 1 and 2 have shown their eagerness before the learned single Judge to consider the case of Sourabh Namdeo for a vacant seat which was available at Rewa Medical College, Rewa and the petition was disposed of in terms of the statement made by the counsel on behalf of respondent nos. 1 and 2. Obviously, Sourabh Namdeo, could not have been admitted to the seat reserved for OBC female category under table 2.1 appended to the Rules and that seat could have been allotted only to the appellant as per her position in the merit list and as per the rules.

10. In the order passed by the Supreme Court on 12.9.2005 in *(Medical Council of India vs. Naina Verma & Others)*[1], the facts were somewhat similar. Naina Verma, respondent, in the said civil appeal, had been admitted in a dental course for B.D.S. She filed a writ petition claiming a seat in M.B.B.S, which was allowed but by the time writ petition was allowed, by the High Court the M.B.B.S. course for the academic session 2003-2004 had started. In the appeal being carried by the Medical Council of India to the Supreme Court, the Supreme Court held that, by the time the writ petition was disposed of, respondent Naina Verma had been studying for 1½ year in B.D.S. course. The Supreme Court while up-holding the claim of

(1) Civil Appeal No. 451/2005.

respondent Naina Verma, to be admitted in the M.B.B.S. course made it clear that she would have to forego 1½ years spent in dental course and start the M.B.B.S course from day one.

11. In this case accordingly we direct that the appellant will have to forego the B.D.S. Course undertaken by her and she will be called for counselling and admitted in the M.B.B.S. course in any of the seats of the State Medical College of Madhya Pradesh during the academic year 2007-2008 well before 30th September 2007 within the intake capacity of such State Medical Colleges as already permitted by the Medical Council of India.

The appeal is accordingly disposed of.

Appeal accordingly disposed of.

I.L.R. [2007] M.P., 1086

WRIT PETITION

Before Mr. Justice Arun Mishra

13 January, 2003

SMT. KAMLA PATEL .....Petitioner*

v.

STATE OF M.P. & ors. ....Respondents

Sah Chikitsiy Parishad Adhiniyam M.P. 2000, Sections 2(b)(i), 2(c), 2(d), 26, 28, Criminal Procedure Code, 1974, Section 133 - Petitioner running pathological laboratory - Prohibitory order under Section 133 Cr.P.C. passed restraining petitioner from running lab as she did not possess recognized qualifications - Chief Medical and Health Officer directed to close the laboratory forthwith - Order of CMHO challenged by filing writ petition - Petitioner claimed to have diploma in Medical Laboratory Techonology issued by Institute of Continuing Medical and Career Making Education Mumbai - CMHO recalled the order of closure during the pendency of petition on the certificate of Doctor that petitioner is working under guidance - Doctor issuing certificate admitted in his statement before High Court that he was not working in Laboratory prior to issue of certificate by him and permission granted by CMHO - Held - Nothing on record to show that ICME, Mumbai has been recognized by State Govt. – Doubtful whether petitioner can obtain instructions of diploma training by attending practical classes on each Sunday at Mumbai- DMLT is laboratory technicians

*W.P. No. 3721/2002

qualification and cannot practice as pathologist or run clinical pathology laboratory independently - CMHO before recalling order did not verify that Doctor who had issued certificate is working in laboratory - Doctor also admitting that he use to visit laboratory only twice or thrice a week- Pathologist must attend the laboratory regularly and must get test performed under his supervision and only then he can sign the report-CMHO must mention in permission that laboratory is equipped for which kind of test and only such tests can be performed in laboratory - Laboratory cannot be allowed to be run by unqualified person - Laboratory technician can work in established laboratory which is to be run by pathologist and not *vice versa* - Directions issued.

The following directions are issued :

1. That pathology labs are run by pathologist who is qualified under M.P. Ayurvigyan Parishad Adhiniyam, 1987 and fulfills the requirement of Sections 13 and 24 of the said Act.

2. No laboratory technician is allowed to run the laboratory. Laboratory technician can only work in laboratory which is actually run by qualified pathologist.

3. Laboratory technician possesses the recognised Qualification and has the right to do so under the M.P. Chikitsiy Parishad Adhiniyam, 2000.

4. The only those tests are allowed to be performed in the laboratories for which they are equipped; blanket permission to run the laboratory be not given.

5. There should be periodical inspection of the Pathological laboratories to ensure that they are being properly run by pathologist and they are equipped, for the kind of tests they are performing and have the due permission for that.

6. Pathological laboratories in which pathologist is not working should be verified and functioning be stopped forthwith on inspection being made. (Para 38)

Rajendra Tiwari with *V. Tiwari,* for the petitioner.
Ms. Seema Agrawal, for the respondent/State.
Dr. Pramod Govind Najpande, present in person as Intervenor.

Cur. adv. vult.

Smt. Kamla Patel v. State of M.P., 2003

ORDER

ARUN MISHRA, J.:– The main question has arisen in the instant case is to the entitlement of the 'Laboratoy Technician' to run the Pathology Laboratory and also about the 'qualifications' to be possessed by Laboratory Technician. Question is also whether visiting pathologist can be allowed to make the visit occasionally in the pathological laboratory and whehter such laboratories can be said to be run by pathologist and can be allowed to be run.

2. The question involved in the writ petition is of utmost importance for the Health of human being, detection of ailments, curative process including medicinal treatment to be imparted depends on the various investigation reports to be furnished on laboratory tests by the pathological laboratories.

3. Finding that the laboratory in question "Maruti Clinical Pathology" was being run by non-qualified person. Prohibitory order u/s 133 of the Cr. P.C. was passed by SDM restraining the running of laboratory. The S.D.M. Jabalpur took the cognizance against the laboratory run by petitioner as petitioner Smt. Kamla Patel did not possess the recognized qualification to run the laboratory. The S.D.M. was of the opinon that the reports prepared by non-qualified person may 'adversely affect' the health of human. Final order was passed on 24.4.99 to the effect that petitioner Smt. Kamla Patel cannot run the pathological laboratory. She can work only under a qualified pathologist and with respect to the Diploma claimed to be possessed by the petitioner Smt. Kamla Patel the correspondence was made with the State Govt. In case she is not qualified, her qualification is not recognized, she would not be able to run the laboratory. The order passed u/s 133(1) Cr. P.C. was made absolute. The order-sheet dated 19.4.99 of the Court of S.D.M. in proceedings u/s 133 Cr. P.C. indicates that petitioner had filed Diploma in Medical Laboratory Technology obtained from Institute for Continuing Medical and Career Making Education (hereinafther referred to as 'ICME'). It is recorded that she has obtained the Diploma training in Janki Raman College situated at Jabalpur and appeared in the examination at Mumbai and used to go every sunday to Mumbai.

4. Chief Medical & Health Officer (CHMO), Jabalpur, as per letter P.5 dated 29.6.2002 directed the laboratory to be closed forthwith as the same was found to be run by the petitioner illegally. In case the same is not stopped, action in accordance with law shall be initiated.

5. Petitioner filed writ petition on 16.7.2002 praying for the relief that the order P.5 dated 29.6.2002 be quashed and petitioner be allowed to run her clinical pathology and such other orders which may be deemed fit by this Court under the circumstances be passed. Petitioner has made the averment in the petition that petitioner is running the pathology laboratory. Petitioner is having Diploma (P.1) in Medical Laboratory

Technology (Fort short 'DMLT;) issued by registered Institute for Continuing Medical and Career Making. Education (ICME). The said Institute is registered with Govt. of Maharashtra under Mumbai Public Trust Act, 1950. Diploma was issued in the year 1998. Petitioner established the said pathology under the name of 'Maruti Pathology Lab' in Panagar, District Jabalpur for the purpose of test of routine blood, urine and biochemical examination. The petitioner strated the said pathology under the guidance of Senior Doctor, Dr. B.M. Agrawal who is a retired Pathologist. Document (P.2) in this regard has been filed. The said certificate (P.2) is granted by Dr. B.M. Agrawal certifying that Smt. Kamla Patel is working as a laboratory technician under his guidance and supervision.

6. Further averment made by the petitioner is that some local antisocial elements tried to harass the petitioner with intention to snatch money from her and complaint was lodged by them. The antisocial elements are being politicly influenced. Report was made to the Collector and Collector made the inquiry against the petitioner u/s 133 Cr. P.C. through S.D.O. Nothing was found against her. Petitioner is running pathology laboratory under the guidance of senior most Doctor and Pathologist Dr. A.S. Makheeja (M.B.B.S., M.D.) as apparent from certificate (P.4) issued by Doctor concerned. Despite of all these facts without assigning any reason, without conducting any inquiry and without giving any opportunity of being heard, respondent no. 3 issued an order P.5. Petitioner further submits that in Panagar there are several pathological labs which are running smoothly and the respondents are not taking any action against them. Petitioner is running the pathology lab legally. Respondent no. 3 has no jurisdiction to close the lab of the petitioner. The order is without issuing show cause notice, without reason and petitioner has been discriminated with other pathological laboratories which are being run similary.

7. An application for amendment was filed on 26.7.2002 which was allowed. By way of amendment, it is further alleged that petitioner has obtained Diploma for running Para Medical Laboratory/Institutte. It is not necessary to get any kind of recognition or N.O.C. from any of the body or Government etc. There are no rules and provisions, for running the said Para Medical course. In all India, all the pathology laboratories are running on the basis of the said Diploma i.e. DMLT. All the pathologies are run by technicians having Diploma i.e. DMLT are having similar circumstances like the case of petitioner as no institute has any recognition from any body or Govt. or any institute, as it is not necessary to get any recognition because there are no rules & provisions in this respect. In the impugned order it is nowhere mentioned that the pathology lab has been closed on the ground of having no recognition. Petitioner is running her pathology lab under the guidance & supervision of expert Doctors i.e. Dr. A.S. Makheeja and Dr. Sadan Lal Yadav. The qualifications for Doctor Incharge were shown of Dr. B.M. Agrawal as M.B.B.S., D.C.P. The application mentions that facilities available with the Unit

are for tests of routine blood, urine and microscopic routine blood, blood sugar. Technician i.e. petitioner Smt. Kamla Patel is having M.A. DMLT.

8. A rejoinder has been filed by the petitioner on 25.9.2002 contending that the order dated 26.6.2002 has been recalled on 5.8.2002. In view of above development, there is nothing to contest in the petition. Therefore, suitable order may be passed. The order dated 5.8.2002 has also been placed on record passed by the CHMO, Jabalpur. On the basis of certificate P.2 dated 1.7.2002 submitted by Dr. B.M. Agrawal, temporary permission was accorded to run "Maruti Clinical Lab" and it was directed that only routine urine and blood sugar routine tests be performed under the guidance of a pathologist and no reporting be made by the petitioner.

9. Return has been filed by the respondents on 23.9.2002. In the return it is contended that the petitioner who is holder of diploma in Medical Laboratory Technology from the Institute of technical Medical and Career Making Education, Bombay, Maharashtra has no power or authority under the provisions of law to establish or run the pathology lab. The pathology is a branch of modern scientific medicine and the course of study as well as the conferral of degree in this branch is made by rcognized university after due recognition of the degree or diploma in pathology is recognized under the Indian Medical Council Act, 1956. It is also contended that the M.P. Ayurvigyan Parishad Adhiniyam defines "medicine" as a branch of modern scientific medicine and defines "recognized medical qualification" to mean those included in the Schedule to the Indian Medical Council Act, 1956 and any of the qualification specified in the Schedule to the Act. Section 21 of the M.P. Ayurvigyan parishad lays down that no person can practice or hold himself out whether directly or indirectly as practicing medicine within the State. The issue of unqualified persons running the pathology lab. Came up before the M.P. medical Council constituted under the provisions of M.P. Ayruvigyan Parishad Adhiniyam and on query being raised by the Indian Medical Association Indore Branch the council has clearly specified that only those persons can be termed as qualified pathologist who posses a duly recognized degree/diploma in pathology and duly registered with the M.P. Medical Council Bhopal under section 13 of the M.P. Ayurvigyan Parishad Adhiniyam. The council has also informed that persons holding any other degree for example M.Sc. Micro biology and bio chemistry cannot run pathology lab. The council has further clarified that no migrated doctor can practice in the State of M.P. unless and until he gets himself registered with the M.P. Medical Council Bhopal. The council has specifically stated that diploma in medical lab. Technology is the qualification of lab. Technician and therefor such person cannot practice as pathologist and run clinical pathology lab. Letter (R.1) was issued by the M.P. Medical Council on 27.4.2001. Another letter R. 2 was issued on 6.12.2000. On receiving several complaints regarding the illegal functioning of the Maruti pathology lab. By the petitioner who is only a lab technician the premises was

inspected by the Chief Medical and Health Officer, Jabalpur on 29.6.2002 and it was found that the lab was being run by the petitioner who is only a lab technician and there was no qualified doctor pathologist in the lab. It was also stated by the petitioner that one Dr. Makheeja who was attached to her lab, was not attending the lab since last one and half months. On the said basis the impugned order (P.5) dated 29.6.2002 was issued. Subsequently the petitioner has produced a certificate of Dr. B.M. Agrawal, resident of Jabalpur who has certified that the petitioner is working under his 'superivision' at Maruti Lab. Petitioner's husband is working as Lab Technician in Government Hospital at Panagar. Petitioner is student of Arts and has procured DMLT certificate. The facts speak for themselves. Petitioner is habitual of using intimidatory tactics. In view of the certificate issued by Dr. B.M. Agrawal the order (P.5) dated 29.6.02 has been recalled as per order (R.4) dated 5.8.2002.

10. Considering the various documents on record, correspondence and the order passed u/s 133 Cr. P.C. and various important questions involved with respect to the running of pathological laboratory, this Court has declined the prayer made by the petitioner not to pursue the writ petition in view of order (R.4) which is illegal as discussed hereafter passed by respondent no.3, as that has been passed during the pendency of the writ petition and time was taken time & again to produce the relevant Rules by the petitioner, however, as petitioner failed to produce the relevant Rules, direction was given to the CHMO to be kept present to explain the position about running of pathology labs.

11. An application for intervention has also been filed by the Intervenors Dr. P.G. Najpande and Shri Sarvesh Mishra. The same was filed on 3.10.2002. Intervention application was allowed by this Court on 7.10.2002 considering the serious allegations meted out and importance of question involved. The tests reports issued by the pathology centre run by Smt. Kamla Patel have been placed on record in which there is no mention of any qualified pathologist. The Intervenors contended that the signature made below the reports for pathologist and technologist are the same signatures which are being made by the same and one person. Even on the reports of this particular laboratory there is no mention of qualified pathologist. It is further contended that husband of the petitioner Shri Sharda Prasad Patel is working as Laboratory Technician in the Govt. hospital, Panagar. He is misusing his position at hospital, and is sending the patients who are coming to the hospital for investigation to the Laboratory run by his wife and carrying out various pathological tests. In this way they are earning illegal huge amount from the poor patients who are coming to the Govt. Hospital to receive treatment free of charge. It is further contended that in Jabalpur city there are more than '40' such Laboratories which are being run by the persons who are not qualified as pathologist. Letter of the Collector, Jabalpur, addressed to the CHMO dated 6.6.2002 has also been placed on record by the

Intervenors requiring CHMO to take action against illegally run pathology centers and it was directed that the pathology centre which was illegally run by petitioner be stopped and CHMO was required to explain why he had not taken any action into the several irregularities at Health Center, Panagar. Thereafter the order (P.5) was passed by the CHMO which has been impugned in the instant writ petition. Intervenor has also filed objections before the Block Medical Officer regarding the running of pathology lab in illegal manner.

12. Reply has been filed by the petitioner to the application for Intervention. It is contended that the allegations have no relevance. There is no bar that wife of Technician cannot run such type of lab if she is eligible for running the same. Petitioner can legally run the pathology lab under the supervision of a doctor in accordance with the permission. The intention of the intervenor is to harass the petitioner and is an exploitative device. The husband of the petitioner is not helping her in running the laboratory.

13. The Intervenor in the reply contends that Dr. B.M. Agrawal although has given the certificate that Smt. Kamla Patel is working as lab technician under his guidance and supervision at Maruti Clinical Lab at Panagar. The order issued by the respondents on 5.8.2002 is not justified since Dr. B.M. Agrawal never attends Maruti Clinical Lab. The respondents in this particular case should have made the verification, whether Dr. B.M. Agrawal is attending this particular laboratory before issuing the order (R.4) dated 5.8.2002. Dr. A.S. Makheeja never attended this lab and only then the impugned order (P.5) was issued on 29.6.2002. The affidavits of two residents of Panagar have been filed showing that Dr. Agrawal or any other Doctor are not attending the Maruti Lab for Pathological investigation. Affidavit of Shri Shyam Tiwari has been filed who has deposed that he resides infront of the laboratory and no Doctor makes the visit. Tests are performed by Smt. Kamla Patel and she gives the results. Sharda Patel used to sit throughout day in the laboratory. To the same effect affidavit has been filed by Shri Vijay Yadav.

14. Further affidavit has been filed by the petitioner Smt. Kamla Patel to the effect that Shyam Tiwari is having ill will with her husband and Shyam Tiwari had lodged the report on 15.2.2002. The affidavit of Shri Vijay Yadav is also false as he did not complete the work under the agreement entered into on 10.12.2001 between the petitioner and Shri Vijay Yadav. Notice was also issued. There is no ring of truth in the affidavit filed.

15. Additional documents have been filed by the Intervenor on 31.10.2002 in which letter of Dr. Anil Grover dated 24.10.2002 addressed to Dr. B.M. Agrawal has been placed on record. Intervenor contends that Dr. B.M. Agrawal is working as a full time pathologist in Grover Pathology Lab, Shyam Talkies, Jabalpur from June, 2002. As such it is not possible for Dr. B.M.Agrawal to work as pathologist in

Maruti Pathology Lab at Panagar on the same day in person, since Panagar is 14 K.M. away from Jabalpur. Dr. Anil Grover submitted this information of working of Dr. B.M. Agrawal in Grover Pathology as pathologist to the C.H.M.O., Jabalpur.

16. Considering the factual disputes and various other circumstances, this Court thought it apposite to record the statements of petitioner Smt. Kamla Patel, Dr. B.M. Agrawal and that of Chief Medical and Health Officer, Dr. A.H. Khan.

17. Smt. Kamla Patel was examined by this Court on 26.11.2002 and stated that :

> "In my Laboratory urine and blood tests are performed. ESR, HB, TLC, Total count & differential count, malaria parasite test and Widal test are performed in my laboratory. SGOT and SGPT tests are also performed. Report dated 21.4.2002 is relating to enzymes and is from my laboratory. Every day I am preparing 2-3 reports. 70-80 reports are prepared in a month. I charge for haemoglobin report Rs. 30/-. My maximum charge for the report is Rs. 30/-. I am saving for myself sum of Rs.2-3,000/- every month. I am incurring an expenditure of about Rs. 2,000/- every month. I am paying maximum of Rs. 2,000/-. Sometimes it happens only Rs. 1,000-1,500/- are saved. Accordingly we have to apportion the amount between myself and Doctor. We also have to pay to the servant and rent also. Doctor is not regularly sitting with us. He makes the visit only after one or two days. Doctor is not visiting the laboratory regularly."

18. Dr. B.M. Agrawal was also examined on 26.11.2002. Statement is to following effect :

> "Dr. B.M. Agrawal states that he is working in the Laboratory concerned w.e.f. 1st July, 2002. He is residing at 229, Jai Nagar Garha Road, Jabalpur. He is not regularly attending the laboratory. Whenever the reports are to be made he makes the visit twice or thrice in a week. He remains in laboratory only for one or two hours on his visits. It is not that I am singing the report in my house. Technician performs the test not I. One third share I obtain. I am obtaining Rs. 2-3,000/- every month. My singnatures are not there on the report filed as Annexure IA-2. In blood test total differential count is included. Haemoglobin count is also counted. Widal test is also performed in the laboratory. Blood grouping tests are also performed in the laboratory. I see the slides and then I make the report. I receive the amount by cash. I cannot say how much amount I have obtained in the last month. Rs. 2-3,000/- is average

amount. When C.M.O. allowed and gave the permission thereafter only I have started attending to the Laboratory. After seeing the document dated 5.8.2002 states; I started working in the laboratory after this permission. Earlier I was not attending to it. I have received a copy of this permission. On the date of furnishing the certificate P. 2 on 1.7.2002 petitioner 'Kamla Patel' was not working under my guidance and supervision. Only on my visit to the laboratory I have mentioned in the certificate that Kamla Patel is working as lab Technician under my guidance and supervision at Maruti Pathology Laboratory at Panagar, Jabalpur and as a matter of fact she was not working under my guidance and supervision as on that date.

Question : Is it correct to suggest that you have given the false certificate ?

Answer : I have given the certificate.

On 29.6.2002 the date of application I was not working in the laboratory."

19. The Statement of Dr. A.H. Khan, CHMO was recorded on 3.12.2002. Dr. A.H. Khan has stated that :

" I visited Panagar laboratory in question and found that it was illegally run, hence I ordered its closure on 29.6.2002. On 5.8.2002 I granted permission on the basis of letter dated 1.7.2002. After 29..6.2002, I did not visit the laboratory in question to verify whether Dr. B.M. Agarwal was actually working in laboratory as mentioned by him in his certificate dated 1.7.2002. I did not verify this fact personally whether Smt. Kamla Patel was functioning under the supervision of Dr. B.M. Agarwal. I cannot say how many laboratories are functioning in Jabalpur and I cannot say as to whether they are working under the Pathologist as I have not verified. I have not made any visit to any laboratory at Jabalpur so as to verify whether they are actually working under the supervision of Pathologist. I without actual verification relied upon the letter of Dr. Agarwal dated 1.7.2002. In four weeks time, I can submit a report to this Court on actual verification of the laboratories verifying whether they are working under supervision of Pathologist. The actual reading has to be done of the reports by an MD/DCP Pathologist who is registered with the Medical Council of M.P. can give such reports."

20. Shri Rajendra Tiwari, learned Senior counsel with Shri V. Tiwari, appearing for the petitioner, has contended that petitioner is having the right to run the laboratory

as she is possessing the qualification of master of Arts & DMLT and she is working under the supervision of Dr. B.M. Agrawal. Though Doctor may be visiting the laboratory as & when required, it is not necessary that the laboratory should be owned by Pathologist, the same can be established by Technician who is duly qualified and Doctor can supervise the laboratory and the tests can be performed under the supervision of qualified pathologist and qualified pathologist gives the report on personal verification of the tests performed. There is nothing on record to show that petitioner is not possessing the requisite qualification for running of such laboratory within the State of M.P. No permission from any of the authority is necessary. Petitioner has attended the classes run in 'Janki Raman College', Jabalpur and appeared in 'examination' in 'Mumbai and used to go to Mumbai on sunday for attending the practical. There is nothing on record to show that the State Govt.'s permission is required. The trust in question which imparated education of DMLT is registered under Mumbai Public Trust Act, 1950. There is no violation of the order passed under section 133 Cr. P.C. Dr. B.M. Agrawal is working in the pathological laboratory. Thus, the impugned order (P.5) has been rightly recalled by the CHMO as per order (R.4) dated 5.8.2002. Learned Sr. counsel for the petitioner further submitted in the programme of the State relating to Tubectomy operation, LTT/CTT operation Female Sterilisation Programme report is obtained from laboratory technician and he has placed printed proforma for consideration.

21. Ms. Seema Agrawal, learned counsel appearing for the respondent/State has placed reliance on the letters issued by the M.P. Medical Council on 27.4.2001 and 6.12.2002. Letter R.2 dated 6.12.2002 indicates that only the person possessing M.D. in pathology or Diploma in clinical pathology (DCP), can run the pathology lab and can only give the report and is authorised to give the report. The qualifications are required to be registered u/Ss 13 and 24 of the M.P. Ayurvigyan Parishad Adhiniyam, 1987 (hereinafter referred to as' the Adhiniyam') and no person can run pathological laboratory on the basis of diploma and can only work as technician in an established laboratory. Such qualification has to be obtained from authorised institute. Laboratory technician can not run the pathology lab independently and can work as lab technician in the laboratory. Learned counsel for the respondents has also referred to the letter dated 27.4.2001 which shows that no person can run pathological laboratory independently merely on the basis of the academic qualification of M.Sc. (Microbiology & Biochemistry). To work as a qualified pathologist, the person must possess the Medical qualifications; degree/diploma, M.D. Pathology or D.C.P. (Diploma in Clinical Pathology) and person must be duly registered with the M.P. Medical Council, Bhopal u/s 13 of the Adhiniyam. No migrant Doctor can practise in the State of Madhya Pradesh only on the basis of their medical registration certificate issued by their parent states. DMLS (Diploma in Medical Laboratory Sciences) and DMLT (Diploma in Medical Laboratory

Technology) are only the Lab Technician qualifications in case if such diplomas are awarded by a recognised institutions. The person possessing DMLS and DMLT, diploma cannot practise as a Pathologist and run a clinical pathology laboratory independently in the State.

22. Intervenor Shri. P.G. Najpande submits that Lab Technician has no right to run the pathological laboratory. Petitioner alleges to have obtained diploma by attending the classes in Janki Raman College, Jabalpur. The said para Medical course in not recognised and it is improbable that theory classes were attended at Jabalpur and for practical every sunday petitioner used to go to Mumbai and the examination was conducted at Mumbai. In the petitioner's laboratory various tests are performed such as enzymes, SGOT/SGPT which are sensitive in nature of tests. They are not performing routine urine and blood sugar only. Widal test is also performed and several other tests for which laboratory in question is not equipped. As a matter of fact CHMO has granted the permission without verifying and as admitted by Dr. B.M. Agrawal that he was not working on the date; he gave the certificate P.2. Thus, the permission has been obtained on certificate which is false. Thus, the order R.4. is bad in law. He has further submitted that within the State of M.P. no such courses can be conducted within the framework of law. Same is not recognized qualification under the 'Adhiniyam. The CHMO has failed to discharge the duty and to check the illegally running of the laboratories which are hazardous and creating havoc to the human life and health. If the reports are given by non-qualified person 'quacks' the human life is endangered and order (R.4) passed during the pendency of writ petition is bad in law and shows lack of application of mind. He has further submitted that only pathologist can run the laboratory and pathologist must run it on full time basis and technician can work in such laboratories not *vice versa.*

23. Various questions arise for consideration in the instant writ petition. Question for consideration is whether petitioner being laboratory technician has a right to run pathology laboratory and whether petitioner is having the recognized qualification of DMLT to work in the pathological laboratory. Whether the order (R.4) passed by the CHMO is valid. Whether the Institute for continuing Medical and Career Making Education can run the college for DMLT course at Jabalpur which is a trust under Mumbai Public Trust Act. What are the parameters to be observed while giving permission for running the pathological laboratories and to ensure that they are run in accordance with law.

24. The case of the petitioner is that the order P.5 dated 29.6.2002 passed by the CHMO be quashed for the reasons that petitioner is running the pathological laboratory under the guidance & supervision of Dr. B.M. Agrawal who has given the certificate P.2 on 1.7.2002. In para 5.1 it is mentioned that petitioner started the laboratory under guidance of Senior Doctor who is M.B.B.S. and retired pathologist

and in para 5.3 it has been wrongly mentioned that she is 'running' pathological laboratory under guidance of senior most Doctor and Pathologist Dr. A.S. Makheeja as evinced from report P.4. Dr. B.M. Agrawal has been examined in this Court on 26.11.2002. Though he has stated that he is working in the laboratory w.e.f. Ist July, 2002, however, he admitted that he is not regularly attending the laboratory. He makes the visit twice or thrice in a week. He remains in the laboratory only for one or two hours on his visits. Technician performs the tests not he. He has further stated that when CHMO allowed and gave the permission thereafter only he has started attending to the laboratory. After seeing the document R. 4 dated 5.8.2002 he stated that he started working in the laboratory after this permission. Earlier he was not attending the laboratory. He has received a copy of this permission. On the date of furnishing the certificate P.2 dated 1.7.2002 petitioner Smt. Kamla Patel was not working under his guidance and supervision. Only on his visits to the laboratory he has mentioned in the certificate that Kamla Patel is working as Lab Technician under his guidance & supervision at Maruti Pathology Laboratory at Panagar, Jabalpur and as a matter of fact she was not working under his guidance & supervision as on that date. It is clear from the statement made by Dr. B.M. Agrawal that he has given false certificate to the CHMO and CHMO has acted on the basis of the said certificate without actually verifying the fact whether Dr. B.M. Agrawal is working in the laboratory in question and whether Smt. Kamla Patel was working under his guidance and supervision.

25. Dr. A.H. Khan, Chief Medical & Health Officer stated before this Court on 3.12.2002 that when he visited Panagar laboratory in question, he found that it was illegally run, hence, he ordered its closure on 29.6.2002. On 5.8.2002 he granted permission on the basis of letter P.2 dated 1.7.2002. After 29.6.2002 he did not visit the laboratory in question to verify whether Dr. B.M. Agrawal was actually working in laboratory as mentioned by him in his certificate dated 1.7.2002. He did not verify this fact personally whether Smt. Kamla Patel was functioning under the supervision of Dr. B.M. Agrawal. He could not say how many laboratories are functioning in Jabalpur and as to whether they are working under the pathologist as he has not verified the said fact. He stated that without actual verification he relied upon the letter of Dr. B.M. Agrawal dated 1.7.2002. He further stated that he can make verification of the various laboratories at Jabalpur and submit the report in four weeks whether they are working under supervision of pathologist. The actual reading has to be done by pathologist and pathologist can give the reports. Smt. Kamal Patel stated before this Court on 26.11.2002 that Doctor is not regularly sitting with her. He makes the visit only after one or to days. Doctor is not visiting the laboratory regularly. Every day she is preparing 2-3 reports. 70-80 reports are prepared in a month. Thus, it is established beyond pale of doubt that petitioner has obtained the permission R.4 on the basis of false documents P.2 which is a certificate granted by Dr. B.M. Agrawal on. 1.7.2002 to the effect that he was working in the

said laboratory though he was not actually working in the laboratory, in the application filed by the petitioner to the CHMO it was wrongly mentioned that Dr. B.M. Agrawal was working in the pathological laboratory. CHMO did not verify the fact and acted upon the false certificate P.2. Thus, the permission granted as per order R.4 on 5.8.2002 is *ex-facie*, illegal and is based on inexistent fact.

26. For yet another reason the order R.4 passed on 5.8.2002 by CHMO, Jabalpur is bad in law as the order sheet dated 19.4.1999 in the proceedings u/s 133 Cr. P.C. indicates that petitioner had filed the certificate of diploma obtained by her from Institute for Continuing Medical and Career Making Education (ICME) of DMLT. She has stated before the S.D.M. that she obtained the diploma training from Janki Raman College, Jabalpur and appeared in examination in Mumbai. She used to go to Mumbai 'every sunday' S.D.M. has written a letter to the CHMO regarding the validity of said diploma. The order-shet dated 24.4.1999 of the SDM Court in proceedings u/s 133 Cr. P.C. collectively (P.3) filed by the petitioner indicates that CHMO has opined that petitioner could not run the pathological laboratory at her own and could work only with the qualified pathologist and with respect to the qualification of diploma in question CHMO was making correspondence with the State Govt. The CHMO has ignored and overlooked the material fact recorded in the order-sheet P.3 dated 19.4.99 and 24.4.99 that whether the petitioner could obtain the diploma from ICME which is run by Public Trust of Mumbai in the method & manner suggested and whether petitioner could obtain the training at Jabalpur in Janki Raman College, Jabalpur and without even caring for obtaining the report from the State Govt. whether such qualification possessed by petitioner is recognized one or not, has issued the order (R.4) on 5.8.2002 that too during the pendency of this petition, when this Court was already in seisin of the matter. The fact whether petitioner is having recognized diploma ought to have been ascertained by CHMO before allowing the petitioner to run the pathological laboratory. Thus, CHMO has failed in discharge of the duty in proper manner.

27. Madhya Pradesh Sah Chikitsiy Parishad Adhiniyam, 2000 (hereinafter referred to as 'the Act of 2000') has been framed by the State of M.P. which is an Act to provide for establishment of Para Medical Council in the State and to regulate the practice by Para Medical practitioners and paramedical education. "Paramedical" is defined under section 2 (b) (i) of the Act. "Paramedical" means any personnel qualified in paramedical subject and who helps in teaching or practice of medicine within the meaning of clause (i) of section 2 of the Indian Medical Council Act, 1956 with which we are concerned in the instant case. Section 2(c) defines "Paramedical subject" to mean the subject mentioned in the Schedule. Schedule as mentioned in 2(c) provides for 'laboratory technicians' (various types) and other technicians required for other works are also mentioned. In all there are 31 entries, Laboratory Technician (various types) of Item no. 4 with which we are concerned

in the instant case as pathological laboratory technician is covered by Item no. 4 of the Schedule. "Recognised paramedical qualification" is defined u/s 2(d) of the Act to mean a degree, diploma or certificate in any paramedical subject, granted by any University established by law or any other institution recognised by the State Government in this behalf. It is not shown that ICME is a recognised institute and Govt. has authorised ICME registered under Mumbai Public Trust Act to run the classes in Janki Raman College, Jabalpur and in any case said institute is not shown to be recognised by the State Govt. It is not shown that ICME was allowed to run the course at Jabalpur in Janki Raman College and moreover is not shown to be an institute recognised one. Section 2(d) of the Act of 2000 is quoted below :

> "2(d) "Recognised paramedical qualification" means a degree, diploma or certificate in any paramedical subject, granted by any University established by law or any other institution recognised by the State Government in this behalf."

28. Section 26 of the Act of 2000 deals with the Recognition of paramedical qualification granted by University or Paramedical Institution in India. Section 26 of the Act is quoted below :

> "26. Recognition of paramedical qualification granted by University or Paramedical Institution in India.
>
> The paramedical qualifications granted by Indian Medical Institutions, which are included in the Schedules to the Medical Council Act, 1956 shall be recognised paramedical qualifications for the purpose of this Act."

29. 'ICME' is not mentioned in the Schedule to the Medical Council Act, 1956. Thus, it cannot be said that qualifications obtained from ICME is to be treated as recognised qualification for the purpose of the Act of 2000. Section 26 provides for recognition of paramedical qualification outside India shall be recognised in that case where there is a scheme of reciprocity. Section 28 of the Act deals with the Recognition of Paramedical qualification granted by certain Paramedical institutions whose qualification are not included in the Schedule. Any paramedical institution in India, which desires a paramedical qualification granted by it, to be included in the Schedule, may apply to the State Government with such application fee as may be fixed by regulation to have such qualification recognised and the State Government, after consulting the council, may by notification in the Official Gazette, amend the Schedule as to include such qualification therein, and any such notification may also direct that an entry shall be made in the last column of Schedule against such paramedical qualification declaring that it shall be recognised paramedical qualification only when granted after a specified date. Section 29 of the Act deals with Power to

require information as to courses of study and examinations. Every University or Paramedical Institution in India which grants a recognised paramedical qualification, shall furnish such information as the Council, may, from time to time require as to the courses of study and examinations to be undergone in order to obtain such qualification, as to the ages at which such courses of study and examinations are required to be undergone and such qualifications conferred and generally as to the requisites for obtaining such qualification. Section 30 of the Act requires Inspection of Paramedical Institution. The Council shall cause all paramedical Institution to be inspected as and when deemed necessary. Section 31 of the Act deals with withdrawal of recognition. Section 32 of the Act provides for Minimum standards of Paramedical Education. It is not shown that the qualification is recognised one under the Act nor is included as recognised qualification u/s 28 of the Act. Thus, in my opinion, petitioner is not having the right to run the pathological laboratory in view of the provisions of the said Act as qualification is not shown to be recognised under the said Act.

30. It is extremely doubtful that petitioner has obtained any instructions of diploma training run by ICME, Mumbai, registered under Mumbai Public Trust Act, 1950 with the Govt. of Maharashtra. On facts it is unblievable that petitioner used to go on every sunday to Mumbai for the practical classes and theory class was attended by her at Janki Raman College, Jabalpur. Firstly, duty was cast upon the CHMO to ascertain whether ICME which is trust registered under Mumbai Public Trust Act is recognized by the State Govt. and qualification of DMLT granted by ICME even for laboratory technician is recognized by State of M.P. or not. This fact has not been ascertained by the CHMO. M.P. Medical Council in its letter dated 27.4.2001 filed along with letter R.1 has clearly mentioned that diploma in Medical Laboratory Sciences, DMLS and diploma in Medical Laboratory Technology, DMLT are only the laboratory technicians qualifications in case if such diplomas are awarded by a 'recognized' institute. It was clearly mentioned in the letter that person possessing DMLS and DMLT diploma 'cannot practise as pathologist' and 'run' a clinical pathology laboratory 'independently' in the State. Another letter R. 2 of M.P. Medical Council dated 6.12.2000 makes it clear that only 'pathologists' who are possessing M.D. / Diploma in clinical pathology can 'run' pathological laboratory and are 'authorised' to give the reports and they should be 'registered' u/s 13 and 24 of the Adhiniyam. It was further made clear that on the basis of diploma DMLT possessed by person an incumbent, pathological laboratory cannot be run. They can 'work' as technician in an 'established laboratory'. They cannot run the pathological laboratory independently and can only work as laboratory technicians. There is nothing on record to show that CHMO made any endeavour to see that petitioner possesses the recognized qualification nor CHMO made any endeavour to ascertain whether petitioner can run the laboratory.

31. Integrally connected with the above question is whether a laboratory can be allowed to be run by laboratory technician and pathologist may be allowed to make the visit twice or thrice in week and to sign the reports. The tests being performed by laboratory technician without his supervision in my opinion R.2 dated 6.12.2000 of M.P. Medical Council in para 3 mentions that on the basis of diploma of laboratory technician pathological laboratory cannot be run and such technicians can work in an established laboratory. Even of a technician is possessing the recognized qualification, such technicians cannot run the pathological laboratory independently and can only work laboratory technician. In the instant case, it clearly emerges from the facts that laboratory is being run Smt. Kamla Patel who is not shown to be possessing recognised diploma qualification and so called Doctor B.M. Agrawal makes visit for one or two hours after one or two days i.e. twice or thrice in a week though claim itself is doubtful. Such laboratories cannot be said to be 'run by pathologist' but 'run' by laboratory technician for all the purposes and, in opinion, in order to weed out quakes it is necessary to draw a line between a laboratory run by pathologist and run by technician. The pathologist must attend the laboratory regularly and should perform the reading and should get the tests performed under his supervision and only thereafter can sign the reports. Same is necessary to weed out the quackery from the field of pathological laboratories. The laboratories which are not being run by pathologist, cannot be, in my opinion, allowed to run by State. Pathologist should run the laboratory on regular basis and must have the deep and real interest in running of the laboratory. There is ring of truth around the allegation made by the Intervenor that Dr. B.M. Agrawal is not attending to the laboratory in question and had given the false certificate P.2. Panagar is located at 14 K.M. away from Jabalpur and Dr. B.M. Agrawal was working in another pathological laboratory at Jabalpur. Dr. B.M. Agrawal was working under Dr. Anil Grover who has objected to Dr. B.M. Agrawal on issuing the certificate (P.2) which was issued by Dr. B.M. Agrawal which on the basis of tacit admission made by Dr. B.M. Agrawal is shown to be false. Dr. B.M. Agrawal mentioned in the certificate P.2 that Smt. Kamla Patel is working as lab technician under my 'guidance and supervision' at "Maruti Pathology" Laboratory" Panagar at Jabalpur. This certificate was given on 1.7.2002. She was not at all working under his guidance and supervision. It is also extremely doubtful that Dr. B.M. Agrawal is making the visits after one or two days as claimed by him in the instant case. In any case such laboratories in which pathologist is not on regular basis, cannot be allowed to run at all. There are serious complaints of wrong analysis reports all around by pathological laboratories and the fact is writ large as submitted by CHMO that he has not verified whether Dr. B.M. Agrawal is working and whether the pathological laboratories at Jabalpur are being run by the technicians or by Pathologists. Situation is grim and if the laboratories which are not run by pathologists are allowed to dispense with, perform tests without being equipped as to give the various reports relating to the sensitive

tests which is so vital for human health and follow up treatment may jeopardize health and is hazardous to the diagnosis and curative therapy.

32. M.P. Ayurvigyan Parishad Adhiniyam, 1987 prescribed a qualification for pathologist and registration under Section 13 and 24. Same is required to be observed. When requirement is for a pathologist to supervise the tests making the reading and then give the reports technician can be allowed to render the help in performing the tests not beyond that and cannot be allowed to run the laboratory independently: for drawing distinction and draw a line between the pathology run by pathologist and pathological laboratory run by technician, in my opinion, as discussed above, there should be a regular pathologist in the laboratory available at the time when tests are performed, reading is done and reports prepared which is absolutely missing in the instant case.

33. Yet another disturbing feature which is reflected in the order-sheet P.3 dated 19.4.99 of the S.D.M. which was filed in the proceedings instituted against the petitioner u/s 133 Cr. P.C. The stand of the petitioner was that ICME run the course in the premises of Janki Raman College, Jabalpur. The claim appears to be doubtful and enquiry is directed to be made and whether training can be imparted by ICME at Jabalpur in Janki Raman College and under what authority within the framework of law. If the institution is not recognised by the State Govt., can it run the course in State of M.P. Let this enquiry be conducted by the Council constituted under the Act of 2000 and Council constituted under the Act to take remedial measures against such institutes. It is also the duty of State to ensure that only recognised institutes impart training.

34. Perusal of order (R.4) dated 5.8.2002 indicates that petitioner was allowed to do routine urine and blood sugar tests considering the facilities available in the laboratory, however, in the laboratory widal test, SGPT, SGOT and enzymes tests are also performed as admitted by Smt. Kamla Patel for which she has no authority. Such tests cannot be said to be routine tests and require sensitive handling.

35. Another important facet is safeguards to be observed while granting permission to run pathology lab and whether it can be limited to the kinds of test which can be performed in laboratory. Intervenor contended that Maruti Pathological Laboratory is being illegally run and it has no proper equipments/permission for performing sensitive tests which it is performing. Thus, the running of laboratory is hazardous to the human life and was rightly set at naught in proceedings u/s 133 Cr. P.C. Thereafter permission has been illegally accorded after closing it down as per order (P.5) on 29.6.2002 on actual verification of the spot and thereafter without caring for actual verification and visit, permission was granted on the false certificate (P.2) is apparent. CHMO ought not to have dealt with the matter so lightly and cursorily as has been done in the instant case, particularly when matter is concerned

with the health and any laxity may be hazardous and running of illegal pathological laboratories which are unequipped and not properly manned are serious risk to the human health, treatment and life itself. When it was found by the S.D.M. that pathological laboratory was running illegally and certain correspondence was pending with the State Govt. to ascertain that qualification of petitioner is recognised. CHMO ought not to have acted in undue haste. CHMO took the action of closure on 29.9.2002 only after he was asked to do so by the Collector, Jabalpur as per letter dated 6.6.2002. CHMO is expected not go grant permission in mechanical manner; duty is cast on the CHMO to safeguard the health and lives of general public and also to supervise that the laboratories which are run are having proper equipments for the kind of tests, they are performing. In case laboratories are not equipped with the proper instruments for performing the kind of test, they are performing. CHMO cannot grant the permission for performance of such tests in the pathological laboratories and has to restrict functioning. Thus, it is imperative that CHMO must mention in each of the permission that laboratory in question is equipped for which kind of test which are performed and in laboratory only such tests can be performed for which it is equipped and allowed. Thus, the duty is enjoined upon the CHMO not to grant the blanket permission but the permission for the kind of test for which laboratory is equipped instrumentwise and only in case the same is having services of regular qualified pathologist within the framework of the Adhiniyam of 1987 and if any technician working as technician within the framework of law prescribed in the Act of 2000. The reasonable restrictions on the right to practise of pathological laboratories are envisaged under the said Adhiniyam and Act and petitioner cannot complain that any unreasonable restriction will be put by not allowing technician to run pathology lab when the pathology is not being run by pathologist. The laboratory technician who is not qualified one, cannot work as technician in a laboratory. The right to run the laboratories is not unfettered and has to be in tune with the right to life itself of human which jeopardized on furnishing of wrong report. Laboratory cannot be allowed to be run by unqualified person who is not a pathologist. Laboratory technician can 'work' in an 'established laboratory' which is to be run by pathologist no *vice versa.*

36. Right to carrying occupation trade or business under Article 19(1) (g) of the Constitution of India is not unfettered and is subjected to the restrictions imposed under the Adhiniyam and Act. There is duty cast on the State to see that improvement of public health takes place. Right to have the proper report for treatment of the ailments is implicit in the right to life itself which is enshrined under Article 21 of the Constitution of India and cannot be allowed to be dealt with arbitrarily.

37. It appears from the statement of CHMO that state of affairs with respect to running of pathological laboratory is not happy. CHMO has stated that he cannot say how many laboratories are functioning in Jabalpur and cannot say whether they

are working under pathologist as he has not verified. He has not made any visit to any laboratory at Jabalpur so as to verify whether they are working under supervision of pathologist and he granted the permission in question without verification. It is high time when directions are issued to the State authorities and CHMO to ensure that running of unequipped and illegally run pathological laboratories is put to halt forthwith; all the laboratories are checked.

38. The following directions are issued :

1. That pathology labs are run by pathologist who is qualified under M.P. Ayurvigyan Parishad Adhiniyam, 1987 and fulfills the requirement of Sections 13 and 24 of the said Act.

2. No laboratory technician. is allowed to run the laboratory. Laboratory technician can only work in laboratory which is actually run by qualified pathologist.

3. Laboratory technician possesses the recognised qualification and has the right to do so under the M.P. Chiktisiy Parishad Adhiniyam. 2000.

4. The only those tests are allowed to be performed in the laboratories for which they are equipped; blanket permission to run the laboratory be not given.

5. There should be periodical inspection of the pathological laboratories to ensure that they are being properly run by pathologist and they are equipped, for the kind of tests they are performing and have the due permission for that:

6. Pathological laboratories in which pathologist is not working should be verified and functioning be stooped forthwith on inspection being made.

39. Let the report about the various pathological laboratories be furnished within a month the date of this decision before this Court. The State may take action and direct the verification of the laboratories in the terms mentioned above and to obtain the report. Secretary, Public Health and Family Welfare, is directed to ensure that pathological laboratories are run properly in the State and to ensure the compliance of the directions made in this order. CHMO, Jabalpur is also to make verifications of all laboratories in Jabalpur and submit report as directed.

40. The order R.4 dated 5.8.2002 is quashed. Let compliance reports on being filed be registered as MCC as and when the same is filed. Let copy of this order be also forwarded to the council under M.P. Sahchiktisiy Parishad Adhiniyam for taking action in terms of this order and also to look into the matter. Costs on parties.

I.L.R. [2007] M.P., 1105

WRIT PETITION

Before Mr. A.K.Patnaik, Chief Justice & Mr.Justice Ajit Singh

5 July, 2007

SMT. MAMTA SHAH Petitioner*

v.

STATE OF M.P. and others Respondents.

A. Explosives Act, Indian (IV of 1884), Section 7, Gas Cylinder Rules, 1994, Rule 71–Powers of inspection search, seizure, detention and removal–Rule 71 provides that any officer specified therein can exercise power specified in section 7(1)–All District Magistrates, Magistrates subordinate of District Magistrate directed to ensure that LPG Cylinders are not used in vehicles contrary to the provisions of Act and Rules made there under.

B. Explosives Act, Indian (IV of 1884), Section 6-B, 6-C– Licence for possession and sale of explosives or any specified class of explosive–Licensing Authority if deems necessary for the security of public peace or for public safety can suspend, refuse to renew or revoke license even if licenced depot is located beyond the distances mentioned in Rules and licence conditions–Public Safety is the overriding consideration for licensing authority and not distances–If licensing authority finds that location of LPG Cylinder Depot is too near a school so as to affect the safety of the school childern, he is empowered to refuse to renew, suspend or revoke the licence even though godowns are situated beyond the distances–Licensing Authority directed to apply his mind and decide LPG Cylinder Depot and godowns in respect of which licences have to be suspended, revoked or not renewed–Compliance report be filed within two months–Petition disposed of.

We find that the use and storage of LPG cylinders is regulated by the Explosives Act, 1884 (in short "the Act") and the Gas Cylinder Rules, 1994 made by the Central Government under Section 18 of the Act. We further find that extensive powers have been vested under Section 7 of the Act on officers to be specified by the Central Government in the Rules to be made under the Act. We also find that Rule 71 of the Gas Cylinder Rules, 2004 (for short "the Rules") provides that any of the officers specified therein can exercise the powers specified in sub-section (1) of Section 7 of the Act and all District Magistrate of their respective districts and all Magistrates, subordinate to District Magistrates, in their respective jurisdictions are empowered under Rule 71 of the Rules to exercise the powers under Section 7 of

*W. P. No.3591/2004. (J)

the Act. We accordingly direct that the District Magistrates of all the districts of the State of Madhya Pradesh as well as the Magistrates, subordinate to the District Magistrates in their respective jurisdiction, will exercise powers as conferred on them under Section 7 of the Act so as to ensure that LPG cylinders are not used in vehicles contrary to the provisions of the Act and the Rules made thereunder.

Section 6-C further provides that the licensing authority may, by order in writing, suspend a licence for such period or revoke a licence if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence [See Section 6-E (3)(b)]. Thus, even in a case where a licenced depot, in which LPG cylinders are kept, is located beyond the distances mentioned in the Rules and the licence conditions mentioned in the forms appended to the Rules the licensing authority, if he deems it necessary for public safety, refuse to renew the licence or to suspend or revoke the licence under the provisions of Sections 6-C and 6-E of the Act. In other words, public safety will be the overriding consideration for the licensing authority and not the distances, as mentioned in the Rules or the conditions of licence in the forms appended to the Rules.

Aditya Sanghi, for the petitioner. (Para 2 and 6)

Vivekanand Awasthy, Government Advocate for the respondent Nos. 1, 2 and 4

Jayant Neekhra, for the respondent No.3.

J.K.Pillai, for the respondent No.5.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :– The petitioner is a teacher of Management subjects. She has filed this writ petition under Article 226 of the Constitution of India as a Public Interest Litigation alleging that school vans and ambulances, run by private hospitals, are using LPG cylinders, which are meant to be used for domestic cooking and the godowns of LPG cylinders are situated near schools at different places in the State of Madhya Pradesh. She has stated in the writ petition that the authorities are not taking steps to check the use of LPG cylinders in motor vehicles and to ensure that the LPG godowns are situated at safe distances from the schools.

2. After hearing Mr. Aditya Sanghi, learned counsel for the petitioner, Mr.Jayant Neekhra for the Union of India, Mr. J.K. Pillai for the Indian Oil Corporation and Mr.Vivekanand Awasthy, learned Government Advocate for the State of Madhya Pradesh, we find that the use and storage of LPG cylinders is regulated by the Explosives Act, 1884 (in short "the Act") and the Gas Cylinder Rules, 1994 made

by the Central Government under Section 18 of the Act. We further find that extensive powers have been vested under Section 7 of the Act on officers to be specified by the Central Government in the Rules to be made under the Act. We also find that Rule 71 of the Gas Cylinder Rules, 2004 (for short "the Rules") provides that any of the officers specified therein can exercise the powers specified in sub-section (1) of Section 7 of the Act and all District Magistrate of their respective districts and all Magistrates, subordinate to District Magistrates, in their respective jurisdictions are empowered under Rule 71 of the Rules to exercise the powers under Section 7 of the Act. We accordingly direct that the District Magistrates of all the districts of the State of Madhya Pradesh as well as the Magistrates, subordinate to the District Magistrates in their respective jurisdiction, will exercise powers as conferred on them under Section 7 of the Act so as to ensure that LPG cylinders are not used in vehicles contrary to the provisions of the Act and the Rules made thereunder. Actions taken by the Magistrates subordinate to the District Magistrates, in this regard will be intimated to the District Magistrates of their districts and the District Magistrates of the districts will file affidavits of compliance both by them and their subordinate Magistrates within two months from the date of receipt of the copy of this order from the Registry of this Court.

3. On 16.11.2005, after hearing the learned counsel for the parties, we had directed that the District Magistrates in whose jurisdiction the cities of Jabalpur, Bhopal, Indore, Gwalior, Rewa, Sagar, Satna, Damoh, Katni, Hoshangabad, Khandwa and Chhatarpur are located, will file affidavits after making necessary enquiries about the location of LPG depots/godowns *vis-à-vis* the schools and pursuant to the said order, the aforesaid District Magistrates have filed their respective affidavits with annexures indicating therein the location of LPG depots/godowns *vis-à-vis* the schools.

4. Section 6-B of the Act provides for grant of licences under the rules made by the Central Government under Section 5 of the Act *inter alia* for possession and sale of explosives or any specified class of explosives. Section 6-C of the Act provides that, notwithstanding anything contained in Section 6-B, the licensing authority can refuse to grant a licence where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence [See Section 6-C (1)(c)]. Section 6-C further provides that the licensing authority may, by order in writing, suspend a licence for such period or revoke a licence if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence [See Section 6-E (3)(b)]. Thus, even in a case where a licenced depot, in which LPG cylinders are kept, is located beyond the distances mentioned in the Rules and the licence conditions mentioned in the forms appended to the Rules the licensing authority, if he deems it

necessary for public safety, refuse to renew the licence or to suspend or revoke the licence under the provisions of Sections 6-C and 6-E of the Act. In other words, public safety will be the overriding consideration for the licensing authority and not the distances, as mentioned in the Rules or the conditions of licence in the forms appended to the Rules. Therefore, if the licensing authority finds that the location of a LPG Cylinder Depot or Godown is too near a school so as to affect the safety of the school children, he is empowered to refuse to renew the licence or suspend or revoke the licence to such LPG Depots/Godowns, even though such Depots/ Godowns are located beyond the distances mentioned in the Rules and the conditions of licence in the forms appended to the Rules.

5. Since, the District Magistrates pursuant to directions of this Court have filed their affidavits along with annexures indicating therein the distances of LPG Cylinders Depots and Godowns from the schools, the Chief Controller of Explosives, Government of India, who is the licensing authority under the Rules, will now apply his mind to the affidavits and annexures to the affidavits filed by the District Magistrates and decide the LPG Cylinders Depots and Godowns in respect of which the licences have to be suspended, cancelled or not renewed. We accordingly direct the Registry of this Court to send a copy of this order and the copies of the affidavits with annexures filed by the District Magistrates to the Chief Controller of Explosives, Government of India to comply the aforesaid direction. It is needless to say that the Chief Controller of Explosives, Government of India, will follow the relevant provisions of the Act and the Rules while taking the decision.

6. The writ petition is disposed of with the aforesaid directions. The compliance report will be filed by the Chief Controller of Explosives, Government of India, as well as the District Magistrates, as directed, within two months from the receipt of the copy of the order of this Court and the affidavits with annexures from the Registry.

Certified copy as per rules.

Petition disposed of.

I.L.R. [2007] M.P., 1109

WRIT PETITION

Before Mr. A.K.Patnaik, Chief Justice & Mr.Justice Ajit Singh

6 July, 2007

MOHD. FAROOQ — Petitioner*

v.

MUNICIPAL CORPORATION, BHOPAL and anr. — Respondents.

Municipal Corporation Act, M.P. (XXIII of 1956), Sections 322,323,335,366, Constitution of India, Article 21–Installation of Gantries and Road Signages–Municipal Corporation adopted resolution to install gantries and road signages–Writ petition filed for direction not to erect gantries as advertisements placed on them may divert concentration of vehicle drivers consequently increasing road accident–Held–Advertisement has become a major source of revenue as it has assumed importance in commercial filed–Law does not prohibit Corporations to allow erection of gantries/road signages–However, advertisements on gantries which would be hazardous and disturbing safe traffic movement should not be permitted by Municipal Corporation.

Under Madhya Pradesh Municipal Corporation Act, 1956, Municipal Corporations have got sufficient powers to permit erections on roads. In M/s *Sagardeep Advertising Vs. Municipal Corporation, Jabalpur & Others* (supra), cited by Mr.Ravindra Shrivastava, a Division Bench of this Court has considered at length the provisions in the Municipal Corporation Act, 1956 particularly Sections 322, 323, 335 and 366 and has observed that the Corporation has the power to regulate advertisements but no statutory procedure or manner has been prescribed or framed to regulate them by the Jabalpur Municipal Corporation. The Division Bench has further observed in the said case that with the immense importance that advertisement has assumed in the commercial field, advertisements have become a major source of revenue and the Municipal Corporation cannot be prohibited or excluded from deriving benefits from the same. Thus, so long as the M.P. Municipal Corporation Act, 1956 or any other law does not prohibit the Municipal Corporations to allow erection of gantries/road signages and advertisements, the Court cannot restrain the Municipal Corporations from erecting gantries with signages and advertisements except for the purpose of ensuring that such gantries with road signages and advertisements do not affect the right to life guaranteed by Article 21 of the Constitution.

We are thus of the view that while road signages and advertisements on the gantries can be permitted, advertisements on the gantries which would be hazardous

*W. P. No.5958/2006 (DB)

and disturbing to the safe traffic movement and may cause road accidents should not be permitted by the Corporation, so as to ensure that the right to life of the people on the road guaranteed under Article 21 of the Constitution of India is to be protected. (Paras 11 & 13)

Cases Referred :

M.C.Mehta vs. Union of India and others; (1998) 1 SCC 363, *5 M & T Consultants, Secunderabad vs. S.Y. Nawab and another,* (2003) 8 SCC 100, *G.B.Mahajan vs. Jalgaon Municipal Council,* (1991) 3 SCC 91, *M/s Sagardeep Advertising vs. Municipal Corporation, Jabalpur & others,* I.L.R. 2007 M.P. 450, *P.Narayana Bhat vs. State of T.N. and others,* (2001) 4 SCC 554,

Girish Shrivastava with *Vijay Raghavsingh,* for the petitioner.

Ravindra Shrivastava, with Mr. Shekhar Sharma, and Mr.Prem Francis, for the respondent Nos.1 and 2.

A.M.Mathur, with *Aditya Sanghi,* for the intervener.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice** :– The petitioner is a resident of Bhopal and has filed this writ petition as Public Interest Litigation. He has stated in the writ petition that the Municipal Corporation, Bhopal, respondent no.1, has adopted a resolution to install 50 gantries and 200-road signages at different locations in the city of Bhopal. He has further stated that these gantries and road signages are to be installed by private agencies, which will be allowed to place advertisements on such gantries. The petitioner apprehends that such advertisements placed on the gantries will divert the concentration of the vehicle drivers while driving and consequently will cause road accidents. The petitioner has accordingly prayed for a direction to the respondents not to erect such gantries either directly or through any private advertising agencies.

2. On 2.5.2006, the Court while issuing notice in the writ petition passed an interim order that in the meanwhile, the respondents shall ensure that no reception gate (gantry) for the purpose of advertisement will be erected on the main roads. Thereafter, M/s Shreenathjee Infrastructure Investments filed I.A. No. 3749/2006 to intervene in the writ petition and also filed I.A. No. 3750/2006 for vacating the interim order. On 18.5.2006, the Court passed orders allowing the application for intervention of the intervener and observed that until the replies are filed by the Municipal Corporation, Bhopal, and the State Government, the interim order dated 2.5.2006 should not be vacated. In the order passed on 18.5.2006, it was also clarified that gantries may be erected by the intervener and signages may be placed

on the gantries, but no advertisement will be put up on the gantries for commercial purposes.

3. After return was filed by the Municipal Corporation, Bhopal, respondent no.1, the Court heard the learned counsel for the parties and passed an order on 13.7.2006 directing the Chief Secretary, Government of M.P., to constitute an Expert Committee with the Principal Secretary of Transport Department of the Government of M.P. as the Chairman to go through the writ petition and the replies filed by the respondent no.1 and the intervener and submit a report to this Court after deliberations whether the installation of proposed gantries in Bhopal city would increase the chances of road accidents.

4. Pursuant to the order dated 13.7.2006, of the Court, the Chief Secretary, Government of M.P., constituted an Expert Committee and the Expert Committee, submitted a report suggesting that gantries/road signages if erected on the roads in densely populated areas would cause hindrance to traffic and that advertisements displayed on such gantries are likely to disturb the concentration of the drivers of motor vehicles and increase the possibility of road accidents. On 3.1.2007, the Court directed the respondent no.1 to remove all advertisements from the gantries/ road signages in the light of the report of the Expert Committee.

5. When the writ petition was taken up for final hearing, Mr. Girish Shrivastava, learned counsel for the petitioner submitted that as reported by the Expert Committee, advertisements on the gantries across the road are likely to disturb the concentration of the drivers of motor vehicles and increase the possibility of road accidents and, therefore, the Court should direct the respondents not to allow advertisements on the gantries. He cited the order in *M.C.Mehta vs. Union of India and others*[1] , in which the Supreme Court has observed that hazardous hoarding visible to the traffic on the road is a disturbance to safe traffic movement and has refused to modify its earlier order dated 20.11.1997 directing the authorities to remove all hoardings which are on roadsides and which are hazardous and a disturbance to safe traffic movement.

6. Shri A.M.Mathur, learned counsel for the intervener, submitted that the Expert Committee has ignored the findings of the Committee of the inspectors who had submitted a report to the Expert Committee that gantries/road signages would not normally divert the attention of the drivers of motor vehicles and are not likely to cause any road accidents. He cited the decision of the Supreme Court in *5 M & T Consultants, Secunderabad vs. S.Y. Nawab and another*[2], in which the Supreme Court has referred to its earlier decision in *G.B.Mahajan vs. Jalgaon Municipal Council*[3], wherein it was observed that a project, otherwise legal, does not become

(1) (1998) 1 SCC 363. (2) (2003) 8 SCC 100. (3) (1991) 3 SCC 91.

any the less permissible by the mere reason that the local authority had entered into an agreement directly with a developer for its financing and execution. He submitted that in the aforesaid case of *5 M & T Consultants, Secunderabad vs S.Y. Nawab and another* (supra), the Supreme Court had also found that the materials on record substantiated the absolute need and necessity to undertake works of the nature executed by the appellant in furtherance of great public interest and for larger public and common good. He argued that the erection of gantries have been entrusted by the Bhopal Municipal Corporation to the intervener and such gantries would have road signages on the front side and advertisement at the back side and drivers driving motor vehicles on the roads will not normally see the advertisement at the back side of the gantry. Mr.Mathur, further submitted that the intervener had undertaken this work at his own cost and without any payment from the Bhopal Municipal Corporation and as per scheme, the intervener will raise the cost of the project from the advertisements on the back side of the gantries.

7. Mr.Ravindra Shrivastava, learned Senior Counsel appearing for the Bhopal Municipal Corporation, referred to the R.F.P. document for providing, fixing, constructing/erecting of different road signages at various locations in Bhopal Municipal Corporation Limits on the basis of Build, Operate and Transfer (BOT). He submitted that the document will show that interested parties will have to build, maintain and later hand over the assets to the Corporation and in lieu of this the parties can be given advertisement rights on these road signage poles. He submitted that the document will also show that the basic purpose of the scheme is to give traffic directions to the commuters. He referred to the general conditions in the document to show that the project will be executed through private participation and the private entrepreneur is expected to recover his total capital outlay, including project cost, interest on project cost, overheads, profit and other incidental expense through the display of advertisements. He referred to Clauses 4.02 and 4.03 in the document, which state that these schematic drawing of the signages would be as enclosed in Appendix -2 and the entrepreneur has to adopt necessary precautionary and effective methods so as to not to disturb the flow of routine traffic during the execution of work of the project. He also referred to Clause 4.04 of the document in which it is stipulated that the entrepreneur shall not display any banned, illegal or obscene matter in the advertisement. He pointed out that in Clause 4.06 of the document, the entrepreneur is required to ensure that all the necessary environmental clearance from the concerned departments of the Corporation/State Government are made available prior to the commencement of the execution of the project. He submitted that all these clauses in the documents will go to show that the entrepreneur will not have a free hand in erecting the gantries and placing the advertisements thereon and the Bhopal Municipal Corporation will exercise necessary control in the interest of the general public. He also referred to the byelaws of the Bhopal

Municipal Corporation to show the control that Municipal Corporation will have on the advertisements on the gantries.

8. Mr.Shrivastava cited the Division Bench judgment of this Court in *M/s Sagardeep Advertising vs. Municipal Corporation, Jabalpur & others*[1], in which this Court has observed that the Municipal Corporation has power to regulate advertisements and that with the immense importance that advertisement has assumed in the commercial field, advertisements have become a major source of revenue and Municipal Corporation cannot be prevented from deriving benefits from the same. He submitted that considering the costs involved in putting up the gantries for road signages, which are necessary for giving direction to the public, the Municipal Corporation, Bhopal has taken a decision to execute the project through private entrepreneurs who will be entitled to put up advertisements on the back side of the gantries to meet the costs of the project. He cited the decision in *P. Narayana Bhat vs. State of T.N. and others*[2], and submitted that unless the hoardings are found to be hazardous and are disturbing to the safe traffic movement which, in turn, would adversely affect the free and safe flow of traffic, the authorities could not take action under Section 326-J of the City Municipal Corporation Act of the State of Tamilnadu.

9. We have considered the submissions of the learned counsel for the parties. This Public Interest Litigation was entertained by the Court because of an apprehension expressed by the petitioner that road signages and advertisements if put on gantries across the road may distract the concentration of the drivers in motor vehicles and cause road accidents. In other words, the Court was concerned with the danger to the life of the common man on the road, which is guaranteed under Article 21 of the Constitution of India. It is for this reason that on 13.7.2006, the Court after observing that earning of revenue should not be at the cost of life of the people using different roads in the city of Bhopal, passed an order that some Expert Committee should examine and report whether installation of proposed gantries in Bhopal city would increase the chances of road accidents.

10. The Expert Committee, therefore, was required to examine in depth whether gantry with road signages and advertisements would really lead to road accidents endangering the life of people on the road. The Expert Committee has submitted a report expressing an opinion that gantry with road signages and advertisements if erected on roads are likely to disturb the concentration of the drivers of motor vehicles and increase the possibility of road accidents. But on reading of the report of the Expert Committee, we do not find that sufficient reasons have been given by the Expert Committee to come to the conclusion that gantry with road signages and

(1) I.L.R. 2007 M.P. 450. (2) (2001) 4 SCC 554.

advertisements if erected on roads would cause road accidents. Moreover, the Expert Committee appears to have ignored the report of the inspectors that such road signages and advertisements are not likely to cause accidents on the roads.

11. Under Madhya Pradesh Municipal Corporation Act, 1956, Municipal Corporations have got sufficient powers to permit erections on roads. In *M/s Sagardeep Advertising vs. Municipal Corporation, Jabalpur & others* (supra), cited by Mr.Ravindra Shrivastava, a Division Bench of this Court has considered at length the provisions in the Municipal Corporation Act, 1956 particularly Sections 322, 323, 335 and 366 and has observed that the Corporation has the power to regulate advertisements but no statutory procedure or manner has been prescribed or framed to regulate them by the Jabalpur Municipal Corporation. The Division Bench has further observed in the said case that with the immense importance that advertisement has assumed in the commercial field, advertisements have become a major source of revenue and the Municipal Corporation cannot be prohibited or excluded from deriving benefits from the same. Thus, so long as the M.P. Municipal Corporation Act, 1956 or any other law does not prohibit the Municipal Corporations to allow erection of gantries/road signages and advertisements, the Court cannot restrain the Municipal Corporations from erecting gantries with signages and advertisements except for the purpose of ensuring that such gantries with road signages and advertisements do not affect the right to life guaranteed by Article 21 of the Constitution.

12. Road signages on the gantries are essential for giving directions to the general public on the road and in particular in a city like Bhopal where a person is likely to lose his way if he does not get the direction for his destination. Road signages are also not normally considered as distractions for the drivers of the motor vehicles plying on the road. Advertisements on the gantries may divert the concentration of the driver driving the vehicle on the road but not all advertisements but some advertisements, which distract the drivers driving the vehicles on the road. It is for this reason that the in *M.C. Mehta vs. Union of India and others* (Supra), cited by Mr. Girish Shrivastava, the Supreme Court has not directed that all hoardings which are on the roadside have to be removed, and instead has only directed that hoardings on the roadsides which are hazardous and disturbing to safe traffic movement have to be removed.

13. Similarly, in *P. Narayana Bhat vs. State of T.N. and others* (Supra), cited by Mr.Ravindra Shrivastava, the Supreme Court took the view that the authorities concerned are empowered under Section 326-J of the Tamilnadu City Municipal Corporation Act to either refuse to grant licence/renewal or to remove the existing hoarding only if the same is hazardous and is a disturbance to safe traffic movement which, in turn, should adversely affect free and safe flow of traffic. We are thus of

the view that while road signages and advertisements on the gantries can be permitted, advertisements on the gantries which would be hazardous and disturbing to the safe traffic movement and may cause road accidents should not be permitted by the Corporation, so as to ensure that the right to life of the people on the road guaranteed under Article 21 of the Constitution of India is to be protected.

14. For the aforesaid reasons, we dispose of this writ petition with a direction to the Bhopal Municipal Corporation to ensure that advertisements on the gantries, which would be hazardous and disturbing to the safe traffic movement in the roads of Bhopal city and are likely to cause road accidents, are not to be put up on the gantries. The interim orders passed in this case are vacated. The security amount deposited by the petitioner be refunded to the petitioner.

Petition disposed of.

I.L.R. [2007] M.P., 1115
APPELLATE CIVIL
Before Mr. Justice S.K. Kulshrestha & Mr. Justice S.K. Seth
12 February, 2007

UNITED INDIA ASSURANCE CO. .... Appellant *
v.
SAROJ BAI .... Respondent

Motor Vehicles Act (LIX of 1988)–Sections 149, 166, 173–Liability of Insurance Company–Deceased going on a motorcycle as a pillion rider–Motorcycle collided with buffalo–Pillion rider died in accident–Pillion rider not covered by terms of Insurance Policy–Held–Insurance Company did not raise the ground before Claims Tribunal or High Court that pillion rider was not covered by Insurance Company–Claimants had no opportunity to meet this ground and to adduced evidence in that behalf–Appeal filed by Insurance Company dismissed.

We find that though the Insurance Company has through out participated in the proceeding before the Tribunal, no ground was raised to disown the liability on the footing that the pillion rider was not covered. In the appeal memo also, before us, it is nowhere stated apart from citing a passage from the said decision that the Insurance Company had not covered the risk of pillion rider. Learned counsel for the Insurance Company, however, submits that since the Insurance policy was brought on record, it is evident that the liability of the pillion rider was not covered.

We are afraid, we cannot subscribe to the view propounded by the learned

* M.A. No. 2130/2006 (I)

counsel for reasons more than one. Before the Tribunal, the Insurance Company did not raise the plea that it was not liable to compensate the claimants as the risk for pillion rider was not covered. It was only pointed out that the person driving the motorcycle did not possess a valid license which was proved to be false. In the appeal memo also, it is not mentioned that the risk of the pillion rider was not covered and only paragraph-21 of the decision in *Tilak Singh* (supra) has been quoted. In absence of proper pleading in this regard, we cannot concede to the suggestion that Insurance Company should be relieved of its liability. Learned counsel submits that in the case of *New India Assurance Co. Ltd. v. Pushpa & ors.*, 2005 ACJ 1520, the Hon'ble Bombay High Court has taken the view that even carbon copy of the policy signed by the duly constituted attorney of the Insurance Company is admissible and on that basis, the Insurance Company should have been relieved. We have observed that this plea was not raised by the Insurance Company either before the Tribunal or before this Court and, therefore, the claimants had no opportunity to meet this ground and to adduce evidence in that behalf. The appeal, M.A. No. 2130/06, is thus liable to be dismissed. (Paras 7 & 8)

Cases Referred :

United India Insurance Co. Ltd. Shimla v. Tilak Singh & ors.; (2006) 4 SCC 404. *New India Assurance Co. Ltd. v. Pushpa & ors.;* 2005 ACJ 1520.

V.P. Khare, for the appellant

Ms. Archana Kher, for the respondent.

Cur.adv.vult.

ORDER

Both these appeals arise from the award dated 27.3.2006 passed by the Motor Accident Claims Tribunal, Indore in Claim Case No. 68/2004. These appeals are, therefore, being decided by this common order at the admission stage.

2. The respondents No. 1 to 6 filed an application under Section 166 of the Motor Vehicles Act to claim a sum of Rs. 45,00,000/- in respect of the death of Devkaran Kajale in a motor accident in which the Tribunal awarded a sum of Rs. 7,41,271/- as against the aforesaid claim of Rs. 45,00,000/-.

3. The case stated by the respondent No. 1 Saroj Bai before the Tribunal was that while her husband Devkaran Kajale was going as a pillion rider on a motorcycle bearing registration No. MP-09-JN4858 which was being driven by Santish s/o Babulal Tiwari (original non-applicant No.2), while he was so proceeding from Khategaon to Bhilkhedi and had reached near Nirmal hospital, on account of the rashness and negligence of the said driver of the motorcycle, it collided with a buffalo, with the result the pillion rider was flung away and he sustained severe injuries in his head, chest and other parts of the body. He was taken to a nursing

home in Khategaon where after initial treatment he was sent to Gokuldas hospital, Indore where he succumbed to his injuries on 9.10.2004.

4. The Insurance Company has assailed the said award on the ground that the appellant/Insurance Company could not have been saddled with the liability either jointly or severally as the pillion rider was not covered by the terms of the policy and, therefore, the Insurance Company was under no obligation to pay compensation to the pillion rider. Ms.Kher, learned counsel for the claimants has pointed out that this averment was not made in the reply filed by the Insurance Company and the claim was contested solely on the ground that the person driving the motorcycle did not have a valid license. This ground was not proved by the Insurance Company with the result, while awarding a sum of Rs. 7,41,271/-, the Insurance Company was also saddled with the liability.

5. Shri V.P. Khare, submits that since the decision in *United India Insurance Co. Ltd., Shimla v. Tilak Singh and others*[1], which was followed in M.A. No. 1605/02 decided on 4.5.2006 by a Division Bench of this Court lays down that the Insurance Company owes no liability in the case of pillion rider, the appeal filed by the Insurance Company deserves to be allowed and the Insurance Company deserves to be relieved from the liability saddled by the Tribunal.

6. We have heard learned counsel for the parties and perused the record placed before us.

7. We find that though the Insurance Company has through out participated in the proceeding before the Tribunal, no ground was raised to disown the liability on the footing that the pillion rider was not covered. In the appeal memo also, before us, it is nowhere stated apart from citing a passage from the said decision that the Insurance Company had not covered the risk of pillion rider. Learned counsel for the Insurance Company, however, submits that since the Insurance policy was brought on record, it is evident that the liability of the pillion rider was not covered.

8. We are afraid, we cannot subscribe to the view propounded by the learned counsel for reasons more than one. Before the Tribunal, the Insurance Company did not raise the plea that it was not liable to compensate the claimants as the risk for pillion rider was not covered. It was only pointed out that the person driving the motorcycle did not possess a valid license which was proved to be false. In the appeal memo also, it is not mentioned that the risk of the pillion rider was not covered and only paragraph-21 of the decision in *Tilak Singh* (supra) has been quoted . In absence of proper pleading in this regard, we cannot concede to the suggestion that Insurance Company should be relieved of its liability. Learned counsel submits that

(1) (2006) 4 SCC 404.

in the case of *New India Assurance Co. Ltd. v. Pushpa and others*[1], the Hon. Bombay High Court has taken the view that even carbon copy of the policy signed by the duly constituted attorney of the Insurance Company is admissible and on that basis, the Insurance Company should have been relieved. We have observed that this plea was not raised by the Insurance Company either before the Tribunal or before this Court and, therefore, the claimants had no opportunity to meet this ground and to adduce evidence in that behalf. The appeal, M.A. No. 2130/06, is thus liable to be dismissed.

9. As regards M.A. No. 2944/06, the learned counsel submits that the deceased was a Rural Agriculture Extension Officer drawing a gross salary of Rs. 10,250/- while the carry house salary was Rs. 8,700/-. The Tribunal had gone through the salary certificate and other documents Ex. P/15 and the statement of Narendra Kumar Gupta AW/3. On the basis of this evidence, the Tribunal has determined the dependency of Rs. 5,000/- per month i.e. annually Rs. 60,000/- and applying the multiplier of 12, the total dependency has been worked out at Rs. 7,20,000/-. The Tribunal has also awarded Rs. 14271/- as medical expenses, Rs. 5,000/- for loss of consortium and Rs. 2,000/- for funeral expenses. However, the learned counsel submits that in view of the income of the deceased, the family deserves more compensation. We find that the Tribunal has worked out the annual dependency and awarded sufficient compensation under other counts. Learned counsel, however, submits that no provision has been made in the compensation for loss of love and affection. We, therefore, enhance the compensation to bring out a round figure of Rs. 7,45,000/-. Thus, the appeal of the Insurance Company (M.A. No. 2130/06) is dismissed while appeal (M.A. No. 2944/06) is partly allowed only to the extent stated hereinabove. The appellants in the aforesaid appeal shall be entitled to recover a sum of Rs. 7,45,000/- in place of Rs. 7,41,271/-. The appropriation of the amount made by the Tribunal in paragraph-33 is affirmed except that the enhanced amount shall be paid to claimant No. 1, Saroj Bai. The enhanced amount shall also carry interest at the same rate as awarded by the Tribunal. There shall be no order as to costs of these appeals.

Appeal partly allowed.

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(1) 2005 ACJ 1520.

I.L.R.[2007] M.P., 1119

SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat and Mr. Justice P.P. Naolekar

30 July, 2007

N.P. JHARIA --- Appellant*

Vs.

STATE OF M.P. --- Respondent

A. Criminal Procedure Code, 1973 (II of 1974)-Section 173(8)-Further Investigation-Investigation agency filing Khatma Report which was accepted by Competent Court-Permission for further investigation granted by Special Court on application of S.P.E.-Further investigation permissible in the background of Section 173(8) of Criminal Procedure Code.

Learned counsel for the appellant submitted that the proceedings were initiated on the basis of complaint to the Lokayukt and therefore the proceedings under the Act could not have been taken. It is to be noted that a faint plea in this regard was raised before the trial court. It was urged that once the final report was submitted there is no scope for further investigation. It appears that after referring to the proceedings the trial court found that there was no substance in the plea. Before the High Court such plea was not raised. In the appeal also the main grounds relate to the defect in sanction and legality of the further investigation.

So far as the further investigation is concerned in the background of Section 173(8) of the Code of Criminal Procedure, 1973 (in short the 'Code') the plea is clearly untenable. (Paras12 and 13)

B. Prevention of Corruption Act (II of 1947)-Section 5(1)(e)-Disproportionate to Known sources of income-Corruption is believed to have penetrated into every sphere of activity-It connotes allowing decisions and actions of a person influenced by monetary gains-Appellant found in possession of property worth Rs. 8,71,377/- which was disproportionate to his known sources of income-Trial Court as well as High Court has analysed the evidence in detail so far as valuation of properties is concerned-No scope for interference-Appeal dismissed.

It is a strange co-incidence that the Prevention of Corruption Act, 1947 (hereinafter referred to as the 'Act') was enacted in the year of our country's independence.

*Cri. A. No. 1262/2001

Corruption is one of the most talked about subjects today in the country since it is believed to have penetrated into every sphere of activity. It is described as wholly widespread and spectacular.

Corruption as such has reached dangerous heights and dangerous potentialities. The word 'corruption' has wide connotation and embraces almost all the spheres of our day to day life the world over. In a limited sense it connotes allowing decisions and actions of a persons to be influenced not by rights or wrongs of a cause, but by the prospects of monetary gains or other selfish considerations. Avarice is a common frailty of mankind, and while Robert Walpole's observation that every man has a price, may be a little generalized, yet it cannot be gainsaid that it is not far from truth. Burke cautioned, "Among a people generally corrupt, liberty cannot last long". (Paras 1, 2, and 3)

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **DR. ARIJIT PASAYAT, J.**:–It is a strange co-incidence that the Prevention of Corruption Act, 1947 (hereinafter referred to as the 'Act') was enacted in the year of our country's independence.

2. Corruption is one of the most talked about subjects today in the country since it is believed to have penetrated into every sphere of activity. It is described as wholly widespread and spectacular.

3. Corruption as such has reached dangerous heights and dangerous potentialities. The word 'corruption' has wide connotation and embraces almost all the spheres of our day to day life the world over. In a limited sense it connotes allowing decisions and actions of a person to be influenced not by rights or wrongs of a cause, but by the prospects of monetary gains or other selfish considerations. Avarice is a common frailty of mankind, and while Robert Walpole's observation that every man has a price, may be a little generalized, yet it cannot be gainsaid that it is not far from truth. Burke cautioned "Among a people generally corrupt, liberty cannot last long".

4. Challenge in this appeal is to the judgment of a learned Single Judge of the Madhya Pradesh High Court, Jabalpur, upholding conviction of appellant for offence punishable under Section 5(1)(e) read with Section 5(2) of the Act. The trial Court had while recording conviction sentenced the appellant to undergo imprisonment for three years and to pay a fine of Rs.75,000/-. The High Court

reduced the sentence to one year while maintaining the fine. With the modification of sentence the appeal was dismissed.

5. Prosecution version in a nutshell is as follows :

> The appellant was appointed as Sales Tax Officer on 16.9.1975 and he was occupying that post during the check period 16.9.1975 to 31.12.1983. He was married to Pushpa Jharia (D.W.1) in the year 1969 and he has three children.
>
> During the period 16.9.1975 to 31.12.1983 the appellant was in possession of pecuniary resources and property worth Rs.10,19,210/-as disproportionate to his known sources of income. Proceedings were accordingly initiated. After investigation the Special Police Establishment (in short 'SPE') had submitted "final report" on 1.3.1990 informing the court that no offence is made out against the appellant. That final report was accepted by the Special Judge on 17.4.1990. But on 1.7.1992 the S.P.E. submitted an application before the Special Judge for permission for further investigation. The Special Judge permitted further investigation. Thereafter, the sanction for prosecution was obtained from the State Government on 1.3.1995. The charge sheet was filed in the Court on 24.7.1995.

6. Accused pleaded not guilty and his version was that he had satisfactorily accounted for all the properties not only in his own name, but also in the name of his wife.

7. The Special Judge after an exhaustive and elaborate consideration of all the documentary and oral evidence on record came to the conclusion that the total income of the appellant and his wife was Rs.9,32,086.90 and the expenditure was Rs.18,81,745.81 and thus the value of the disproportionate assets was Rs.9,49, 658/- It was further held that the submission of the Final Report once by the investigating agency was not a legal bar to make further investigation and file the charge-sheet. It has also been found that the sanction for the prosecution is valid and proper.

8. High Court referred to the various items of expenditure, the assets acquired, the sources and the incomes. It was held that the assessee had explained the income of himself and his wife from the known sources for a sum of Rs.2,62,061/- while the assets found were Rs.10,79,438/-. Therefore the value of the disproportionate assets was of Rs.8,17,377/-. The High Court held that in respect

of certain items of income the trial court was rather charitable but since the State has not questioned the computation, the same was to be accepted.

9. Accordingly, the conclusions of the trial court were upheld and the appeal was dismissed except for modification of the sentence.

10. In support of the appeal, learned counsel for the appellant submitted that the trial Court and the High Court had erroneously held that the value of the assets found in possession of the appellant was disproportionate to his known sources of income. The prosecution has not discharged the burden that lay on it.

11. Learned counsel for the State on the other hand supported the judgment of the High Court.

12. Learned counsel for the appellant submitted that the proceedings were initiated on the basis of complaint to the Lokayukt and therefore the proceedings under the Act could not have been taken. It is to be noted that a faint plea in this regard was raised before the trial court. It was urged that once the final report as submitted there is no scope for further investigation. It appears that after eferring to the proceedings the trial court found that there was no substance in the plea. Before the High Court such plea was not raised. In the appeal also the main grounds relate to the defect in sanction and legality of the further investigation.

13. So far as the further investigation is concerned in the background of Section 173(8) of the Code of Criminal Procedure, 1973 (in short the 'Code') the plea is clearly untenable.

14. So far as the factual position is concerned various sources of income disclosed by the accused were the salary, the income of his wife and certain earnings from agricultural lands of the family. It was urged that before joining as a lecturer he had earned approximately Rs.50,000/-.

15. The High Court noted that the salary earned came to about Rs.24,000/- and since he had to maintain the family there was hardly scope for any saving and therefore any availability of funds at the beginning of the check period has not been established. We find no infirmity in this conclusion. The trial court had estimated the appellant's income from agricultural land at Rs.1,49,000/- from about 10 to 15 acres of land. The High Court rightly observed that the trial court has been rather liberal in accepting the income of accused in the share of the joint family property on the basis of mere assertion without any supporting material. Same could not have been accepted. But since the State had not questioned the

computation there was no scope for any further relief. The total income was taken to be Rs.2,38,561.95 which was also not disputed by the appellant. The trial court had noted that even by most liberal standards the appellant and his family consisting of five persons could not have saved more than 50% of the earnings of the salary and must have spent Rs.44,500/- Therefore, the savings of the appellant from salary and agriculture was taken at Rs.1,94,061/-. Ms. Pushpa Jharia, DW1 had deposed that she was doing the work of knitting. The trial court without any supporting material fixed the income at Rs.68,000/-. The High Court rightly noted that the computation was on the liberal side. Only a small knitting machine was found during search. DW1 accepted that she had not employed any other person for knitting, from which she used to fetch between Rs.15/- to Rs.35/- per sweater. Since the finding of the trial court was not challenged by the prosecution the High Court accepted the amount fixed and held that the appellant and his wife have satisfactorily accounted for Rs.2,62,061/- from the known sources. Though a claim was made that DW1 used to cultivate land, same was found to be totally unacceptable plea by the trial Court, and therefore the claim that Rs.32,000/- had been earned from the said source was rejected. Similarly, the plea relating to availability of a sum of Rs.80,000/- on the basis of the appellant's father's Will was found to be unacceptable as the 'Will' itself was not produced and the availability of Rs.80,000/- with appellant's father was not established. Similarly, the plea that appellant had Rs.75,000/- from the property of his father after his death was unacceptable. There was no material to substantiate the plea. Similarly plea of having availed loans from relatives was not pursued before the High Court.

16. So far as the valuation of the assets was concerned on the basis of the valuation report (Ex.P.11) of the Executive Engineer (Valuation) of the Income Tax Department, Jabalpur, the house was valued at Rs.6,91,000/- and including the value of the land, value was fixed at Rs. 7,22,000/-. Apart from that, cost of acquisition of a house of five plots was added. Admitted cost of house as per Ext.P-12 was Rs.1,43,671/-. The value of movable property available at the time of search was fixed at Rs.1,22,283/-. The High Court fixed it at Rs.80,000/-. Thus, the total value of immovable and movable properties was computed at Rs.10,79,438/-. Both the trial Court and the High Court have analysed the evidence in great details so far as the valuation of the properties is concerned. There is no scope for any interference in this appeal so far as the valuation and the determination of the disproportionate assets is concerned.

17. Appeal is dismissed. *Appeal dismissed.*

I.L.R. [2007] M.P., 1124

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and Mr. Justice A.M. Sapre

17 September, 2007

SMT. HIRAKUMARI WIFE OF THAKUR JAIPAL SINGH and others ... Petitioners*

Vs.

STATE OF MADHYA PRADESH and others ...Respondents

Ceiling on Agricultural Holdings Act, M.P.(XX of 1960) - Section 2(k), M.P. Akrishik Jot Uchchatam Seema Adhiniyam, 1981 - Section 2(c) - Reference to Larger Bench to consider correctness of decision passed in *State of M.P. Vs. Board of Revenue, Gwalior* - Case under Act of 1960 instituted against petitioners and draft statement was published - Petitioners raised objections in regard to certain land as the said land was not agricultural land and trees standing on the said land - Competent Authority after spot inspection declared the said land as agricultural land and declared it to be surplus - Held - Once it is held that land was held in Bhumiswami rights for agricultural purposes provisions of Adhiniyam, 1981 are not applicable - No finding either by authorities including learned Single Judge hearing writ petition that petitioners held Bhumiswami rights in respect of forest land - Unless clear finding is recorded that lands in question were held not for agricultural purposes Court cannot render decision that provisions of Act, 1960 are not applicable - Matter to be placed before Learned Single Judge for decision on merits.

The learned single Judge in the said order dated 28.1.1997 also referred to the findings of the Division Bench in the said case of the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) that the lands though covered by forest were held by holder in Bhumiswami rights and therefore came within the definition of 'land' in Section 2 (k) of the Act of 1960. The learned single Judge, however, observed that the provisions of the Adhiniyam of 1981 were not brought to the notice of the Division Bench in the case of the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) and had the Division Bench considered the definition of 'holder' and 'non-agricultural holding' as given in the Adhiniyam of 1981, the Division Bench might have arrived at a different decision. The learned single Judge, thus, held in the

*Misc. Appeal No 4013 of 1985.

order dated 28.1.1997 that the matter deserves to be re-considered by a larger Bench so that the wrinkles caused by the observations made in the matter of the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) by the Division Bench are creased out. (Para 5)

Coming now to the facts of the present case, the Competent Authority, Pipariya, the Collector, Hoshangabad who was the Appellate Authority, and the Additional Commissioner, Hoshangabad who was the first Revisional Authority, have held that the land in question was agricultural land to which the Act of 1960 was applicable and in second revision, the Board of Revenue has refused to interfere with such finding of fact recorded by the Competent Authority, Appellate Authority and the first Revisional Authority. The learned Single Judge, who heard the writ petition against the order passed by the Board of Revenue, as yet, has not disturbed the said finding that the lands of the petitioners were agricultural land. There is no finding whatsoever by any of the authorities including the learned single Judge hearing the writ petition that the petitioners held Bhumiswami rights in respect of forest land. Until a clear finding is recorded by any authority or the Court that the lands in Survey Nos.76/1 and 239/4 held by the petitioners were held not for agricultural purposes, this Court cannot render a decision that the lands of the petitioners are not agricultural lands to which the provisions of the Act of 1960 are not applicable. (Para 12)

Cases Referred :

State of M.P. Vs. Board of Revenue; AIR 1983 MP 111, *Laxman Ichharam Vs Divisional Forest Officer, Raigarh and others;* 1953 NLJ 44, *T.N. Godavarman Thirumulkpad Vs. Union of India and others;* AIR 1997 SC 1228.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE :–** This is a reference made initially by a learned single Judge and thereafter by a Division Bench by orders dated 28.1.1997 and 4.4.1997 respectively for considering the correctness of the decision rendered by a Division Bench of this Court in *State of M.P. vs. Board of Revenue*[1].

2. The background facts which have led to the reference are that a case under the M.P. Ceiling on Agricultural Holdings Act, 1960 (for short 'the Act of 1960) was instituted against the petitioners before the Sub-Divisional Officer-cum-

(1) AIR 1983 M.P. 111.

Competent Authority, Pipariya. The Competent Authority published a draft statement in the said ceiling case and the petitioners raised objections with regard to Survey Nos. 76/1 and 239/4 contending that there were big trees standing on the land and that the land was not agricultural land and cannot be declared ceiling surplus under the Act of 1960. After spot inspection, the Competent Authority found the land to be agricultural land and declared the land to be surplus. Against the order of the Competent Authority, the petitioners filed appeal before the Collector, Hoshangabad, who dismissed the appeal. The petitioners thereafter filed revision before the Additional Commissioner, Hoshangabad who also dismissed the revision. Thereafter, the petitioners filed a second revision (Revision No.58-5/84) before the Board of Revenue, Madhya Pradesh, Gwalior and contended that the land was shown as jungle in settlement papers and there was natural forest on the land and, therefore, the land should not be treated as agricultural land.

3. The respondents, on the other hand, contended before the Board of Revenue that whether a land was agricultural and or not was a question of fact and all the authorities have recorded a concurrent finding that the land was agricultural land. The respondents further contended before the Board of Revenue that it will be clear from the finding that some portion of the land has been cultivated and the remaining portion of the land also could be brought under cultivation and, therefore, it has to be treated as agricultural land and the land cannot be treated as non-agricultural land. The Board of Revenue, after taking into consideration the aforesaid contentions, rejected the revision petition of the petitioners after holding that all the authorities have given a concurrent finding of fact on the point that the land was agricultural land and at the stage of second revision, there was no reason to interfere with the order. Paragraphs 5 and 6 of the order of the Board of Revenue dated 18.3.1985 are quoted herein below:

> "5. The only question agitated on behalf of the holder was that the land under dispute is partly recorded as jungle having trees and therefore it does not come under agricultural purpose. Under Section 2 (k) the word land has been defined and it means land held for agricultural purpose but does not include land diverted to or used for non-agricultural purpose. On this point there is a clear ruling in case of *Razia Ban vs. State of M.P.*[1] that where the land is jungle, pathar and pahad, and is not cultivable, but is held in Bhumiswami

(1) 1970 RN 435.

rights and is assessed to agricultural purpose and also is not used for any non-agricultural purposes, the land is covered by the Act. Thus, it is clear that the land under dispute will be governed under the Act. The ruling reported in 1980 RN 17 in which it has been held that land on which these are natural forest, cannot be treated as agricultural land will not be applicable to the present case as the land under dispute is being partly cultivated and is held for agricultural purpose.

6. To ascertain facts the Competent Authority has visited the spot and himself satisfied that this is a land held for agricultural purpose. All the lower courts have given a concurrent finding of fact on this point. At the stage of revision I do not find any reason to interfere in the said findings. The revision petition is, therefore, rejected."

4. Aggrieved by order dated 18.3.1985 of the Board of Revenue in Revision No.58-V/84, the petitioner filed Misc. Petition No.4013 of 1985 before this Court under Articles 226 and 227 Constitution of India. When the petition came up for hearing before the learned single Judge, the learned counsel for the petitioners contended that the authorities under the Act of 1960 had misdirected themselves in not appreciating that the land held by the petitioners was not for agricultural purpose and that it could not include land diverted to or used for non-agricultural purpose and the land, therefore, could not be declared as surplus under the said Act of 1960. The learned counsel for the petitioners further submitted before the learned single Judge that the provisions of the M.P. Akrishik Jot Uchchatam Seema Adhiniyam, 1981 (for short 'the Adhiniyam of 1981') would be applicable and the petitioners would be entitled to hold atleast 21.85 hectares of land which fall within the definition of non-agricultural holding under clause (d) of Section 2 of the Adhiniyam of 1981. The Government advocate appearing for the respondents, on the other hand, submitted before the learned single Judge, relying on the decision of the Division Bench in the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) that the land though covered by forest was held by the petitioner in his Bhumiswami rights and therefore, came within the definition of 'land' in Section 2 (k) of the Act of 1960.

5. The learned single Judge in the said order dated 28.1.1997 also referred to the findings of the Division Bench in the said case of the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) that the lands though covered by forest were held

by holder in Bhumiswami rights and therefore came within the definition of 'land' in Section 2 (k) of the Act of 1960. The learned single Judge, however, observed that the provisions of the Adhiniyam of 1981 were not brought to the notice of the Division Bench in the case of the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) and had the Division Bench considered the definition of 'holder' and 'non-agricultural holding' as given in the Adhiniyam of 1981, the Division Bench might have arrived at a different decision. The learned single Judge, thus, held in the order dated 28.1.1997 that the matter deserves to be re-considered by a larger Bench so that the wrinkles caused by the observations made in the matter of the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) by the Division Bench are creased out.

6. When the matter was thereafter referred to a Division Bench, the Division Bench took the view that since the correctness of the decision of the Division Bench in the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) is tobe considered, the matter should be placed before a larger Bench and this is how the matter has now been placed before this Full Bench.

7. Mr. A.D. Deoras, learned Senior counsel for the petitioners referred to para 12 of the judgment of the Division Bench in the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) and submitted that the Division Bench construed Section 16 (2) (ii) of the Act of 1960 which made a provision for additional compensation for trees and held that the word 'trees' under Section 16 (2) (ii) of the Act of 1960 is used to signify trees such as those in a grove or orchard i.e. trees planted by the holder which can be described to be improvement and not trees of spontaneous growth such as in a forest. He also referred to paragraph 20 of the judgment of the Division Bench in the *State of M.P. vs. Board of Revenue, Gwalior* (Supra), which the Division Bench has held that though the lands in that case were covered by forest, they were held in Bhumiswami rights for agricultural purposes and, therefore, came within the definition of 'land' in Section 2 (k) of the Act of 1960. He vehemently argued that the Division Bench lost sight of the fact is that under the Adhiniyam of 1981, ceiling on non-agricultural holdings was imposed for the first time and Section 2 (c) of the Adhiniyam of 1981 defined 'holder' to mean Bhumiswami of a non-agricultural land and Section 2 (d) of the Adhiniyam of 1981 definined 'non-agricultural holding' to mean all forest land held by a Bhumiswami within a State. He submitted that these provisions would go to show that Bhumiswami rights in forest land could also be held within the State of M.P. and in respect of such forest land, the Act of 1960 did not apply but these aspects

were not considered by the Division Bench while rendering the judgment in the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) as has been observed by the learned single Judge in the order of reference dated 28.1.1997 in the present case.

8. Mr. R.N. Singh, learned Advocate General appearing for the respondents, on the other hand, submitted that all the authorities under the Act of 1960, namely, the Competent Authority, the Appellate Authority and the first Revisional Authority have held in the present case that the land in question was agricultural land and this finding of fact recorded by all the three authorities has not been interfered with by the Board of Revenue, Gwalior in the revision. He submitted that since there is no finding of fact as yet by any of the authorities, as also the learned single Judge in the order of reference dated 28.1.1997 that the lands of the petitioners in Survey NOs.76/1 and 239/4 were actually forest land, and not agricultural land, the reference made by the learned single Judge was academic and it should not be answered by the Full Bench. He cited the decision of the Nagpur High Court in *Laxman Ichharam vs. Divisional Forest Officer, Raigarh and others*[1], in which a Division Bench of the Nagpur High Court has held that the word 'forest' has not been defined in the Forest Act and must be taken in its ordinary dictionary sense. He also referred to the order of the Supreme Court in *T.N. Godavarman Thirumulkpad vs. Union of India and others*[2] in which a similar view has been taken that the term 'forest' occurring in Section 2 of the Forest Conservation Act, 1980 will not only include 'forest' as understood in the dictionary sense but also any area recorded as forest in the Government record irrespective of the ownership.

9. We have considered the submissions of Mr. Deoras and Mr. Singh and we find that in the Act of 1960, the word 'land' has been defined in Section 2 (k) to mean 'land held for agricultural purposes but does not include land diverted to or used for non-agricultural purposes'. Keeping in mind this aforesaid definition of 'land' in Section 2 (k) of the Act of 1960, the Division Bench in the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) in second paragraph of the judgment took note of the fact that Hariprasad Naik was Proprietor of village Shivpuri in Raigarh District and after the abolition of proprietary rights by the Madhya Pradesh Abolition of Proprietary Rights Act, 1950 (for short 'the Act of 1950) with effect from 31st March, 1951, Naik was allowed to retain in his possession, as provided in Section 4 (2) of the Act of 1950, only homestead and home-farm land. Section 4 (2) of the Act of 1950 is quoted herein below :

(1) (1953N.L.J. page 44. (2) AIR 1997 S.C. 1228.

"4 Consequences of the vesting -

(1) .....

(2) Notwithstanding anything contained in sub-section (1), the proprietor shall continue to retain the possession of his home-stead, home-farm land and in the Central Provinces also of land brought under cultivation by him after the agricultural year 1948-49 but before the date of vesting."

It will be clear from the aforesaid provision in Section 4 (2) of the Act of 1950 that the Proprietor was allowed to retain possession of his home-stead and home-farm land and in the Central Provinces also the land brought under cultivation by him after the agricultural year 1948-49 but before the date of vesting.

10. Since Naik and his relations were allowed to hold the land in question for agricultural purposes under Section 4(2) of the Act of 1950, the Division Bench held in para 20 of the judgment as reported at page 122 of the AIR:

" During the course of arguments it was also hinted that as the lands were mostly covered by forest they did not fall within the Ceiling Act. In our opinion, that is not the correct legal position. The lands though covered by forest were held by Naik and his relations in Bhumiswami rights for agricultural purposes. The lands, therefore, came within the definition of land in Section 2 (k). ...."

It will be clear from the aforesaid finding recorded by the Division Bench in the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) that though the lands in the aforesaid case were covered by forest, they were held by Naik and his relations in Bhumiswami rights 'for agricultural purposes'. Thus in the case of the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) there was a clear finding by the Division Bench that Naik and his relations were holding the alleged forest land as part of their Bhumiswami rights for agricultural purposes and not for non-agricultural purposes such as forest purpose.

11. Once it is held that the land in that case was held in Bhumiswami rights for agricultural purposes and not for non-agricultural purposes such as forest purposes, the land came within the definition of Section 2 (k) of the Act of 1960 and the provisions of the said Act of 1960 were applicable to the said land. Further, once it is held that the land was held in Bhumiswami rights for agricultural purposes, the provisions of the Adhiniyam of 1981 were not applicable inasmuch as the

Adhiniyam of 1981 was a law imposing ceiling on non-agricultural holdings and Section 2 (d) of the Adhiniyam of 1981 defined 'non-agricultural holdings' to mean all forest land held by a Bhumiswami within the State. We have therefore no doubt in our mind that the Division Bench judgment in the *State of M.P. vs. Board of Revenue, Gwalior* (Supra) was correctly decided on the facts as found in that case.

12. Coming now to the facts of the present case, the Competent Authority, Pipariya, the Collector, Hoshangabad who was the Appellate Authority, and the Additional Commissioner, Hoshangabad who was the first Revisional Authority, have held that the land in question was agricultural land to which the Act of 1960 was applicable and in second revision, the Board of Revenue has refused to interfere with such finding of fact recorded by the Competent Authority, Appellate Authority and the first Revisional Authority. The learned single Judge, who heard the writ petition against the order passed by the Board of Revenue, as yet, has not disturbed the said finding that the lands of the petitioners were agricultural land. There is no finding whatsoever by any of the authorities including the learned single Judge hearing the writ petition that the petitioners held Bhumiswami rights in respect of forest land. Until a clear finding is recorded by any authority or the Court that the lands in Survey Nos.76/1 and 239/4 held by the petitioners were held not for agricultural purposes, this Court cannot render a decision that the lands of the petitioners are not agricultural lands to which the provisions of the Act of 1960 are not applicable.

13. The matter will now be placed before the appropriate Bench for deciding the writ petition on merits.

Order passed accordingly.

I.L.R. [2007] M.P., 1132

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and Mr. Justice A.M. Sapre

18 September, 2007

MUNICIPAL CORPORATION, BHOPAL ... Petitioner*

Vs.

ARVIND JAIN and others .... Respondents

A. Municipal Corporation Act, M.P. (XXIII of 1956) - Sections 293(3), 294(1), 295, 403(3) - Appeal - Respondents received notice from petitioner requiring them to produce the map of their building after making provision in F.A.R. 1:2, Coverage 70% and height upto 40 Ft. - Appeal filed by respondents before Add. District Judge allowed - Jurisdiction of Add. District Judge to entertain appeal under Section 293(3) of Act, 1956 Challenged in writ petition - Matter referred to Larger Bench by Learned Single Judge in view of two conflicting judgments - Held - Power to refuse sanction or to grant sanction for erection or re-erection of any building is exercised by Commissioner under Section 295 and not under Section 293(1) of Act, 1956 - Appeal against any notice or order issued or other action taken by Commissioner under Section 295 is to be filed before Corporation which has to be heard by Appeal Committee - Difficult to hold that appeal against order of Commissioner refusing or sanctioning erection or re-erection of building can also be filed before District Judge - View taken in *Sardarbi Noor Mohammad Vs. Municipal Corporation, Indore and others* is not correct view and is overruled.

The marginal title of Section 293 quoted above would show that the provision deals with prohibition of erection or re-erection of buildings without permission. Sub-section (1) of Section 293 *inter alia* provides that no person shall erect or re-erect any building or commence to erect or re-erect any building unless the Commissioner has either by an order in writing granted permission or has failed to intimate within the prescribed period his refusal of permission for the erection or re-erection of the building. Section 294 of the Act is titled as "Notice of buildings". Sub-section (1) of Section 294 provides that every person who intends to erect or re-erect a building shall submit to the Commissioner an application in writing for

*W. P. No.269/1995. (J)

approval of the site plan and an application in writing for permission to build together with a ground plan, elevation and section of the building and a specification of work to be done. Section 295 of the Act is titled "Commissioner to refuse erection or re-erection of buildings" and indicates the cases in which the Commissioner shall refuse to sanction erection or re-erection of a building. Thus, the power to refuse sanction or to grant sanction for erection or re-erection of any building is exercised by the Commissioner under Section 295 of the Act and not under Section 293(1) of the Act. (Para 7)

A reading of sub-section (2) of Section 403 of the Act quoted above would show that any person aggrieved by any notice or order issued or other action taken by the Commissioner *inter alia* under Section 295 of the Act may appeal to the Corporation within 30 days from the date of such order. Sub-section (3) of Section 403 further provides that such appeal shall be heard and disposed of by a Committee to be called the Appeal Committee appointed by the Corporation. Once it is clear that appeal against any notice or order issued or other action taken by the Commissioner under Section 295 of the Act is to be filed before the Corporation and has to be heard by the Appeal Committee appointed by the Corporation as provided in sub-sections (2) and (3) of Section 403 of the Act, it is difficult to hold that an appeal against the order passed by the Commissioner refusing or sanctioning erection or re-erection of the building can also be filed before the District Court under sub-section (3) of Section 293 of the Act. This is because the Legislature could not have intended two different appellate authorities against the orders passed by the Commissioner refusing to sanction or sanctioning erection or re-erection of any building. (Para 8)

B. Municipal Corporation Act, M.P. (XXIII of 1956) - Sections 293 (2), (3) - Scope of Appeal to District Judge - Section 293(2) provides that Commissioner shall determine that whether external alteration or addition to a building is a material alteration or not - Order passed under Section 293(2) of Act, 1956 is appealable to District Court - Scope of appeal to District Court is confined to order passed by Commissioner determining whether a particular alteration in or addition to an existing building is or not a material alteration.

Hence, sub-section (2) of Section 293 contemplates an order by the Commissioner determining that the external alteration or addition to a building is a material alteration even though the owner of the building may think that the alteration made by him is not material. It is this order of the Commissioner passed under

sub-section (2) of Section 293 of the Act which is appealable under sub-section (3) of Section 293 before the District Court. In fact, sub-section (3) of Section 293 of the Act states that any person aggrieved by "the order of the Commissioner in this behalf" may appeal to the District Court The expression "the order of the Commissioner in this behalf" in sub-section (3) can only refer to the order of the Commissioner in sub-section (2) of Section 293 of the Act. The scope of the appeal to the District Court under sub-section (3) of Section 293 is thus confined to an order passed by the Commissioner determining whether a particular alteration in or addition to an existing building is or is not a material alteration within the meaning of Section 293(1)(3) read with sub-section (2) of Section 293 of the Act. Our answer to the first question referred by the learned Single Judge therefore is that the appeal provided under sub-section (3) of Section 293 is confined only to the order of the Commissioner when he determines that a particular proposed alteration is or is not a material alteration under sub-section (2) of Section 293 of the Act. (Para 10)

C. Interpretation of Statutes - Harmonious Construction - Court should attempt to interpret the provisions of an Act harmoniously and avoid as far as possible conflict between two provisions of same Act.

It is also a well settled principle of interpretation that the Court should attempt to interpret the provisions of an Act harmoniously and avoid as far as possible conflict between two provisions of the same Act. In *Sultana Begum vs. Pre Chand Jain,* (1997) 1 SCC 373, the Supreme Court has held that when there are two apparently conflicting provisions of an Act then they should be so interpreted that if possible, effect should be given to both the provisions. (Para 9)

Cases Referred :

Moolchand and another Vs Indore Municipal Corporation and another; 1973 MPLJ 596; *Sultana Begum Vs. Prem Chand Jain;* (1997) 1 SCC 373.

Cases Overruled :

Sardarbi Noor Mohammad Vs. Municipal Corporation, Indore and others; 1984 MPLJ 617.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE :–** This is a reference made to this Bench pursuant to an order passed by a learned Single Judge of this Court on 24.1.2006 in W.P. No.269/1995.

2. The facts leading to the reference are that the respondents received a notice dated 22.10.1991 from the petitioner requiring them to produce the map of their building after making provision in F.A.R. 1:2, coverage 70% and the height upto 40 ft.. The respondents filed an appeal against the said notice under Section 293(3) of the Madhya Pradesh Municipal Corporation Act, 1956 (for short 'the Act') before the District Judge, Bhopal. The appeal was entertained and allowed by the Vth Additional Sessions Judge, Bhopal. Aggrieved by the order that was passed by the Vth Addl. District Judge, Bhopal, the petitioner filed a petition under Article 227 of the Constitution of India. When the writ petition was heard by the learned Single Judge of this Court, the petitioner contended before the learned Single Judge that the learned Additional District Judge did not have jurisdiction to entertain the appeal under Section 293(3) of the Act.

3. The learned Single Judge found that there were two Division Bench decisions of this Court *Moolchand and another vs. Indore Municipal Corporation and another*[1], and *Sardarbi Noor Mohammad vs. Municipal Corporation, Indore and others*[2], in which conflicting opinions had been expressed with regard to the forum in which an appeal could be filed against the orders passed by the Commissioner of the Municipal Corporation refusing to grant permission for construction or reconstruction of a building. The learned Single Judge noticed that in *Moolchand and another vs. Indore Municipal Corporation and another* (supra), a Division Bench of this Court had taken a view that the order of the Commissioner refusing sanction for the galleries was apparently passed under Section 295 of the Act and was thus appealable to the Corporation under sub-section (2)(a) of Section 403 of the Act and under sub-section (3) of Section 403 of the Act, the Appeal Committee of the Corporation had jurisdiction to hear the appeal. The learned single Judge however noticed a later decision in *Sardarbi Noor Mohammad vs. Municipal Corporation, Indore and others* (supra), in which a Division Bench of this Court had come to the conclusion that Section 293(3) of the Act provides for an appeal to the District Court by a person aggrieved by the order of the Commissioner regarding permission to construct or reconstruct a building.

4. Confronted with two conflicting decisions of the Division Benches of this Court, the learned Single Judge in his order dated 24.1.2006 has referred to the Full Bench for consideration of following two questions:

> (1) Whether the appeal provided under Sub-section (3) of Section 293 is confined only to the order of Commissioner when it determines

(1) 1973 MPLJ 596. (2) 1984 MPLJ 617.

that a particular proposed alternation is material or not under Sub-section (2) ?

(2) Whether the conclusion of the Division Bench decision in *Sardarbi Noor Mohammad's case* (supra) that Section 293(3) of the Act clearly provides for an appeal to the District Court for a person being aggrieved by the order of the Commissioner regarding permission to construct or reconstruct is not a good law in view of the scope of the various provisions of the Municipal Corporation Act, 1956 and specially on account of having been rendered ignoring the earlier Division Bench decision in Moolchand's case ?

5. While Mr. Shekhar Sharma, learned counsel appeared for the petitioner, no one has appeared for the respondents despite notice having been served on the respondents. Mr. Shekhar Sharma took us through the provision of the Chapter XXIV of the Act and particularly Sections 293, 294, 295 and 305 of the Act. He also referred to the provisions of Section 403 of the Act which provides for appeals against the orders of the Commissioner and Subordinate Officers.

6. For answering the two questions referred to us by the learned single Judge, Sections 293 and sub-sections (2) and (3) of Section 403 of the Act are relevant and are extracted hereinbelow:

"293. Prohibition of erection or re-erection of buildings without permission.-(1) No person shall -

(i) erect or re-erect any building; or

(ii) commence to erect or re-erect any building; or

(iii) make any material external alteration to any building; or

(iv) construct or re-construct any projecting portion of a building which the Commissioner is empowered by section 305 to require to be set back or is empowered to give permission to construct or re-construct,-

(a) unless the Commissioner has either by an order in writing granted permission or has failed to intimate within the prescribed period his refusal of permission for the erection or re-erection of the building or for the construction or re-construction of the projecting part of the building; or

(b) after the expiry of one year from the date of the said permission or such longer period as the Commissioner may allow or from the end of the prescribed period, as the case may be:

Provided that nothing in this section shall apply to any work, addition or alteration which the Corporation may by byelaw declare to be exempt.

(2) If a question arises whether a particular alteration in or addition to an existing building is or is not a material alteration the matter will be determined by the Commissioner.

(3) Any person aggrieved by the order of the Commissioner in this behalf may appeal to the district court within thirty days of such order in the manner prescribed therefore and the decision of the district court shall be final.

403. Appeal against the order of the Commissioner and subordinate officers.

(1) xxxxxxxx

(2) Any person aggrieved by-

(a) any notice or order issued or other action taken by the Commissioner under Sections 174, 193, 195, 196, 197, 198, 199, 202, 204, 206, 207, 208, 209, 210, 237, 241, 243, 246, 248, 249, 295, 296, 299, 301, 302, 310, 311, 312, 313, 315, 322, 323 or 393 of this Act or any rule or byelaw made thereunder;

(b) any order of the Commissioner regarding granting or refusing a licence or permission; or

(c) any other order of the Commissioner that may be made appealable by byelaws under section 427, may appeal to the Corporation within 30 days from the date of such order.

(3) Such appeal shall be heard and disposed of by a committee to be called the "Appeal Committee" appointed by the Corporation."

(4) xxxxxxx
(5) xxxxxxx
(6) xxxxxxx
(7) xxxxxxx
(8) xxxxxxx
(9) xxxxxxx

7. The marginal title of Section 293 quoted above would show that the provision deals with prohibition of erection or re-erection of buildings without permission. Sub-section (1) of Section 293 *inter alia* provides that no person shall erect or re-erect any building or commence to erect or re-erect any building unless the

Commissioner has either by an order in writing granted permission or has failed to intimate within the prescribed period his refusal of permission for the erection or re-erection of the building. Section 294 of the Act is titled as "Notice of buildings". Sub-section (1) of Section 294 provides that every person who intends to erect or re-erect a building shall submit to the Commissioner an application in writing for approval of the site plan and an application in writing for permission to build together with a ground plan, elevation and section of the building and a specification of work to be done. Section 295 of the Act is titled "Commissioner to refuse erection or re-erection of buildings" and indicates the cases in which the Commissioner shall refuse to sanction erection or re-erection of a building. Thus, the power to refuse sanction or to grant sanction for erection or re-erection of any building is exercised by the Commissioner under Section 295 of the Act and not under Section 293(1) of the Act.

8. A reading of sub-section (2) of Section 403 of the Act quoted above would show that any person aggrieved by any notice or order issued or other action taken by the Commissioner *inter alia* under Section 295 of the Act may appeal to the Corporation within 30 days from the date of such order. Sub-section (3) of Section 403 further provides that such appeal shall be heard and disposed of by a Committee to be called the Appeal Committee appointed by the Corporation. Once it is clear that appeal against any notice or order issued or other action taken by the Commissioner under Section 295 of the Act is to be filed before the Corporation and has to be heard by the Appeal Committee appointed by the Corporation as provided in sub-sections (2) and (3) of Section 403 of the Act, it is difficult to hold that an appeal against the order passed by the Commissioner refusing or sanctioning erection or re-erection of the building can also be filed before the District Court under sub-section (3) of Section 293 of the Act. This is because the Legislature could not have intended two different appellate authorities against the orders passed by the Commissioner refusing to sanction or sanctioning erection or re-erection of any building.

9. It is also a well settled principle of interpretation that the Court should attempt to interpret the provisions of an Act harmoniously and avoid as far as possible conflict between two provisions of the same Act. In *Sultana Begum vs. Pre Chand Jain*[1], the Supreme Court has held that when there are two apparently conflicting provisions of an Act then they should be so interpreted that if possible, effect should be given to both the provisions. It may be apparent that against the

(1) (1997) 1 SCC 373.

order passed by the Commissioner, an appeal could be filed before the Corporation which is to be heard by the Appeal Committee of the Corporation under sub-sections (2) and (3) of the Act and at the same time an appeal could be filed before the District Court under sub-section (3) of Section 293 of the Act. But this conflict is not a real one because we have seen that against the orders passed by the Commissioner under Section 295 of the Act refusing or granting sanction for erection or re-erection of the building and therefore against such orders of the Commissioner refusing sanctioning or granting sanction for erection or re-erection of the building, an appeal could only be filed before the Corporation to be heard by the Appeal Committee under sub-sections (2) and (3) of Section 403 of the Act.

10. The question then is what is the scope of the appeal against an order passed by the Commissioner to District Court under sub-section (3) of Section 293 of the Act. The answer to this question lies in the very language of Section 293 of the Act. Sub-section (1) of Section 293 of the Act provides inter alia that no person shall make any material external alteration to any building without permission of the Commissioner. A person therefore can make external alteration to his building which is not material. A person who has made an external alteration to his building may think that the alteration made to his building is not material. But sub-section (2) of Section 293 of the Act quoted above provides that if a question arises whether a particular alteration in or addition to an existing building is or is not a material alteration, the matter would be determined by the Commissioner. Hence, sub-section (2) of Section 293 contemplates an order by the Commissioner determining that the external alteration or addition to a building is a material alteration even though the owner of the building may think that the alteration made by him is not material. It is this order of the Commissioner passed under sub-section (2) of Section 293 of the Act which is appealable under sub-section (3) of Section 293 before the District Court. Infact, sub-section (3) of Section 293 of the Act states that any person aggrieved by "the order of the Commissioner in this behalf" may appeal to the District Court. The expression "the order of the Commissioner in this behalf" in sub-section (3) can only refer to the order of the Commissioner in sub-section (2) of Section 293 of the Act. The scope of the appeal to the District Court under sub-section (3) of Section 293 is thus confined to an order passed by the Commissioner determining whether a particular alteration in or addition to an existing building is or is not a material alteration within the meaning of Section 293(1)(3) read with sub-section (2) of Section 293 of the Act. Our answer to the first question referred by the learned Single Judge therefore is that the appeal

provided under sub-section (3) of Section 293 is confined only to the order of the Commissioner when he determines that a particular proposed alteration is or is not a material alteration under sub-section (2) of Section 293 of the Act.

11. Coming now to the second question referred to us by the learned Single Judge, we find on a perusal of the decision in *Sardarbi Noor Mohammad vs. Municipal Corporation, Indore and others* (supra) that the Division Bench in that case has proceeded as if the order of the Commissioner sanctioning construction of the building was under Section 293 of the Act. The Division Bench in para 5 of the judgment raised the point for consideration as to whether a permission granted under Section 293(1) of the Act can be revoked or interfered with by the Appeal Committee of the Corporation under Section 403 of the Act and held in para 7 of the judgment that Section 293(3) of the Act clearly provides for an appeal to the District Court in the event of any person being aggrieved by the order of the Commissioner regarding permission to construct or reconstruct. As we have seen that the order of the Commissioner regarding permission to construct or reconstruct a building is really an order under Section 295 of the Act which empowers the Commissioner to refuse to sanction the erection or re-erection of any building and implicit in this power is the power to grant sanction for erection or re-erection of any building and under sub-sections (2) and (3) of Section 403 of the Act such an order passed by the Commissioner is appealable to the Corporation and is to be heard by the Appeal Committee of the Corporation. We have also seen that the order passed by the Commissioner under Section 293 of the Act is only an order under sub-section (2) of Section 293 determining whether a particular alteration in or in addition to an existing building is or is not material alteration and such an order passed by the Commissioner under sub-section (2) of Section 293 only is appealable under sub-section (3) of Section 293 of the Act to the District Court. The view taken by the Division Bench in *Sardarbi Noor Mohammad vs. Municipal Corporation, Indore and others* (supra) is therefore not correct view and is hereby overruled.

12. The writ petition will now be placed before the appropriate Bench for disposal in accordance with law on merits.

Order passed accordingly.
