

I.L.R.[2007] M.P., 1141

FULL BENCH

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and
Mr. Justice A.M. Sapre*

19 September, 2007

SMT. USHA BAGHEL and others

... Appellants*

Vs.

UNITED INDIA INSURANCE COMPANY

LIMITED and another

.... Respondents

Motor Vehicles Act (LIX of 1988) - Section 147 - Liability of Insurance Company - Owner was driving auto-rickshaw - Auto Rickshaw turned turtle and driver/owner suffered injuries and died subsequently - Claims Tribunal determined compensation of Rs. 4,41,500 but held that since additional premium was not paid to insurer to cover risk of owner, therefore, insurer is not liable to pay compensation - Claimants/Appellants relied upon clause in insurance policy which specifies persons or classes of persons including owner/insured entitled to drive the vehicle - Question whether merely by aforesaid condition of policy enabling owner to drive vehicle, risk of owner was covered by insurance policy when no separate premium was paid to cover owner's risk referred to Larger Bench - Held - Clause in Insurance Policy only specifies persons or classes persons entitled to drive vehicle and it says that any person including insured can drive insured vehicle provided such person holds an effective licence - Such a clause by itself doesnot cover the risk of owner/insured unless additional premium was paid so as to cover risk of owner driving vehicle - Reference answered accordingly.

With great respect, we differ from the view taken by the Division Bench in *Smt. Sukhbeer Kaur and others vs. National Insurance Company Ltd., Indore* (supra). A plain reading of the clause relied upon by the appellants and quoted in paragraph 3 above, it is clear that the clause only specifies the persons or classes of persons entitled to drive the vehicle which is insured and it says that any person including the insured can drive the insured vehicle provided such person driving the vehicle holds an effective driving licence and is not disqualified from holding or obtaining such licence and further that the person holding an effective learner's licence may also drive the vehicle when not used for transport of goods at the time

*Misc. Appeal No.1576 of 2004. (J)

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of accident and such a person satisfies the requirements of Rule 3 of the Central Motor Vehicles Rules, 1989. Such a clause by itself does not cover the risk of the owner/insured and hence by virtue of this clause, the owner or the insured cannot claim compensation from the insurer for personal injuries suffered by him nor can the legal representatives of the owner/insured claim compensation for death of the owner/insured.

(Para 8)

We accordingly answer the question referred to us by the Division Bench in the order dated 16.7.2007 in the present appeal by saying that merely by a clause in the policy enabling the owner of the vehicle to drive the vehicle, the risk of the owner/insured was not covered by the policy of insurance, unless additional premium was paid so as to cover the risk of owner/owner driving the vehicle.

(Para 9)

Cases Referred :

Hemlata Sahu and others Vs. Ramadhar and another; 2000 ACJ 134, *Virendra Singh Rajpoot and others Vs. New India Insurance Company Limited*; 2007(1) MPHT 63 (DB), *Dhanraj Vs. New India Assurance Co. Ltd.*; 2004 (8) SCC 553, *New India Assurance Company Ltd. Vs. Meera Bai and others*; (2006) 9 SCC 174.

Case Overruled :

Smt. Sukhbeer Kaur and others Vs. National Insurance Company Limited, Indore; 2006(3) T.A.C. 1022 (M.P.).

Aparna Nakra, for the appellants.

Ashok Kumar Ben, for the respondent No.1.

Hemant Namdeo, for the respondent No.2.

Sanjay Agrawal, -Amicus Curiae.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :— This is a reference made by order dated 16.7.2007 passed by a Division Bench of this Court in M.A.No.1576 of 2004.

2. The facts which are necessary to answer this reference are that when Nand Kishore was driving auto-rickshaw he owned, the auto-rickshaw turned turtle and he sustained injuries. He was taken to Nagpur for treatment where he died on 30.12.2003. The auto-rickshaw was financed by District Antvavyasayi Sahakari Vikas Samiti Maryadit, Seoni, and was insured with the United India Insurance Company Limited. The appellants claimed compensation of Rs. 18,16,000/- on

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account of death of Nand Kishore. The insurer denied its liability for the compensation. The Claims Tribunal determined the compensation of Rs.4,41,500/- but held in the award that since additional premium was not paid to the insurer to cover the risk of the owner, the insurer was not liable to pay compensation. Aggrieved by the award dated 24.12.2004 passed by Tribunal the appellants filed the appeal M.A.No.1576 of 2004.

3. Before the Division Bench of this Court hearing the appeal, the learned counsel for the appellants submitted that the risk of driver-cum-owner was covered by the insurance policy and the counsel for the appellants relied upon the following clause in the insurance policy:

" Persons or classes of persons entitled to drive any person including insured provided that person driving holds an effective driving licence at the time of the accident and is not disqualified from holding or obtaining such a licence, provided also that the person holding an effective learner's licence may also drive the vehicle when not used for the transport of passengers/goods at the time of the accident and that such a person satisfies the requirements of Rule 3 of the Central Motor Vehicle Rules, 1989."

4. Learned counsel for the appellants submitted before the Division Bench that in *Smt. Sukhbeer Kaur and others vs. National Insurance Company Limited, Indore*¹, a Division Bench of this Court interpreted a clause in the insurance policy identical to the clause quoted above and held that the risk of insured/owner of the vehicle is also covered by the policy in question and in the event of any accident arising out of use of the vehicle the owner or his legal representatives (as the case may be) is entitled to claim compensation for the injury or death, as the case may be, arising out of the accident in relation to the use of vehicle in question.

5. The Division Bench hearing the appeal passed in the order dated 16.7.2007 referreing the following question to us:

Whether merely by the aforesaid condition of the policy enabling the owner to drive the vehicle, risk of the owner/insured was covered by the policy when no separate premium was paid so as to cover owner's risk.

In the order dated 16.7.2007, the Division Bench also observed that there were other decisions of this Court in *Hemlata Sahu and others vs. Ramadhar and another*², *virendra Singh Rajpoot and others vs. New India Insurance*

(1) 2006 (3) T.A.C. 1022 (M.P.).

(2) 2000 ACJ 134.

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*Company Limited*¹, and of the Supreme Court in *Dhanraj vs. New India Assurance Co. Ltd*² and *New India Assurance Company Ltd. Vs. Meera Bai and others*³, which were in conflict with the view taken by the Division Bench of this Court in *Smt. Sukhbeer Kaur and others vs. National Insurance Co. Ltd. Indore* (supra).

6. We have heard Ms. Aparna Nakra, learned counsel for the appellants, Mr. Ashok Kumar Ben, learned counsel for respondent No.1, Mr. Hemant Namdeo, learned counsel for respondent No.2 and Mr. Sanjay Agrawal, Advocate/Amicus Curiae.

7. We find that in the two decisions of the Division Bench of this court in *Hemlata Sahu and others vs. Ramadhar and another* (supra) and *Virendra Singh Rajpoot and others vs. New India Insurance Co. Ltd.* (supra) as well as the two decisions of the Supreme Court in *Dhanraj vs. New India Assurance Co. Ltd.* (supra) and *New India Assurance Company Ltd. Vs. Meera Bai and others* (supra), the clause in the insurance policy relied upon by the learned counsel for the appellants and quoted in paragraph 3 above did not arise for consideration before the Court. It is only in the Division Bench decision of this Court in *Smt. Sukhbeer Kaur and others vs. National Insurance Company Limited, Indore* (supra) that a clause identical to the one relied upon by the appellants and quoted above was interpreted to cover the risk of the deceased owner of the vehicle in the event of any accident arising out of use of the vehicle so as to entitle the insured himself or his legal representatives to claim compensation for injury or death caused by an accident involving the vehicle.

8. With great respect, we differ from the view taken by the Division Bench in *Smt. Sukhbeer Kaur and others vs. National Insurance Company Ltd., Indore* (supra). A plain reading of the clause relied upon by the appellants and quoted in paragraph 3 above, it is clear that the clause only specifies the persons or classes of persons entitled to drive the vehicle which is insured and it says that any person including the insured can drive the insured vehicle provided such person driving the vehicle holds an effective driving licence and is not disqualified from holding or obtaining such licence and further that the person holding an effective learner's licence may also drive the vehicle when not used for transport of goods at the time of accident and such a person satisfies the requirements of Rule 3 of the Central Motor Vehicles Rules, 1989. Such a clause by itself does not cover the risk of the owner/insured and

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hence by virtue of this clause, the owner or the insured cannot claim compensation from the insurer for personal injuries suffered by him nor can the legal representatives of the owner/insured claim compensation for death of the owner/insured.

9. We accordingly answer the question referred to us by the Division Bench in the order dated 16.7.2007 in the present appeal by saying that merely by a clause in the policy enabling the owner of the vehicle to drive the vehicle, the risk of the owner/insured was not covered by the policy of insurance, unless additional premium was paid so as to cover the risk of owner driving the vehicle. We may hasten to add that it is open for the appellants to establish before the Division Bench that by virtue of some other clause or condition in the insurance policy, the claimants are entitled to compensation for the death of owner or insured. The case will now be placed before the Division Bench for disposal on merits in accordance with law.

Writ petition disposed.

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FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S.Jha and

Mr. Justice A.M. Sapre

19 September, 2007

SMT. SUNITA LOKHANDE and others

..... Appellants*

Vs.

THE NEW INDIA ASSURANCE COMPANY

LIMITED and others

..... Respondents

A. Motor Vehicles Act, (LIX of 1988) - Sections 147, 166 - Liability of Insurance Company - Question whether owner can claim compensation in respect of injury sustained by him in accident unless a premium in respect of personal injury has been paid referred to larger bench - Deceased/owner travelling in truck - Truck turned turtle and owner/deceased eventually died - Claims Tribunal held that Insurance Company not liable to indemnify the owner of vehicle - Held - Owner cannot claim compensation in respect of injury or death suffered by him, unless additional premium in respect of such personal injury or death has been taken by way of Special Insurance Contact.

It is clear from the aforesaid two decisions of the Supreme Court in *Dhanraj*

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Vs. New India Assurance Company Ltd. and another (Supra) and Oriental Insurance Company Ltd Vs. Jhuma Saha and others (Supra) that the owner cannot claim compensation in respect of injury or death suffered by him in a motor accident, unless additional premium in respect of such personal injury or death has been taken by way of special insurance contract. (Para 8)

B. Motor Vehicles Act, (LIX of 1988) - Section 166 - Claim for compensation - Question whether legal heirs of deceased owner put forth claim for compensation in absence of special policy - Held - Legal heirs of deceased/owner cannot put a claim for compensation for death or injury of deceased unless additional premium in respect of personal injury has been taken by the Insurance Company by way of special insurance contract from the owner of the vehicle.

We hold that the legal heirs of deceased-owner cannot put a claim for compensation for death or injury of deceased in a motor accident unless additional premium in respect of personal injury has been taken by the Insurance Company by way of special insurance contract from the owner of the vehicle. (Para 9)

C. Motor Vehicles Act, (LIX of 1988) - Sections 145(g), 157 - Third Party - Meaning and Scope of - Question whether owner under any circumstance can be treated as third party - Held - Insured who is party to policy of Insurance is not a third party - Section 157 goes to show that owner of vehicle and insured under insurance policy is one and same person - Owner of vehicle cannot be a third party for purposes of Chapter XI of Motor Vehicles Act.

It will be clear from the aforesaid judgment of the Full Bench that the insured who is a party to the policy of insurance is not a "third party" for the purposes of Chapter XI of the Act and in particular section 147 thereof. (Para 10)

It will be further clear from a plain reading of section 157 of the Act quoted above that whenever a person in whose favour the certificate of insurance has been issued transfers to any other person, the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance related thereto, the certificate of insurance and the policy described in the insurance certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer. This provision goes to show that the owner of the vehicle and the insured under an insurance policy is one and the same person. Accordingly, the owner of the vehicle

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cannot be a "third party" for the purposes of chapter XI of the Act.

(Para 11)

D. Motor Vehicles Act, (LIX of 1988) - Section 147(5) - Policy - Question whether own damage would cover damage to person of owner or it is confined to properties of vehicle owner - Held - Expression own damage has to be read along with express terms and conditions of Insurance Policy - If on reading of terms and conditions of insurance policy it is found that additional premium has also been paid for injury or death of owner then Insurance Company will also be liable for compensation for injury or death of owner in addition to property.

Thus, the expression "own damage" will have to be read along with the express terms and conditions of the insurance policy and if on a reading of the terms and conditions of the insurance policy, it is found that the premium that is paid for "own damage" covers only damage to the property of the insured and not to injury to the person of the owner or life of the owner, then obviously the insurer would not be liable for compensation for injury or death of the owner, but if on a reading of the terms and conditions of the insurance policy it is found that additional premium has been paid not only for damage to property but also for injury or death of the owner then the insurance company will also be liable for compensation for injury or death of the owner in addition to loss of property. Accordingly, we answer question no.(d), referred to us by the Division Bench by saying that it will ultimately depend upon the terms and conditions of the insurance policy and the premium or additional premium paid and the purpose for which premium or additional premium has been paid for coming to the conclusion whether "own damage" would cover damage to the person of the owner or will be confined to the properties of the vehicle owner.

(Para 13)

Cases Referred :

Dhanraj Vs. New India Assurance Company Ltd. and another; 2004 AIR SCW 5438 = 2004(8) SCC 553, Oriental Insurance Company Ltd. Vs. Jhuma Saha and others; 2007 ACJ 818; Jugal Kishore and another Vs. Ramlesh Devi and others; 2003 (4) MPLJ 546, Oriental Insurance Company Vs. Jamna Bai and others; 2001 (4) MPHT 293.

Subodh Kathar, for the appellants.

Anoop Nair, for the respondent no.1.

None, for the respondents nos. 2 & 3

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S. K. Rao with Sanjay Agrawal, amicus curiae.

Cur. adv. vult.

ORDER

The Order of the Court, was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :— This is a reference made by a Division Bench of this Court in this M.A. for reconsideration of the decision rendered by another Division Bench in *Oriental Insurance Company Vs. Jamna Bai and others*¹.

2. The facts of the case in the miscellaneous appeal which necessitated the reference are that on 3.5.1997, when Bhanwar Lal Lokhande was travelling in a truck bearing registration no. CIB-3490, the truck turned turtle and in the accident Bhanwar Lal Lokhande sustained injuries and eventually died. The legal heirs of the deceased Bhanwar Lal Lokhande instituted claim case No. 14/97 before the Motor Accident Claims Tribunal, Betul claiming an amount of Rs. 7,77,500/- as compensation against the New India Assurance Company Ltd. which had insured the truck. The truck was owned by Bhanwar Lal Lokhande and his brother Umesh Kumar Lokhande and therefore the Insurance Company contended before the Tribunal that the Insurance Company was not liable to indemnify the owners of the truck or their legal heirs and that the Insurance Company was only liable under the policy read with section 147 of the Motor Vehicles Act, 1988 (hereinafter referred to as the "Act") to pay compensation to the third party. The Tribunal upheld the contention of the Insurance Company and dismissed the claim petition.

3. Aggrieved, the legal heirs of Bhanwar Lal Lokhande, filed M.A. No. 2461/99 before this Court. Before the Division Bench hearing the M.A., the appellants relied upon the decision of a Division Bench of this Court in the case of *Oriental Insurance Company Ltd. Vs. Jamna Bai and others* (Supra). In *Jamna Bai's* case, the facts were that the deceased was the owner of tractor along with Apa. The deceased, however, was not travelling in the tractor insured with the Insurance Company. The tractor was being driven by a driver appointed by Apa and when the tractor was being taken towards the land, the deceased was injured. On these facts, the Division Bench held that the deceased fell within the definition of "third party". The Division Bench further found that under the policy of Insurance of that case, besides normal premium, the deceased had paid Rs. 150/- against "Own damages". The Division Bench held that the Insurance Company was liable to pay compensation on the death of deceased Umrao Singh.

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4. Before the Division Bench of the present M.A., the counsel for the Insurance Company cited inter alia the decision of the Supreme Court in *Dhanraj Vs. New India Assurance Company Ltd. and another*¹ and contended that the law laid down by the Division Bench in the case of *Jamna Bai* (supra) requires reconsideration in view of the decision of the Supreme Court in *Dhanraj Vs. New India Assurance Company Limited and another* (Supra). The Division Bench passed an order dated 8.11.2004 taking a prima facie view that the decision of the Division Bench rendered in the case of *Jamna Bai* (supra) requires reconsideration by the Full Bench and framed following questions to be answered by the Full Bench:

"(a) Whether the owner can claim compensation in respect of an injury sustained by him in a motor accident, unless a premium in respect of personal injury has been taken by way of special insurance contract ?

(b) Can the legal heirs of the deceased owner put forth the claim for compensation in the absence of special policy ?

(c) Can the owner under any circumstance be treated or deemed to be treated as a third party ?

(d) Whether own damage would cover the damage to the person of the owner or it is confined to the properties of the vehicle owner ?"

5. We have heard Mr. Subodh Kathar, learned counsel for the appellants and Mr. Anoop Nair, learned counsel for respondent no.1. None has appeared for the other respondents. We have also heard Mr. S.K. Rao and Mr. Sanjay Agrawal, who assisted the Court as *amicus curiae*.

6. Under question (a) referred by the Division Bench, we are required to answer whether the owner can claim compensation in respect of an injury sustained by him in the motor accident, unless a premium in respect of personal injury has been taken by way of special insurance contract ? In *Dhanraj Vs. New India Assurance Company Ltd. and another* (supra) the Supreme Court held :

"Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an

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insurance company to assume risk for death or bodily injury to the owner of the vehicle."

It is thus clear that in *Dhanraj Vs. New India Assurance Company Ltd. and another* (Supra), the Supreme Court clearly held that section 147 of the Act does not require the Insurance Company to assume risk for death or bodily injury to the owner of the vehicle and therefore the Insurance Company under the insurance policy which covers only liability under section 147 of the Act would not be liable for death or bodily injury to the owner of the vehicle.

7. Again, in *Oriental Insurance Company Ltd Vs. Jhuma Saha and others*¹, the Supreme Court after referring to the law as laid down in *Dhanraj Vs. New India Assurance Company Ltd and another* (supra) held :

"The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, section 147 (1) (b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

8. It is clear from the aforesaid two decisions of the Supreme Court in *Dhanraj Vs. New India Assurance Company Ltd. and another* (Supra) and *Oriental Insurance Company Ltd Vs. Jhuma Saha and others* (Supra) that the owner cannot claim compensation in respect of injury or death suffered by him in a motor accident, unless additional premium in respect of such personal injury or death has been taken by way of special insurance contract. Question no. (a) referred by the Division Bench in the present case is answered accordingly.

9. Question No. (b) referred by the Division Bench, is whether legal heirs of the deceased-owner can put forth a claim for compensation in the absence of special policy. As a logical corollary of our answer to question no. (a) above, we hold that the legal heirs of deceased-owner cannot put a claim for compensation for death or injury of deceased in a motor accident unless additional premium in respect of personal injury has been taken by the Insurance Company by way of special insurance contract from the owner of the vehicle.

10. The question referred under clause (c) by the Division Bench is whether the owner in any circumstance can be treated or deemed to be treated as a "third party". The expression "third party" was interpreted by the Full Bench of this

(1) 2007 ACJ 818.

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Court in *Jugal Kishore and another Vs. Ramlesh Devi and others*¹ to mean parties other than the contracting parties to the insurance policy. Paragraph 17 of the judgment of the Full Bench in *Jugal Kishore* (Supra) is quoted hereunder :

"Section 145(g) of the Act defines "third party". It defines that the "third party" includes the Government. It would mean that other than the contracting parties to the insurance policy, the expression "third party" should include everyone, be it a person travelling in another vehicle, one walking on the road or a passenger in the vehicle itself which is the subject-matter of the insurance policy. Every insured takes out an insurance policy against a third party risk and enters into a contract with insurer only with the motive, intention and purpose of covering the risks which may arise in relation to claims lodged against him by a third party. Insurer agreeing to issue insurance policy thereby undertakes to insure the insured and indemnify him against all risks in relation to all claims lodged against him by third party. It will not be proper to narrow the scope and ambit of the word "third party" and exclude the passengers from the operation and purview which would not only defeat the very purpose of taking out the insurance policy, but the very object of the Motor Vehicles Act which makes it mandatory requirement of law that all vehicles/owners of the vehicles must be compulsorily insured against third party risk."

It will be clear from the aforesaid judgment of the Full Bench that the insured who is a party to the policy of insurance is not a "third party" for the purposes of Chapter XI of the Act and in particular section 147 thereof.

11. The next question is whether the person who is insured and the owner of the vehicle can be two different persons. If they can be two different persons, then there may be a case where the owner of a vehicle, who is not the insured person, would be a "third party" for the purposes of Chapter XI of the Act. But section 157 of the Act contemplates that the certificate of insurance will be issued in favour of the owner of the vehicle. Section 157 of the Act is quoted here-in-below:

"157. Transfer of certificate of insurance -(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating

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thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

Explanation - For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance".

It will be further clear from a plain reading of section 157 of the Act quoted above that whenever a person in whose favour the certificate of insurance has been issued transfers to any other person, the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance related thereto, the certificate of insurance and the policy described in the insurance certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer. This provision goes to show that the owner of the vehicle and the insured under an insurance policy is one and the same person. Accordingly, the owner of the vehicle cannot be a "third party" for the purposes of chapter XI of the Act. Question number (c) referred by the Division Bench is answered accordingly.

12. This is not to say that the owner of the vehicle would not be entitled to any loss suffered in an accident from the insurer. All that we have held is that a policy only satisfying the requirements of section 147 of the Act does not cover such loss suffered by the owner of the vehicle. But subsection 5 of section 147 of the Act makes it clear that a policy of insurance may contain terms and conditions under which the owner can claim loss suffered by him in the accident from the insurer notwithstanding anything contained in any law for the time being.

13. This leads us to question number (d) referred by the Division Bench :

"Whether own damage would cover the damage to the person of the owner or it is confined to the properties of the vehicle owner"

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In *Dhanraj Vs. New India Assurance Co. Ltd. and another* (supra), the Supreme court considered a policy which covered "own damage" and held that under the policy of insurance in that case under the heading "own damage" words "premium on vehicle and non-electrical accessories" appear and on the terms and conditions of the said policy held that the premium that was paid was towards damage to vehicle and not for injury to the person of the owner. Thus, the expression "own damage" will have to be read along with the express terms and conditions of the insurance policy and if on a reading of the terms and conditions of the insurance policy, it is found that the premium that is paid for "own damage" covers only damage to the property of the insured and not to injury to the person of the owner or life of the owner, then obviously the insurer would not be liable for compensation for injury or death of the owner, but if on a reading of the terms and conditions of the insurance policy it is found that additional premium has been paid not only for damage to property but also for injury or death of the owner then the insurance company will also be liable for compensation for injury or death of the owner in addition to loss of property. Accordingly, we answer question no. (d), referred to us by the Division Bench by saying that it will ultimately depend upon the terms and conditions of the insurance policy and the premium or additional premium paid and the purpose for which premium or additional premium has been paid for coming to the conclusion whether "own damage" would cover damage to the person of the owner or will be confined to the properties of the vehicle owner.

14. Before we part with this case, we would like to record our appreciation for the assistance rendered by Mr. S.K. Rao, Senior Advocate and Mr. Sanjay Agarwal, Advocate; amicus curiae, Mr. Ashok Lalwani, Advocate who appeared for the appellant in M.A.No.246/04, Mr. Anoop Nair, Advocate for the respondent and Mr. Subodh Kathar, Advocate for the appellant in writing this judgment on very intricate questions of law.

This M.A. will now be placed before the appropriate Bench for hearing on merits.

Order passed accordingly.

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FULL BENCH

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and
Mr. Justice A.M. Sapre*

19 September, 2007

RAJEEV DALELA

.... Petitioner*

Vs.

STATE OF M.P. and others

... Respondents

Medical and Dental Postgraduate Entrance Examination Rules, Madhya Pradesh 1999 - Rules 3(VI)(iv) - Incumbent already admitted to postgraduate course debarred from appearing in Entrance Examination for three years - Held - Object of Rule is to ensure that resources of State spent on giving postgraduate education to students are not wasted by leaving postgraduate courses in midstream and seeking admission in some other postgraduate course of his choice - Direction to permit candidates to participate in counseling on the basis of result of subsequent entrance examination not tenable in law - However, as Petitioner by interim order was allowed to participate in counseling and was given admission in postgraduate course allotted to him and he must have completed the course therefore, admission given to petitioner pursuant to interim order will not be disturbed.

We have no doubt in our mind that Rule 3(VI)(iv) of the Rules by its very language is clear that a person admitted to any postgraduate course in Madhya Pradesh in the previous year who has not completed the postgraduate course is not eligible to take examination upto three years from the date of his previous admission. The object of this Rule is to ensure that the resources of the State spent on giving postgraduate education to students are not wasted by the students leaving the postgraduate course in the midstream and seeking admission in some other postgraduate course of his choice. Hence, the entire approach of the Gwalior Bench in L.P.A. No.62/99 (Dr. Miss Vaishali Govila vs. State of M.P. and others) as well as in L.P.A. No.52/99 (Dr. Miss Madhu Gupta vs. State of M.P. and others) in directing the authorities to permit candidates who had been admitted to the postgraduate courses on the basis of 1998 Pre-Postgraduate examination to participate in the counseling on the basis of the results of the 1999 Pre-Postgraduate examination on their filing affidavits that they will forego their admissions to the

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postgraduate courses on the basis of 1998 examination frustrates the object of the Rule 3(VI)(iv) of the Rules. In our considered opinion, therefore, the directions of the Gwalior Bench in the two cases were not tenable in law. (Para 4)

Case Referred :

Dr. Naveen Kumar Dulhani Vs. State of M.P. and others; L.P.A. No.196/99.

Cases Overruled :

Dr. Miss Vaishali Govila Vs. State of M.P. and others L.P.A. No. 62/99,
Dr. Miss Madhu Gupta Vs. State of M.P. and others; L.P.A. 52/99.

Rajendra Tiwari with A. Gupta, for the petitioners.

Kumares Pathak, Dy. 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 reference made by a Division Bench of this Court in the order dated 17.8.1999 passed in W.P. No.1171/99.

2. The background in which the reference is made is that Rule 3(VI)(iv) of the Madhya Pradesh Medical and Dental Postgraduate Entrance Examination Rules, 1999 (for short 'the Rules') inter alia provided that a person admitted to any postgraduate course in Madhya Pradesh in previous year who has not completed the post graduation course is not eligible to take the examination up to three years from the date of his previous admission. Candidates who had been admitted to postgraduate courses in Madhya Pradesh on the basis of the results of Pre-Postgraduate Examination in the year 1998 approached this Court in the writ petitions and thereafter Letters Patent Appeals for a direction to authorities to permit them to participate in the counseling on the basis of the results of the Pre-Postgraduate Examination, 1999 so that they may get a course or seat of their choice.

3. A Division Bench of the Principal Seat of this Court at Jabalpur held in L.P.A. No.196/99 (*Dr. Naveen Kumar Dulhani vs. State of M.P. and others*) in a judgment delivered on 20.7.1999 that such candidates who had appeared in the 1998 Pre-Postgraduate Examination and had been admitted to postgraduate courses cannot be allowed to participate in the counseling on the basis of the results in the Pre-Postgraduate Examination, 1999, but a Division Bench at Gwalior of this Court in L.P.A. No.62 of 1999 (*Dr. Vaishali Govila vs. State of M.P. and*

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others) directed the authorities to permit such candidates who had been admitted to postgraduate courses pursuant to the Pre-Postgraduate Entrance Examination, 1998 for counseling on the basis of their results in the Pre-Post Graduate Entrance Examination, 1999 on filing affidavits that they will forego their admission on the basis of the 1998 examination.

4. When the present writ petition came before a Division Bench of this Court, the Division Bench in the order dated 17.8.1999 took the view that if under Rule 3(VI)(iv) of the Rules, the incumbent already admitted to a postgraduate course is debarred from appearing in entrance examination for three years, the direction of the Gwalior Bench of this Court that the candidates will be allowed to participate in the counseling on the basis of the results of the 1999 examination, on filing affidavits by the candidates that they will forego their admission in the postgraduate course could not have been possible. In the order dated 17.8.1999 passed in the present case, the Division Bench also observed that the mode and approach adopted by the Gwalior Bench considered in the light of the interpretation given by the Court in L.P.A. No.196/99 (*Dr. Naveen Dulhani vs. State*) in the judgment dated 20.7.1999 was not at all correct.

5. After hearing Mr. Rajendra Tiwari, learned senior counsel for the petitioner and Mr. Kumaresh Pathak, learned Dy. Advocate General for the State, we have no doubt in our mind that Rule 3(VI)(iv) of the Rules by its very language is clear that a person admitted to any postgraduate course in Madhya Pradesh in the previous year who has not completed the postgraduate course is not eligible to take examination upto three years from the date of his previous admission. The object of this Rule is to ensure that the resources of the State spent on giving postgraduate education to students are not wasted by the students leaving the postgraduate course in the midstream and seeking admission in some other postgraduate course of his choice. Hence, the entire approach of the Gwalior Bench in L.P.A. No.62/99 (*Dr. Miss Vaishali Govila vs. State of M.P. and others*) as well as in L.P.A. No.52/99 (*Dr. Miss Madhu Gupta vs. State of M.P. and others*) in directing the authorities to permit candidates who had been admitted to the postgraduate courses on the basis of 1998 Pre-Postgraduate examination to participate in the counseling on the basis of the results of the 1999 Pre-Postgraduate examination on their filing affidavits that they will forego their admissions to the postgraduate courses on the basis of 1998 examination frustrates the object of the Rule 3(VI)(iv) of the Rules. In our considered opinion, therefore, the directions of the Gwalior Bench in the two cases were not tenable in law.

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6. In the present case, however, we find that when the writ petition was taken up for consideration of interim prayer by a learned Single Judge of this Court on 13.4.1999, the learned Single Judge directed that as and when counseling based on the 1999 examination takes place, the petitioner shall also be allowed to participate in the counseling and until further orders and subject to the result of the writ petition, the seat, if any, allotted to him shall be kept reserved. We are informed by Mr. Rajendra Tiwari that pursuant to the said direction of the learned Single Judge in the present writ petition, the petitioner participated in the counseling based on the Pre-Postgraduate 1999 examination and was given admission in a seat in a Postgraduate course allotted to him. Thus, the petitioner in this case had been admitted to a Postgraduate course on the basis of his results in the Pre-Postgraduate 1998 examination but by virtue of the interim order passed by the learned Single Judge of this Court on 13.4.1999, he left the said course and participated in the counseling based on the 1999 examination and after being allotted a seat pursuant to said counseling, he was admitted to the seat and he must have in the meantime completed the course. On these peculiar facts, even though we have taken a view that the approach of the Gwalior Bench in the two cases in directing the authorities to permit the candidates who had been admitted in the Postgraduate course on the basis of 1998 examination to participate in the counseling for the seats in the Postgraduate course on the basis of 1999 examination on filing affidavits that they will forego their seats was not tenable in law, the admission given to the petitioner pursuant to the interim order passed by the learned Single Judge on 13.4.1999 will not be disturbed.

7. The reference stands answered and the writ petition stands disposed of accordingly.

Order passed accordingly.

I.L.R. [2007] M.P., 1158

FULL BENCH

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and**Mr. Justice A.M. Sapre*

20 September, 2007

SURJEET SINGH SALOJA and another

..... Petitioners*

Vs.

THE STATE OF MADHYA PRADESH and another

..... Respondents

Essential Commodities (Price Exhibition and Price Control) Order, M.P. 1977 - Clause 6(2), M.P. Motor Spirit and High Speed Diesel Oil (Licensing and Control) Order, 1980 - Clause 6, 10 - Issuance of Receipt or Invoice - Control Order 1977 requires a dealer to issue correct receipt or invoice to every purchaser - Licence issued under Order, 1980 requires licensee to issue to every customer, correct receipt or invoice if so demanded - Order issued by Collector in exercise of power under Clause 6(2) of Order, 1977 directing all Petrol and Diesel pump owners to supply cash memos to customer challenged - Matter referred to larger bench for reconsideration of judgment passed in Virendra Singh Vs. Collector, Indore and others holding that it is not necessary to issue receipt or invoice unless demanded in case of sale of motor spirit - Held - Control Order, 1977 applicable to Petrol and Diesel (H.S.D.) - Control Order, 1980 applies to Motor Spirits and High Speed Diesel Oil only - Elaborate provisions including licensing of dealer have been made in Control Order, 1980 to regulate sale and supply of Motor Spirits and High Speed Diesel Oil - Clause 8 of term of licence provides that licensee shall issue receipt or invoice to customer if so demanded by him - Whether a dealer to whom Control Order, 1980 applies has to comply with provisions of Control Order, 1977 - Dealer as defined in Clause 2(b) of Control Order, 1980 means person engaged in business of purchase, sale or storage of sale of motor spirit and or high speed diesel oil or both on the basis of agreement with Oil Company - Dealer who carries on business in Motor Spirit and High Speed Diesel Oil has to sell in accordance with instructions of Government or Public Sector Companies with regard to prices at which product is to be sold - Thus, dealer cannot be asked to comply with provisions of Control Order, 1980 as well

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as Control Order, 1977 - Decision passed in Virendra Singh Vs. Collector, Indore and others holding that it is not necessary to issue receipt or invoice unless demanded was correct in facts of the case - However, authorities mentioned in Clause 10 of Control Order, 1980 can issue any direction in addition to those contained in terms and conditions of licence.

The question, therefore, arises whether a dealer of oil to whom the Control Order 1980 is applicable is to comply with the provision of Clause 8 of the terms and conditions of the licence in Form-B issued under Clause 6 of the Control Order 1980 and issue a receipt or invoice to the customer only where the customer demands the same or he has also to comply with the provisions of sub-clause (2) of Clause 6 of the Control Order 1977 and has to issue to every purchaser a correct receipt or invoice whether he demands the same or not. The answer to this question lies in two different definitions of 'dealer' given in the Control Order 1977 and the Control Order 1980. (Para 10)

A reading of the definition of 'dealer' in the Control Order 1977 would show that it means a person who carries on business of selling by retail or wholesale or storing for sale by retail or wholesale any commodity whether or not such business is carried in addition to any other business. (Para 11)

It will be clear from the aforesaid definition of 'dealer' in the Control Order 1980 that the dealer means a person engaged in the business of purchase, sale or storage for sale of motor spirit and or high speed diesel oil or both on the basis of an agreement with an Oil Company. It, thus, appears that the Control Order 1980 applies only to dealers of Motor Spirit and High Speed Diesel oil carrying on their business on the basis of an agreement with an Oil company. (Para 12)

Such a dealer carrying on the business in Motor Spirit and High Speed Diesel oil on the basis of an agreement with the Oil company obviously cannot be asked to comply with the provisions of the Control Order, 1980 as well as Control Order 1977 because, as we have seen, elaborate provisions have been made in the Control Order 1977 as well as the Control Order 1980 with regard to regulation of supply and distribution and other matters and provisions in this regard in the Control Order 1977 and the Control Order 1980 also are different. It further appears that the Control Order 1977, which has been issued by the State Government in exercise of its powers delegated by the Central Government under the Central Government order Nos. S.O. 681 (E) and S.O. 682 (E) dated 30th November 1974, has been issued not only to provide for matters specified in

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clauses (d), (e), (f), (g), (h), (i), (ii) and (j) contained in sub-section (2) of Section 3 of the Act but also to provide for matters specified in clause (c) of sub-section (2) of Section 3 of the Act, namely, control of prices at which essential commodities are bought and sold. On the other hand, the Control Order 1980 has been made, as we have seen, in exercise of powers delegated by the Central Government to the State Government under Central Government order Nos.S.O.681 (E) dated 30th November, 1974 to provide matters specified in clauses (d), (e), (f), (g), (h), (i), (ii) and (j) contained in sub-section (2) of Section 3 of the Act and has not been made in exercise of its powers delegated to it under Central Government Order No.S.O. 682 (E) to provide for matters specified in clause (e) of sub-section (2) of Section 3 of the Act relating to control of prices at which essential commodities are bought and sold. This explains why the Control Order 1980 does not make elaborate provisions relating to exhibition of price list, charging of prices, issue to every purchaser a correct receipt or invoice. Since the Control Order 1980 applies to dealers carrying on the business in Motor Spirit and High Speed Diesel oil on the basis of an agreement with the Government or Public Sector Oil Companies, the State Government has not thought it necessary to provide strict provisions with regard to price control under the Control Order 1980 and has, therefore, provided in Clause 8 of the terms and conditions of the licence in Form-B issued under Clause 6 thereof that the licensee shall issue an invoice or receipt only if the customer demands the same. (Para 14)

Hence the authorities mentioned in Clause 10 of the Control Order 1980 can issue any direction in addition to those contained in the terms and conditions of the licence in Form-B and if such directions are issued, the licensee under the Control Order 1980 will have to comply with such directions as well as the terms and conditions of the licence in Form-B. (Para 15)

Case Referred :

Virendra Singh Vs. Collector, Indore and others; AIR 1986 M.P. 159.

None, for the petitioners.

V.K. Shukla, Dy.A.G. for the respondents

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :— This is a reference made to us pursuant to an order dated 21.11.2000 passed by learned single Judge in W.P.No.4602 of 2000.

2. The relevant facts briefly are that the Collector, Bhopal issued an order

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dated 12.7.1999 in exercise of powers under Clause 6 (2) of the M.P. Essential Commodities (Price Exhibition and Price Control) Order, 1977 directing that all the petrol and diesel pump owners must supply cash memos to consumers in respect of petrol and diesel failing which appropriate legal action shall be taken.

3. The petitioners challenged the order dated 12.7.1999 of the Collector, Bhopal in the present writ petition under Article 226 of the Constitution and contended before the learned single Judge that under Condition No.8 of the licence of the petrol and diesel pump owners issued under the M.P. Motor Spirit and High Speed Diesel Oil (Licensing and Control) Order, 1980 (for short 'the Control Order 1980'), it was not necessary to issue a receipt or invoice, unless demanded in case of sale of motor spirit. In support of this contention, the counsel for the petitioners relied on a decision of the Division Bench of this Court in *Virendra Singh vs. Collector, Indore and others*¹.

4. The learned single judge, however, found that under sub-clause (2) of Clause 6 of the M.P. Essential Commodities (Exhibition of Prices & Price Control) Order, 1977 (for short 'the Control Order, 1977'), a dealer was required to issue to every purchaser a correct receipt or invoice showing the name and address of the customer, the date of transaction, the essential commodity sold, the quantity, the rate and the total amount charged and this provision in the Control Order, 1977 had not been taken into consideration by the decision in *Virendra Singh vs. Collector Indore and others* (supra). In the order dated 21.11.2000, the learned single Judge therefore took the view that the decision rendered in the case of *Virendra Singh vs. Collector Indore and others* (supra) requires to be reconsidered by a larger Bench. This is how the matter has been referred to us.

5. We have heard Mr. V.K. Shukla, learned Deputy Advocate General for the State. No one however has appeared for the petitioners although the name of the counsel for the petitioners has been shown in the cause-list.

6. We find that by Central Government order No.S.O.681 (E) dated 30th November, 1974 issued under Section 5 of the Essential Commodities Act, 1955 (for short 'the Act'), the Central Government delegated its power under sub-section (1) of Section 3 of the Act to the State Government to make orders to provide for matters specified in clauses (d), (e), (f), (g), (h), (i) (ii) and (j) of sub-section (2) of Section 3 of the Act in relation to all essential commodities other than foodstuffs and fertilizers subject to conditions specified therein and by another Central Government order No.S.O.682 (E) dated 30th November, 1974 issued

(1) AIR 1986 M.P. 159.

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under Section 5 of the Act, the Central Government delegated its powers under sub-section (1) of Section 3 of the Act to the State Government to make orders to provide for matters specified in Clause (c) of sub-section (2) of Section 3 of the Act in relation to all essential commodities, other than foodstuffs and fertilizers subject to conditions specified therein.

7. In exercise of these powers delegated under Central Government order No.S.O. 681 (E) and Central Government Order No.S.O.682 (E) dated 30th November, 1974 in relation to essential commodities other than foodstuffs and fertilizers and in exercise of powers delegated to it under other orders of the Central Government issued under Section 5 of the Act in relation to foodstuffs, the State Government made Control Order 1977. In the Control Order 1977, elaborate provisions have been made regarding exhibition of price lists (clause 3), charging of prices (clause 4), maintenance of accounts etc. (clause 6), regulation and supply and distribution (clause 7) and powers of entry, search and seizure, etc. (clause 8). In the Control Order 1977, the definition of 'essential commodity' in clause 2 (b) is given to mean an essential commodity within the meaning of clause (a) of Section 2 of the Act and specified in the Schedule appended to the Control Order 1977 and a number of essential commodities have been mentioned in the Schedule appended to the Control Order, 1977. Under serial No.11 of the Schedule as amended, the essential commodities 'Petrol and Diesel (H.S.D.)' have been mentioned. The result is that the Control Order 1977 is applicable to Petrol and Diesel (H.S.D.). Sub-clause (2) of Clause 6 of the Control Order 1977, referred to by the learned single Judge in the order dated 21.11.2000 reads thus:

"6. Maintenance of accounts etc.-

(1)

(2) A dealer shall issue to every purchaser a correct receipt or invoice, showing the name and address of the customer, the date of transaction, the essential commodities sold, their quantity, the rate and the total amount charged."

Thus, under sub-clause (2) of clause 6 of the Control Order, 1977, a dealer of petrol and diesel (H.S.D.) is required to issue to every purchaser a correct receipt or invoice, showing the name and address of the customer, the date of transaction, the essential commodity sold, the quantity and the rate and the total amount charged.

8. We further find that the Control Order. 1980 was made by the State Government in exercise of its powers delegated to it by the Central Government

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by order No.S.O.681 (E) dated 30th November, 1974 only. In the Control Order 1980, which applies to only Motor Spirits and High Speed Diesel Oil, elaborate provisions have been made with regard to regulation of sale and supply of Motor Spirit and High Speed Diesel Oil (Clause 3) including maintenance of true and correct accounts of purchase, sale and storage of oil (subclause [4] of clause 3), licensing of dealer (clauses 4 to 9), cancellation or suspension of licence (clauses 11 and 12), deposit of security and forfeiture of security deposit (clauses 14 and 15), appeal and revision (clauses 16 and 17) and powers of entry, search and seizure (clause 19). We further find that under clause 6 of the Control Order 1980, a licence for carrying on the business in diesel and oil is issued in Form-B. In form-B, various terms and conditions of the licence have been mentioned and Clause 8 of the terms and conditions of the licence as amended with effect from 13th May, 1986 reads as follows:

"8. The licensee shall, except when specially exempted by the State Government, issue to every customer if so demanded by him a correct receipt or invoice, as the case may be, giving his own name and address and the name and address of the customer, the date of transaction, the quantity of oil sold and the rate and total price charged and shall keep the counter-foil or duplicate of the same, in the form of a book, to be readily available for inspection on demand by the licensing authority or any officer authorized by it on his behalf."

It will be clear from language of clause 8 of the terms and conditions of licence in Form-B issued under clause 6 of the Control Order 1980 that the licensee shall issue to every customer, if so demanded by him a correct receipt or invoice, as the case may be, giving his own name and address and the name and address of the customer, the date of transaction, the quantity of oil sold and the rate and total price charged.

9. Thus, there is a difference in the language of sub-clause (2) of Clause 6 of the Control Order 1977 and the language of Clause 8 of the terms and conditions of licence in Form-B issued under Clause 6 of the Control Order 1980. Whereas under sub-clause (2) of Clause 6 of the Control Order 1977 a dealer has to issue to every purchaser a correct receipt or invoice showing the particulars mentioned therein, under clause 8 of the terms and conditions of the licence in Form-B issued under Clause 6 of the Control Order 1980, a licensee is required to issue to every customer 'if so demanded by him' a correct receipt or invoice, giving particulars mentioned therein. In other words, under sub-clause (2) of Clause 6 of the Control

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Order 1977, it is obligatory for the dealer to issue to every purchaser, a correct receipt or invoice, but under Clause 8 of the terms and conditions of the licence issued under Clause 6 of the Control Order 1980, it is obligatory for the dealer to issue a correct receipt or invoice only if the customer demands the same.

10. The question, therefore, arises whether a dealer of oil to whom the Control Order 1980 is applicable is to comply with the provision of Clause 8 of the terms and conditions of the licence in Form-B issued under Clause 6 of the Control Order 1980 and issue a receipt or invoice to the customer only where the customer demands the same or he has also to comply with the provisions of sub-clause (2) of Clause 6 of the Control Order 1977 and has to issue to every purchaser a correct receipt or invoice whether he demands the same or not. The answer to this question lies in two different definitions of 'dealer' given in the Control Order 1977 and the Control Order 1980.

11. Clause 2(a) of the Control Order 1977 is quoted herein below :

"(a) 'dealer' means a person who carries on the business of selling by retail or wholesale or storing for sale by retail or wholesale any commodity whether or not such business is carried in addition to any other business; but does not include a hawker or a pedlar, or an oil company storage depot or installation wherefrom no sales are made to general public."

A reading of the definition of 'dealer' in the Control Order 1977 would show that it means a person who carries on business of selling by retail or wholesale or storing for sale by retail or wholesale any commodity whether or not such business is carried in addition to any other business.

12. The definition of 'dealer' in clause 2(b) of the Control Order 1980 is somewhat restricted and is quoted herein below :

"(b) 'Dealer' means a person engaged in the business of purchase, sale or storage for sale of Motor spirit and or High Speed diesel oil, or both on the basis of an agreement with an Oil company, but does not include an Oil Company."

It will be clear from the aforesaid definition of 'dealer' in the Control Order 1980 that the dealer means a person engaged in the business of purchase, sale or storage for sale of motor spirit and or high speed diesel oil or both on the basis of an agreement with an Oil Company. It, thus, appears that the Control Order 1980 applies only to dealers of Motor Spirit and High Speed Diesel oil carrying on their business on the basis of an agreement with an Oil company.

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13. The expression 'Oil Company' has also been defined in clause 2(d) of the Control Order, 1980 which is quoted below :

"(d) 'Oil Company' means any of the Oil Companies Specified below:

- (i) Indian Oil Corporation Ltd.;
- (ii) Hindustan Petroleum Corporation Ltd.;
- (iii) Bharat Petroleum Corporation Ltd.;
- (iv) The Indo Burma Petroleum Company Limited;
- (v) Hindustan Petroleum Corporation Ltd. (VMU)."

'Oil Company', therefore, means the five Government or Public Sector Companies mentioned against serial Nos. (i), (ii) (iii), (iv) and (v) in Clause 2(d) of the Control Order, 1980. Obviously, a dealer who carries on the business in Motor Spirit and High Speed Diesel Oil Companies, has to sell Motor Spirit and High Speed Diesel Oil in accordance with the instructions of the Government or Public Sector Companies with regard to prices at which the product is to be sold and this may be the reason why in Clause 8 of the terms and conditions of the licence in Form-B issued under Clause 6 of the Control Order 1980, it has not been made obligatory for the dealer holding the licence to issue to every customer a correct receipt or invoice unless demanded by the customer.

14. Such a dealer carrying on the business in Motor Spirit and High Speed Diesel oil on the basis of an agreement with the Oil company obviously cannot be asked to comply with the provisions of the Control Order, 1980 as well as Control Order 1977 because, as we have seen, elaborate provisions have been made in the Control Order 1977 as well as the Control Order 1980 with regard to regulation of supply and distribution and other matters and provisions in this regard in the Control Order 1977 and the Control Order 1980 also are different. It further appears that the Control Order 1977, which has been issued by the State Government in exercise of its powers delegated by the Central Government under the Central Government order Nos. S.O. 681 (E) and S.O. 682 (E) dated 30th November 1974, has been issued not only to provide for matters specified in clauses (d), (e), (f), (g), (h), (i), (ii) and (j) contained in sub-section (2) of Section 3 of the Act but also to provide for matters specified in clause (c) of sub-section (2) of Section 3 of the Act, namely, control of prices at which essential commodities are bought and sold. On the other hand, the Control Order 1980 has been made, as we have seen, in exercise of powers delegated by the Central Government to the State Government under Central Government order Nos. S.O. 681 (E) dated 30th November, 1974 to provide matters specified in clauses (d), (e), (f), (g), (h),

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(i), (ii) and (j) contained in sub-section (2) of Section 3 of the Act and has not been made in exercise of its powers delegated to it under Central Government Order No.S.O. 682 (E) to provide for matters specified in clause (e) of sub-section (2) of Section 3 of the Act relating to control of prices at which essential commodities are bought and sold. This explains why the Control Order 1980 does not make elaborate provisions relating to exhibition of price list, charging of prices, issue to every purchaser a correct receipt or invoice. Since the Control Order 1980 applies to dealers carrying on the business in Motor Spirit and High Speed Diesel oil on the basis of an agreement with the Government or Public Sector Oil Companies, the State Government has not thought it necessary to provide strict provisions with regard to price control under the Control Order 1980 and has, therefore, provided in Clause 8 of the terms and conditions of the licence in Form-B issued under Clause 6 thereof that the licensee shall issue an invoice or receipt only if the customer demands the same.

15. We are, thus, of the considered opinion that the decision of a Division Bench of this Court in *Virendra Singh vs. Collector, Indore and others* (supra) rendered in the case of a petrol pump which presumably was run by the dealer in that case on the basis of an agreement with an 'Oil Company' as defined in Clause 2 (d) of the Control Order 1980 was correct in the facts of the case. We further hold that while Clause 8 of the terms and conditions of the licence in Form-B issued under Clause 6 of the Control Order 1980 will be applicable to a dealer of Motor Spirit and High Speed Diesel carrying on his business on the basis of an agreement with an Oil Company as defined in Clause 2 (d) of the Control Order 1980, sub-clause (2) of Clause 6 of the Control Order 1977 will apply to all other dealers carrying on business of petrol and diesel (HSD).

16. We however find that Clause 10 of the Control Order 1980 provides that a licensee shall comply with any directions that may be given to him from time to time by the authorized officer or the licensing authority or the Director, as the case may be, by a general or special order in writing in regard to purchase, sale and storage for sale and disposal of oil. Hence the authorities mentioned in Clause 10 of the Control Order 1980 can issue any direction in addition to those contained in the terms and conditions of the licence in Form-B and if such directions are issued, the licensee under the Control Order 1980 will have to comply with such directions as well as the terms and conditions of the licence in Form-B.

16. The matter will now be placed before the appropriate Bench for hearing on merits.

Order passed accordingly.

I.L.R. [2007] M.P., 1167

FULL BENCH

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and
Mr. Justice A.M. Sapre*

25 September, 2007

B.B. VERMA and another

..... Appellants*

Vs.

STATE OF M.P. and another

..... Respondents

Madhyastham Adhikaran Adhiniyam, M.P. (XXV of 1983)—Section 7, M.P. Land Revenue Code, 1959, Sections 146, 147 - Whether State Govt. can recover damages for breach of contract from Contractor without seeking adjudication of its claim before the Tribunal - Agreements of Appellants with State Government of public works were terminated and issued orders for recovery of money under clauses 4.3.3.3 and 4.3.38.1 as arrear of land - Appellants raised dispute before Superintending Engineer but he did not decide the claim - Applications filed under Section 7 of Adhiniyam, 1983 which are pending adjudication - Held - Where Contractor disputes amount claimed by State Govt. as payable by Contractor to State Govt. cannot be said to be due - State Govt. has no power to recover any amount which is disputed by Contractor as payable under the Contract prior to the decision of Superintending Engineer or Tribunal under Adhiniyam, 1983.

After considering the aforesaid decisions of the Supreme Court in *Union of India vs. Raman Iron Foundry and State of Karnataka vs. Rameshwar Rice Mills Thirthahalli* (supra), we have no doubt in our mind that clause 4.3.38.1 does not confer any power on the State Government or its officers to recover any amount that is disputed by the contractor as payable under the contract to the State Government prior to the decision of the S.E. or of the Tribunal under the Adhiniyam. (Para 14)

In the decision of the Division Bench in *Ch. Chandra Shekhar vs. State of M.P. and others* (supra) a reference has been made to Sections 146 and 147 of the M.P. Land Revenue Code, 1959 (for short 'the Code') to show that the procedure has been prescribed for recovery of amount as arrears of land revenue. Section 146 of the Code provides that Tahsildar or Naib-Tahsildar may cause a notice of demand to be served on any defaulter before the issue of any process under Section 147 for the recovery of an arrear and Section 147 of the Code mentions the different processes by which arrear of land revenue payable to the

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Government may be recovered by the Tahsildar. These two provisions, provide the procedure for recovery of arrear of land revenue but does not provide whether any amount under any contract between the State Government and a private person can be recovered as arrear of land revenue. Section 155 (b) of the Code provides that 'all moneys falling due to the State Government under any grant, lease or contract which provides that they shall be recoverable in the same manner as an arrear of land revenue' may be recovered in the same manner as an arrear of land revenue if the contract provides as such. Obviously, where the contractor disputes an amount claimed by the State Government or any officer on its behalf as payable by the contractor to the State Government, such an amount cannot be said to be due to the State under the contract and cannot be recovered as arrear of land revenue in accordance with the terms of the contract and Section 155 (b) of the Code. (Para 15)

We, therefore, hold that the view taken by the Division Bench in the two decisions in *Ch. Chandra Shekhar vs. State of M.P. and others* and *M/s Seth Mohanlal Hiralal* (supra) that under Clause 4.3.38.1 or any other similar clause in the conditions of contract, a claim against the contractor for payment of sum or money under the contract can be recovered by the Government from the contractor as arrears of land revenue in accordance with the M.P. Land Revenue Code, 1959 without a decision of the S.E. or the Tribunal under the Adhinyam where the contractor disputes the amount before the S.E. or the Tribunal under the Adhinyam is not correct in law and the two decisions of the Division Bench on this point are over-ruled. (Para 17)

Cases Referred :

State of Karnataka Vs. Rameshwar Rice Mills Thirthahalli; AIR 1987 SC 1359, *M/s Thakurdas Narang and Sons Vs. State of M.P. and others*; W.P. No. 640 of 1998, *M/s F.A. Construction, Mumbai Vs. Narmada Valley Development Department and another*; 2006(2) MPHT 216.

Case Relied upon :

Union of India Vs. Raman Iron Foundry; AIR 1974 SC 1265.

Cases Overruled :

Ch. Chandra Shekhar Vs. State of M.P. and others; 2002(1) MPLJ 358, *M/s Seth Mohanlal Hiralal Vs. State of M.P. and another*; 2001 (5) MPHT 539.

Rohit Arya, for the appellant.

V.K. Shukla, Dy.A.G. for the respondent.

Cur. adv. vult.

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ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE :-** These are references made by the Division Bench by order dated 4.5.2007 passed in W.A. Nos. 292 of 2006, 316 of 2006, 320 of 2006 and 321 of 2006, by order dated 17.5.2006 passed in W.A.No.314 of 2006 and by order dated 19.6.2006 passed in W.A.No.319 of 2006. By the aforesaid orders, the Division Bench has referred to the Full Bench two Division Bench decisions in *Ch. Chandra Shekhar vs. State of M.P. and others*¹, and *M/s Seth Mohanlal Hiralal vs. State of M.P. and another*², for reconsideration.

2. The facts briefly are that the agreements of the appellants with the State Government in respect of some public works were terminated by the respondents and orders were issued for recovery of money under Clauses 4.3.3.3 and 4.3.38.1 from the appellants as arrear of land revenue under the M.P. Land Revenue Code, 1959. The appellants raised a dispute before the Superintending Engineer (for short 'S.E.') contending that the action of the Executive Engineer in terminating the agreements and issuing orders of recovery was illegal. Since the S.E. did not decide the dispute, the appellants filed applications under Section 7 of the M. P. Madhyastham Adhikaran Adhiniyam, 1993 (for short 'the Adhiniyam') and the applications are pending adjudication by the Arbitration Tribunal under the Adhiniyam. The appellants filed writ petitions in this Court contending inter-alia that until the Tribunal adjudicates the dispute filed by the appellants under the Adhiniyam, the recovery of the amounts as arrears of land revenue could not be made by the respondents. The learned single Judge held relying on the decision of the Division Bench in *M/s Seth Mohanlal Hiralal vs. State of M.P. and another* (supra) that the respondents could recover the amounts from the appellants without any adjudication by the Tribunal under clauses 4.3.3.3 and 4.3.38.1 of the conditions of contract and dismissed the writ petitions.

3. Aggrieved, the appellants filed the present Writ Appeals before the Division Bench of this Court and after hearing learned counsel for the parties, the Division Bench found that in *Ch. Chandra Shekhar vs. State of M.P. and others* and *M/s Seth Mohanlal Hiralal vs. State of M.P. and another* (supra), two earlier Division Benches had taken a view that the Government had the power under the conditions of contract to recover the amounts from the appellants as arrears of land revenue without seeking adjudication of its claim before the Tribunal under the Adhiniyam. The Division Bench, however, found that in *State of Karnataka vs. Rameshwar Rice Mills Thirthahalli*³, the Supreme Court while interpreting Clause 12 of the agreement in the case enabled the State Government to recover

(1) 2002 (1) M.P.L.J. 358.

(2) 2001 (5) MPHT 539.

(3) AIR 1987 S.C. 1359.

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from a private person who was a party to the agreement amount that may become due and payable by him as arrears of land revenue but the Supreme Court took a view that under Clause 12 of the agreement, damages for breach of conditions of contract could not be recovered. The Division Bench further found that following the decision of the Supreme Court in *State of Karnataka vs. Rameshwar Rice Mills Thirthahalli* (supra), a learned single Judge of this Court had decided in (*M/s Thakurdas Narang and Sons vs. State of M.P. and others*)¹ on 13.4.1999 that unilateral recovery of any sum without adjudication is impermissible. The Division Bench also found that in yet another decision in *M/s F.A. Construction, Mumbai vs. Narmada Valley Development Department and another*², a learned single Judge placing reliance on the decision of the Supreme Court in *State of Karnataka vs. Rameshwar Rice Mills Thirthahalli and Thakurdas Narang and Sons vs. State of M.P. and others* (supra) had expressed the opinion that recovery of damages cannot be done without proper adjudication. Considering the aforesaid conflicting decisions on the point, the Division Bench in the orders dated 4.5.2007, 17.5.2007 and 19.6.2007 has referred to the Full Bench the decisions in *M/s Seth Mohanlal Hiralal vs. State of M.P. and another and Ch. Chandra Shekhar vs. State of M.P. and others* (supra) for reconsideration.

4. Mr. Rohit Arya, learned senior counsel for the appellants submitted that in *Union of India vs. Raman Iron Foundry*³, the Supreme Court, after interpreting Clause 18 of the general conditions of contract, which is similar to Clauses 4.3.38.1 of the conditions of contract in the present case has held that the clause confers a right on the purchaser to recover a claim for a sum which is presently due to be paid by the contractor and does not confer any right on the purchaser to recover a claim for damages for breach of contract. He submitted that in this decision, the Supreme Court has also held that it is only when the claim for damages is adjudicated upon by a Civil Court or an Arbitrator and the breach of contract is established and the amount of damages decreed or awarded becomes a debt due and payable or recoverable. He submitted that similarly, Clause 4.3.38.1 confers a right on the Government to recover dues from the contractor and until the amount claimed by the Government is held to be due by the S.E. under clause 4.3.38.1 of the general conditions of contract or by the Tribunal under the Adhiniyam, the State Government cannot recover the amount as arrears of land revenue under Clause 4.3.38.1 of the conditions of contract.

5. Mr. Arya also cited the decision of the Supreme Court in *State of Karnataka vs. Rameshwar Rice Mills Thirthahalli* (supra) in which Clause 12 of the agreement entered into between the State of Mysore and a private party for purchase of

(1) W.P.No.640 of 1998.

(2) 2006 (2) MPHT 216.

(3) AIR 1974 S.C. 1265.

paddy under the Paddy Procurement Scheme, 1959 provided inter-alia that any amount that may become due or payable by the first party to the second party as may be assessed by the second party under any part of the agreement, shall be deemed to be and may be recovered from the first party as if they were arrears of land revenue, and the Supreme Court held that interest of justice and equity require that where a party to the contract disputes the committing of any breach of conditions, the adjudication should be by an independent person or body and not by the other party to the contract and therefore Clause 12 did not confer any power on the officer of the State to decide upon the question of breach as well as assessment of quantum of damages. He submitted that in the present case similarly Clause 4.3.38.1 does not confer any power on the State Government or its officers to unilaterally assess the damages for breach of the terms and conditions of the contract by the contractor and recover the amount so assessed as damages from the contractor as arrears of land revenue.

6. Mr. Arya submitted that in view of the aforesaid two decisions of the Supreme Court in *Union of India vs. Raman Iron Foundry and State of Karnataka vs. Rameshwar Rice Mills Thirthahalli* (supra), the view taken by the Division Bench in the two decisions in *Ch. Chandra Shekhar vs. State of M.P. and others* and *M/s Seth Mohanlal Hiralal vs. State of M.P. and another* (supra) that the State Government and its officers can recover the amount from the contractor as damages under Clause 4.3.38.1 of the agreement as arrear of revenue without decision by the S.E. and thereafter by the Tribunal under the Adhiniyam is not correct in law.

7. Mr. V.K. Shukla, learned Deputy Advocate General appearing for the respondents, on the other hand, submitted that clause 4.3.3.3 of the conditions of contract confers a right on the Divisional Officer or the Executive Engineer to measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and give it to another contractor to complete, in which case expenses, which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole work had been executed by him shall be borne and paid by the original contractor and may be deducted from any money due to him by the Government under the contract or otherwise, or from security deposits or from proceeds of sale thereof, or a sufficient part thereof. He argued that the claim made by the Divisional Officer or the Executive Engineer under clause 4.3.3.3 is thus, not a claim of damages but a claim towards additional expenses incurred for the work to be completed by another contractor and can be recovered under Clause 5.4.38.1 as arrears of land revenue as has been stipulated in the said clause of the conditions of contract. He submitted that the view taken by the Division Bench in the two decisions in *Ch. Chandra Shekhar vs. State of*

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M.P. and others and *M/s Seth Mohanlal Hiralal vs. State of M.P. and another* (supra) therefore is correct.

8. Clauses 4.3.3.3, 4.3.29.2 and 4.3.38.1 of the conditions of contract incorporated in the agreement in Form-B prescribed by the Government of M.P. are extracted herein below:

"4.3.3.3 - To measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and give it to another contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole work had been executed by him (for the amount of which excess, the certificate in writing of the Divisional Officer shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under the contract or otherwise, or from his security deposit or the proceeds of sale thereof, or a sufficient part thereof. If the work is carried out at lower rates, the contractor shall not be entitled for any refund on this account. Savings, if any, shall go to the Government.

In the event of any of the above courses being adopted by the Divisional Officer, the Contractor shall have no claim to compensation, for any loss sustained by him by reason of his having purchased or procured any materials or entered into any engagements or made any advance on account of, or with a view to the execution of the work or the performance of the contract. And in case the contract shall be rescinded under the provisions aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work thereof actually performed under this contract, unless and until the Sub-Divisional/Divisional Officer will have certified in writing the performance of such work and the value payable in respect thereof, and he shall only be entitled to be paid the value so certified."

"4.3.29.2 - Except where otherwise specified in the contract, for claim valued at Rs.50,000/- or more the decisions of the S.E. of the Circle for the time being in respect of all questions and disputes relating to the meaning of the specification, designs, drawings, and instructions hereto before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising

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out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the work of execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be final provided that the S.E. shall before giving his decision in writing in the matter give an opportunity of being heard, to the parties to the contract.

If any party to the contract is dissatisfied with the final decision of the S.E. in respect of any matter, he may within 28 days after receiving notice of such decision may refer such dispute to the Arbitration Tribunal constituted under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1982 (No.2 of 1983)."

"4.3.38.1 - Recovery of dues from the contractor -

Whenever any claim against the contractor for the payment of a sum or money arises out of or under the contract, Government shall be entitled to recover such sum by appropriating, in part or whole, the security deposit of the contractor and to sell any Govt. promissory notes etc. forming the whole or part of such security. In the event of the security being insufficient or if no security has been taken from the contractor, then the balance or the total sum recoverable, as the case may be, shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under this or any other contract with Govt. Should this sum be not sufficient to cover the full amount recoverable from the Contractor then it shall be recovered from him as arrears of land revenue."

9. A perusal of Clause 4.3.29.2 of the conditions of contract quoted above would show that the decision of the S.E. of the Circle for the time being in respect of questions and disputes mentioned therein 'or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to the contract..... or otherwise concerning the work of execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be final'. Hence, the decision of the Divisional Officer or the Executive Engineer under Clause 4.3.3.3 of the conditions of contract quoted above to have the unexecuted work completed by another contractor and claim the expenses which may have been incurred in excess of the sum which would have been paid to the original contractor is subject to the final decision of the S.E. if the contractor raises a dispute on such claim made by the

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Divisional Officer or the Executive Engineer. The second para of Clause 4.3.29.2 further stipulates that if any party to the contract is dissatisfied with the final decision of the S.E. in respect of any matter, he may within 28 days after receiving notice of such decision refer such dispute to the Arbitration Tribunal constituted under the Adhiniyam. Hence, any decision taken and any amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 of the conditions of contract is not final but subject to the decision of the S.E. and any decision of the S.E. on these aspects is also subject to the decision of the Tribunal under the Adhiniyam, if referred to the Tribunal by any party to the contract. The result is that the amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 will not become a sum due from the contractor until the dispute is decided by the S.E. on an appeal made before him from the decision of the Executive Engineer or the Divisional Officer, or until the dispute is adjudicated by the Tribunal under the Adhiniyam where the decision of the S.E. is challenged by way of reference.

10. Further, the Proviso to Section 7-B of the Adhiniyam states that if the final authority, namely S.E. fails to decide a dispute within the period stipulated therein, a petition to the Tribunal under Section 7 can be made by a party. Thus, when an appeal against the decision of the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 of the conditions of contract is not decided by the S.E. and a party files a reference under Section 7 of the Adhiniyam before the Tribunal, the amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 will not be due and therefore not recoverable from the contractor as arrears of land revenue under Clause 4.3.38.1 of the conditions of contract until the Tribunal adjudicates the dispute raised by the contractor.

11. In the two decisions in *Ch. Chandra Shekhar vs. State of M.P. and others* and *M/s Seth Mohanlal Hiralal vs. State of M.P. and another* (supra), the Division Bench lost sight of the fact that the decision of the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 and other clauses of the conditions of contract is subject to the final decision of the S.E. and the decision of the S.E. is subject to the award of the Tribunal where a reference is made to the Tribunal against the decision of the S.E. or where the S.E. fails to decide the dispute. In fact, in the two decisions of the Division Bench, there is no reference whatsoever to the clause providing for decision by the S.E. or by the Tribunal under the Adhiniyam.

12. In the two decisions of the Division Bench in *Ch. Chandra Shekhar vs. State of M.P. and another* and *M/s Seth Mohanlal Hiralal vs. State of M.P. and another* (supra) there is also no reference to the decision of the Supreme Court in *Union of India vs. Raman Iron Foundry* (supra). As we have seen, in *Union of India vs. Raman Iron Foundry* (supra) Clause 18 of the general

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conditions of the contract which was titled 'Recovery of Sums Due' provided inter-alia that whenever any claim for payment of a sum or money arises against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part the security if any deposited by the contractor and in the event of security being insufficient and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser. The Supreme Court, interpreting Clause 18 of the general conditions of contract, held that under Clause 18, the purchaser cannot recover the amount as claimed without resorting to arbitration by appropriating sums due to the contractor under the same contract or under other contracts and if the claim of the purchaser is not well founded and the appropriation made by him is therefore not justified, the contractor can always resort to civil suit or arbitration and it is only when the adjudication is made by the Civil Court or the Arbitrator and the breach of the contract is established and the amount of damages decreed that the amount becomes due and recoverable from the contractor.

13. In the two decisions of the Division Bench in *Ch. Chandra Shekhar vs. State of M.P. and others* and *M/s Seth Moha. Lal Hiralal vs. State of M.P. and another* (supra), there is also no reference to the decision of the Supreme Court in *State of Karnataka vs. Rameshwar Rice Mills Thirthahalli* (supra) in which Clause 12 of the agreement with the State of Mysore and a private person for purchase of paddy under the Paddy Procurement Scheme, 1959 inter-alia provided that any amount that may become due or payable by the first party to the second party under any part of the agreement shall be deemed to be and will be recovered from the first party as if they are arrears of land revenue and the Supreme Court held that the terms of Clause 12 of the agreement do not have scope for liberal construction being made so as to confer power on the Deputy Commissioner to adjudicate upon disputed questions of breach as well as to assess the damages arising from the breach. The Supreme Court further held that the officers of the State Government which is a party to the agreement, cannot be an arbiter in his own cause and interest of justice and equity require that where a party to a contract disputes the committing of any breach of conditions, the adjudication should be by an independent person or body and not by the other party to the contract.

14. After considering the aforesaid decisions of the Supreme Court in *Union of India vs. Raman Iron Foundry and State of Karnataka vs. Rameshwar Rice Mills Thirthahalli* (supra), we have no doubt in our mind that clause 4.3.38.1 does not confer any power on the State Government or its officers to recover any amount that is disputed by the contractor as payable under the contract to the State Government prior to the decision of the S.E. or of the Tribunal under the Adhinyam.

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15. In the decision of the Division Bench in *Ch. Chandra Shekhar vs. State of M.P. and others* (supra) a reference has been made to Sections 146 and 147 of the M.P. Land Revenue Code, 1959 (for short 'the Code') to show that the procedure has been prescribed for recovery of amount as arrears of land revenue. Section 146 of the Code provides that Tahsildar or Naib-Tahsildar may cause a notice of demand to be served on any defaulter before the issue of any process under Section 147 for the recovery of an arrear and Section 147 of the Code mentions the different processes by which arrear of land revenue payable to the Government may be recovered by the Tahsildar. These two provisions, provide the procedure for recovery of arrear of land revenue but does not provide whether any amount under any contract between the State Government and a private person can be recovered as arrear of land revenue. Section 155 (b) of the Code provides that 'all moneys falling due to the State Government under any grant, lease or contract which provides that they shall be recoverable in the same manner as an arrear of land revenue' may be recovered in the same manner as an arrear of land revenue if the contract provides as such. Obviously, where the contractor disputes an amount claimed by the State Government or any officer on its behalf as payable by the contractor to the State Government, such an amount cannot be said to be due to the State under the contract and cannot be recovered as arrear of land revenue in accordance with the terms of the contract and Section 155 (b) of the Code.

16. We may now deal with the contention of Mr. Shukla that under Clause 4.3.3.3 of the conditions of contract, the Executive Engineer or the Divisional Officer does not assess and recover any damages but expenses which may be incurred in excess of the sum which would have been paid to the original contractor in case the unexecuted part of the work is completed by another contractor. This contention of Mr. Shukla over-looks the fact that the additional expenses incurred by the State Government for getting the unexecuted part of the work completed by another contractor which are sought to be recovered under Clause 4.3.3.3 are really in the nature of damages. Section 73 of the Indian Contract Act 1872 provides that when a contract is broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it but such compensation will not be given for any remote and indirect loss or damage sustained by reason of the breach. Where therefore a contractor does not complete the work entrusted to him under the contract and the unexecuted part of the work is entrusted to another contractor for completion and the Government incurs additional expenses for having the work completed by another contractor over and above the expenses which have been

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paid to the original contractor, the additional expenses sought to be recovered by the Government are nothing but damages within the meaning of Section 73 of the Indian Contract Act, 1872. The contention of Mr. Shukla that the additional expenses sought to be recovered under Clause 4.3.3.3 of the conditions of contract are not really damages is therefore misconceived.

17. We, therefore, hold that the view taken by the Division Bench in the two decisions in *Ch. Chandra Shekhar vs. State of M.P. and others* and *M/s Seth Mohanlal Hiralal* (supra) that under Clause 4.3.38.1 or any other similar clause in the conditions of contract, a claim against the contractor for payment of sum or money under the contract can be recovered by the Government from the contractor as arrears of land revenue in accordance with the M.P. Land Revenue Code, 1959 without a decision of the S.E. or the Tribunal under the Adhinyam where the contractor disputes the amount before the S.E. or the Tribunal under the Adhinyam is not correct in law and the two decisions of the Division Bench on this point are over-ruled.

The Writ Appeals will now be placed before the appropriate Division Bench for hearing on merits.

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FULL BENCH

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and
Mr. Justice A.M. Sapre*

25 September 2007

GOVERDHAN GURJAR

----Petitioner*

Vs.

STATE OF MADHYA PRADESH and others

---Respondent

Land Revenue Code, M. P. (XX of 1959)–Sections 234, 237–Judgments passed in *Amar Singh's* case and in *Dayaram's* case referred to Full Bench to resolve the conflict between the law laid down by both of these judgments - After detailed scrutiny of both the judgments, the Full Bench- Held-*Amar Singh's* case was decided before incorporation of sub clause 3 in section 237 of M.P. LRC whereas *Daya Ram's* case was decided after incorporation of Sub clause 3 in Section 237 of M.P. LRC. -- Before incorporation of sub clause

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3 in Section 237 by amendment Act, (M.P. Act no. 1 of 1998), the collector had no jurisdiction to divert unoccupied land reserved for Nistar Rights into agricultural land, the power to divert Nistar Land into agricultural land was vested with Sub Divisional Officer -Sec.234 (3) and 237 (3) operates in two separate spheres-234(3) deals with Nistar Patrak whereas 237 (3) provides for diversion of certain lands-Law laid down by referred two judgments are not in conflict.

After the judgment was delivered by the Division Bench in Amar Singh V. Raghuvir Singh and others (supra), sub section (3) was introduced in section 237 of the Code by M.P. Act no. 1 of 1998 with effect from 5.1.1998 and in this sub section (3) of section 237 it was provided that subject to the rules made under the Code, the Collector may divert such unoccupied land, which is set apart for the purposes mentioned in clause (b) of sub section (1) to secure a minimum of 5% of the agricultural land of the village for abadi or agricultural purposes. Subsequently, by M.P. Act no.23 of 2000, brought into force with effect from 16.8.2000 the minimum 5% of the agricultural land of the village was reduced to 2% of the agricultural land of the village.

This Amendment Act No. 23 of 2000 was challenged before this court in Daya Ram and another V. State of M.P. and others (supra) and Mr. Imtiaz Hussain appearing for the petitioners in the writ petitions contended that when sub section (3) of section 234 of the Code has not been amended, sub section (3) of section 237 of the Code cannot be implemented and in support of his contention Mr. Hussain relied upon the Division Bench decision in Amar Singh V. Raghuvir Singh and others (supra). While repelling this contention, the Division Bench held in Daya Ram and another V. State of M.P. and others (supra) that sub section (3) of section 234 and sub section (3) of section 237 operate in two separate spheres. The Division Bench pointed out that while sub section (3) of section 234 deals with preparation of 'Nistar Patrak', sub section (3) of section 237 provides for diversion of certain land. The Division Bench also took note of the fact that the decision of the Division Bench in Amar Singh V. Raghuvir Singh and others (supra) was delivered before sub section (3) of section 237 was introduced by way of amendment and that section 237 now authorised the Collector to divert unoccupied land which is set apart for the purposes mentioned in clause (b) of sub section (1) for abadi or agricultural purposes to secure minimum of 2% of the agricultural land of that village.

(Paras 5 & 6)

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None, for the petitioner.

Kumaresh Pathak, Deputy Advocate General for the State.

Cur. adv. vult

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :— A learned Single Judge of this court having found divergence of opinion expressed by the two Division Benches in *Amar Singh V. Raghuvir Singh and others*¹, and in *Daya Ram and another V. State of M.P. and others*², on the interpretation of sections 234 and 237 of the M.P. Land Revenue Code (herein after referred to as 'the Code'), has, by a common order passed in these two writ petitions, referred the matter to a larger bench to resolve the conflict of opinion in the two decisions.

2. We have heard Mr. Mukesh Pandey, learned counsel for the petitioner in W.P.No.952/03 and Mr.Kumaresh Pathak, learned Deputy Advocate General, for the respondents and we find that there is in fact no conflict in the decisions of the two Division Benches in *Amar Singh V. Raghuvir Singh and others* and *Daya Ram and another V. State of M.P. and others* (supra).

3. Sections 234 and 237 of the M.P. Land Revenue Code, 1959, which were interpreted by the Division Benches in the two decisions are quoted herein below :

234. Preparation of Nistar Patrak.-(1) The Sub Divisional Officer shall, consistently with the provisions of this Code and the rules made thereunder, prepare a Nistar Patrak embodying a scheme of management of all unoccupied land in a village and all matters incidental thereto and more particularly matters specified in section 235.

(2) A draft of the Nistar Patrak shall be published in the village and after ascertaining the wishes of the residents of the village in the prescribed manner, it shall be finalised by the [Sub Divisional Officer].

(3) On a request being made by the Gram Sabha, or where there is no Gram Sabha, on the application of not less than one-fourth of the adult residents of a village, or on his motion the Sub-Divisional Officer may, at any time, modify any entry in the Nistar Patrak after such enquiry as he deems fit.

237. Collector to set apart land for exercise of Nistar rights.-(1)

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Subject to the rules made under this Code, the Collector may set apart unoccupied land for the following purposes, namely,-

- (a) for timber or fuel reserve;
- (b) for pasture, grass bir or fodder reserve;
- (c) for burial ground and cremation ground;
- (d) for gaathan;
- (e) for encamping ground;
- (f) for threshing floor;
- (g) for bazar;
- (h) for skinning ground;
- (i) for manure pits;
- (j) for public purposes such as schools, play grounds, parks road, lanes, drains and the like; and
- (k) for any other purposes which may be prescribed for the exercise of right of Nistar.

(2) Lands set apart specially for any purpose mentioned in sub-section (1), shall not otherwise be diverted without the sanction of the Collector.

(3) Subject to the rules made under this Code, the Collector may divert such unoccupied land, which is set apart for the purposes mentioned in clause (b) of sub-section (1). Subject to secure minimum two percent of the agriculture land of that village for the said purposes in to abadi or for agricultural purposes.

4. On perusal of decision of the Division Bench in Amar Singh V. Raghuvir Singh and others (supra) we find that the Collector exercising the powers under section 237(2) of the Code had permitted the petitioner in that case to permit him to use land in Khasra nos. 182, 198 and 199 recorded as 'Charnoi' for cultivation purposes. A contention was raised before the High Court by the respondent that the Collector did not have the power or jurisdiction to change the classification of the land from non-agricultural purposes to agricultural purposes under sub section (2) of section 237 of the Code and that the power to allow such change of classification vested in the Sub Divisional Officer under sub section (3) of section 234 of the Code. The Division Bench held that under sub section (2) of section 237 the Collector could divert land for purposes mentioned in sub section (1) inter se but did not have the power to divert unoccupied land for non-agricultural

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purposes for agricultural purposes. The Division Bench also took note of the fact that by the Amendment Act No.24 of 1961, the legislature intended that instead of Collector, the Sub Divisional Officer must exercise powers to permit modification of any entry in the 'Nistar Patrak' and accordingly had vested such powers on the Sub Divisional Officer in sub section (3) of section 234 of the Code and held that this Amending Act brought about a material change in the powers of the Collector bestowing the powers on the Sub Divisional Officer instead of the Collector to change the classification of land.

5. After the judgment was delivered by the Division Bench in *Amar Singh V. Raghuvir Singh and others* (supra), sub section (3) was introduced in section 237 of the Code by M.P. Act no.1 of 1998 with effect from 5.1.1998 and in this sub section (3) of section 237 it was provided that subject to the rules made under the Code, the Collector may divert such unoccupied land, which is set apart for the purposes mentioned in clause (b) of sub section (1) to secure a minimum of 5% of the agricultural land of the village for abadi or agricultural purposes. Subsequently, by M.P. Act no.23 of 2000, brought into force with effect from 16.8.2000 the minimum 5% of the agricultural land of the village was reduced to 2% of the agricultural land of the village.

6. This Amendment Act No. 23 of 2000 was challenged before this court in *Daya Ram and another V. State of M.P. and others* (supra) and Mr. Imtiaz Hussain appearing for the petitioners in the writ petitions contended that when sub section (3) of section 234 of the Code has not been amended, sub section (3) of section 237 of the Code cannot be implemented and in support of his contention Mr. Hussain relied upon the Division Bench decision in *Amar Singh V. Raghuvir Singh and others* (supra). While repelling this contention, the Division Bench held in *Daya Ram and another V. State of M.P. and others* (supra) that sub section (3) of section 234 and sub section (3) of section 237 operate in two separate spheres. The Division Bench pointed out that while sub section (3) of section 234 deals with preparation of 'Nistar Patrak', sub section (3) of section 237 provides for diversion of certain land. The Division Bench also took note of the fact that the decision of the Division Bench in *Amar Singh V. Raghuvir Singh and others* (supra) was delivered before sub section (3) of section 237 was introduced by way of amendment and that section 237 now authorised the Collector to divert unoccupied land which is set apart for the purposes mentioned in clause (b) of sub section (1) for abadi or agricultural purposes to secure minimum of 2% of the agricultural land of that village.

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7. It will be clear from the analysis of the two Division Bench decisions in *Amar Singh V. Raghuvir Singh and others* (supra) and *Daya Ram and another V. State of M.P. and others* (supra) that when the Division Bench rendered the decision in *Amar Singh V. Raghuvir Singh and others* (supra), sub section (3) of section 237 authorising the Collector to divert unoccupied land for agricultural purpose was not in existence and hence the Division Bench held, in that case, that the power of the Collector to divert land in sub section (2) of section 237 was only for the purposes mentioned in sub section (1) of section 237 inter se and that the power to permit change of classification from 'Charnoi' land used for non-agricultural purposes to cultivable land used for agricultural purposes was vested in the Sub Divisional Officer under sub section (3) of section 234 of the Amendment Act no.24 of 1961 but by the time, the Division Bench rendered the judgment in *Daya Ram and another V. State of M.P. and others* (supra), sub section (3) had been introduced in section 237 of the Code with effect from 5.1.1998 by M.P. Act No.1 of 1998 empowering the Collector to divert unoccupied land set apart for 'Charnoi' purposes as mentioned in clause (b) of sub section (1) of section 237 to abadi or agricultural purposes subject to the minimum percentage of agricultural land mentioned therein and subject to rules made under the Code and for this reason the Division Bench held in that case that sub section (3) of section 234, which deals with preparation of 'Nistar Patrak' by the Sub Divisional Officer and modification of entries in the 'Nistar Patrak' by him, and sub section (3) of section 237, which authorises the Collector to divert unoccupied land for the purposes mentioned in clause (b) of sub section (1) of section 237 in to abadi or for agricultural purposes, operate in two different fields.

8. We, therefore, do not find any conflict in the two Division Bench decisions in *Amar Singh V. Raghuvir Singh and others* (supra) and *Daya Ram and another V. State of M.P. and others* (supra). Since we have answered the reference made to us, the two writ petitions will now be placed before the appropriate bench for hearing on merits.

Order passed accordingly.

I.L.R. [2007] M.P., 1183

FULL BENCH

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and**Mr. Justice A.M. Sapre*

25 September, 2007

ANANDILAL CHOURASIA and anr.

---Petitioner*

Vs.

STATE OF M.P. and ors.

---Respondents

Constitution of India-Directive Principles of State Policy-P.I.L.-A woman jumped into funeral pyre of her husband & died (Committed Sati)-Cabinet of State Govt. decided not to provide any kind of financial assistance to Gram Panchayat for two years and also requested the Central Govt. not to extend any financial assistance to that Gram Panchayat-Order challenged by P.I.L. - Looking to the importance of the matter, Division Bench referred the matter to the Full Bench-Held-Although provisions contained in Part IV of the Constitution are not enforceable in any Court-But, if State Govt. or Central Govt. withhold all financial aid of a village on the ground that some people of the village have committed or abetted the commission of offence-Order of the Govt. arbitrary and ultra vires Art. 14 of the Constitution.

The Council of Ministers exercise the executive power that has been vested in the Governor of the State under Article 154 of the Constitution of India. The executive power of the State has to be exercised consistent with the directive principles of State policy contained in Part IV of the Constitution of India. Article 37 in Part IV of the Constitution provides that the provisions in Part IV of the Constitution shall not be enforceable by any Court but the principles laid down in the part are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply the principles in making laws. Article 38 in Part IV of the Constitution states that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Article 40 in Part IV of the Constitution states that the State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. Article 48 in Part IV of the Constitution provides that the State shall endeavour to organize

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agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds. In accordance with these principles, the Central Government and the State Government have formulated various schemes for the welfare of the people living in villages and for organization of village panchayats and development of agriculture and animal husbandry on modern and scientific lines and have been providing aids and funds for implementation of such schemes in the villages.

If for some good reason such as inability on the part of the State Government to provide necessary funds, the State Government takes a decision not to implement a particular scheme for development of a village, then perhaps the High Court in exercise of its power under Article 226 of the Constitution may not be able to issue any writ of direction to the State Government to implement the scheme. This is because the provisions contained in Part IV of the Constitution are not enforceable in any Court. But in a case where the State Government takes a decision to withhold all financial aid to a village and not to implement any of the Schemes of the State Government or the Central Government for the development of the village on the ground that some people of the village have mentioned or abetted the commission of offence, which is punishable under the law, such a decision of the State Government would obviously be arbitrary and ultra-vires Article 14 of the Constitution. (Paras 4, 5)

Naman Nagrath, for the petitioners

Vijay K.Shukla, Dy. AG, for the respondents

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :— The Petitioner No.1 is an Advocate from village Patna Tamoli; Thana Saleha, Tahsil Gunor, District Panna. The petitioner No.2 is a retired Government Servant from the same village Patna Tamoli. On 5.8.2002, one Mallu Sen, aged about 70 years, expired in village Patna Tamoli. Next morning, when preparations were made for his funeral, Smt. Kuttibai, his wife, jumped on to the funeral pyre and died. The incident got wide publicity and the State Government set up an inquiry and a team of State Commission for Women went to village Patna Tamoli and submitted a report. The cabinet of the State Government took a decision to stop all kinds of financial assistance to Patna Tamoli Gram Panchayat for a period of two years and also requested the Central Government

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not to extend any financial assistance to the Gram Panchayat. This decision of the State Government was communicated by a letter dated 28.8.2002 of the Secretary, Panchayat and Rural Development Department to the Chief Executive Officer, District Panchayat, Panna, a copy of which has been annexed as Annexure P/6. Aggrieved, the petitioners have filed this writ petition as a public interest litigation praying to the Court to quash the decision of the State Government in Annexure P/6 and also praying to the Court to direct the State Government to implement all the schemes of the State Government and the Central Government relating to development in village Patna Tamoli.

2. When the writ petition came up for hearing on 27.2.2003, the Division Bench, after hearing the learned counsel for the petitioners and the respondents, was of the view that the matter is of great importance and should be considered and decided by the Full Bench. This is how the writ petition has been referred to us for decision.

3. We have heard Mr. Naman Nagrath, learned counsel appearing for the petitioners and Mr. Vijay K. Shukla, learned Dy. AG. appearing for the respondents and we are of the considered opinion that the decision of the State Government conveyed in Annexure P/6 to stop all financial aid to village Patna Tamoli is unconstitutional and cannot be sustained for reasons which we will now state.

4. The Council of Ministers exercises the executive power that has been vested in the Governor of the State under Article 154 of the Constitution of India. The executive power of the State has to be exercised consistent with the directive principles of State policy contained in Part IV of the Constitution of India. Article 37 in Part IV of the Constitution provides that the provisions in Part IV of the Constitution shall not be enforceable by any Court but the principles laid down in the part are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply the principles in making laws. Article 38 in Part IV of the Constitution states that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Article 40 in Part IV of the Constitution states that the State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. Article 48 in Part IV of the Constitution provides that the State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds. In accordance with

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these principles, the Central Government and the State Government have formulated various schemes for the welfare of the people living in villages and for organization of village panchayats and development of agriculture and animal husbandry on modern and scientific lines and have been providing aids and funds for implementation of such schemes in the villages.

5. If for some good reason such as inability on the part of the State Government to provide necessary funds, the State Government takes a decision not to implement a particular scheme for development of a village, then perhaps the High Court in exercise of its power under Article 226 of the Constitution may not be able to issue any writ or direction to the State Government to implement the scheme. This is because the provisions contained in Part IV of the Constitution are not enforceable in any Court. But in a case where the State Government takes a decision to withhold all financial aid to a village and not to implement any of the Schemes of the State Government or the Central Government for the development of the village on the ground that some people of the village have committed or abetted the commission of offence, which is punishable under the law, such a decision of the State Government would obviously be arbitrary and *ultra-vires* Article 14 of the Constitution.

6. We are told by Mr. Vijay Shukla, learned Dy. AG appearing for the respondents, that after investigations were carried out into the incident, a charge-sheet was filed against some of the accused persons and the accused persons have also, in the meanwhile, been convicted by the Special Court constituted for trying the offence. Hence, the State Government has taken all necessary steps to prosecute and punish all those who are involved in commission of offence. The further decision of the State Cabinet to withhold all financial aid and not to implement the schemes for welfare in village Patna Tamoli was, therefore, uncalled for and was arbitrary and violative of Article 14 of the Constitution.

7. For the aforesaid reasons, we quash the impugned decision of the State Government in Annexure P/6 and direct the respondents to implement all the schemes for development and welfare of the villages as are being implemented in other villages in the State of Madhya Pradesh in village Patna Tamoli.

8. With the aforesaid directions, the writ petition is allowed. The security amount, if any paid by the petitioners be refunded to the petitioners.

Petition allowed.

I.L.R. [2007] M.P., 1187

FULL BENCH

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and
Mr. Justice A.M. Sapre*

27 September, 2007

DY. C.M.E./SUB AREA MANAGER, RAMNAGAR R.O.,
SECL SHAHDOL

.....Petitioner*

Vs.

UNION OF INDIA and others

...Respondents

**Industrial Disputes Act (XIV of 1947) - Section 10(1) - Reference of Dispute
- Whether stale claims can be rejected by Central Government on
the ground that Industrial Dispute doesnot exist - 152 Contract
Workers removed in the year 1984 - Dispute raised before
Conciliation Officer in the year 1995 - Conciliation proceedings
failed - Central Government referred the dispute that whether action
of management in not regularizing services of 152 contract workers
is legal and justified to Central Industrial Tribunal - Order of
reference Challenged on the ground that dispute is a stale one -
Held - If appropriate Government finds that Industrial dispute exists
at the time of making reference notwithstanding that claim is belated
such order cannot be interfered on the ground of incompetence or
without jurisdiction - Appropriate Government may also refuse to
refer Industrial Dispute which exists but has become stale if it is no
expedient to refer the same - Reference answer accordingly.**

On the aforesaid analysis of the provisions of Sections 10 (1) and 12 (5) of the Act as well as the principles laid down by the Supreme Court in various cases, we are of the considered opinion that a belated claim giving rise to an industrial dispute can be referred by the appropriate Government under Section 10 (1) of the Act if the appropriate Government finds that the industrial dispute exists at the time of making the reference notwithstanding the fact that the claim is belated and such an order passed by the appropriate Government under Section 10 (1) of the Act cannot be interfered with by the High Court under Article 226 of the Constitution on the ground that the reference is incompetent or without jurisdiction. But at the same time, the appropriate Government while exercising its wide discretion under Sections 10 (1) and 12 (5) of the Act may refuse to refer an industrial dispute which exists but which has become stale if it is not expedient to refer the same as

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this would be a relevant circumstance while examining the question whether a case for reference is made out or not for industrial adjudication. These are the conclusions we have arrived at on examining various decisions of the Supreme Court under Sections 10 and 12 of the Act discussed above and we answer the reference accordingly. (Para 23)

Cases Referred :

Nedungadi Bank Limited Vs. K.P. Madhavankutty and others; (2000) 2 SCC 455, *Ajaib Singh Vs. Sirhind Cooperative Marketing-cum-Processing service Society*; (1999) 6 SCC 82, *Anand Kumar Dubey Vs. Union of India and others*; 2000 (3) MPLJ 461, *Ramsewak Vs. Union of India and others*; W.P. No. 3695/2000, *Haryana Cooperative Land Development Bank Vs. Neelam*; (20005) 5 SCC 91, *Madras State Vs. C.P. Sarathy*; AIR 1953 SC 53, *Secretary, Indian Tea Association Vs. Ajit Kumar Barat and others*; (2000) 3 SCC 93, *Rewa Coal Fields Ltd. Vs. Central Government Industrial Tribunal*; AIR 1969 MP 174, *Western India Watch Co. Ltd. Vs. Western India Watch Co. Workers Union*; AIR 1970 SC 1205, *National Engineering Industries Ltd. Vs. State of Rajasthan*; (2000) 1 SCC 371, *Bombay Union of Journalists and others Vs. State of Bombay and another*; AIR 1964 SC 1617, *State of Bombay Vs. K.P. Krishnan*; AIR 1960 SC 1223.

N.S. Kale with Kapil Patwardhan, for the petitioner.

Naman Nagrath, for the respondent No.2.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :— This is a reference made to the Full Bench pursuant to the order dated 21.8.2001 passed by the learned single Judge in the present writ petition on interpretation of Section 10 (1) of the Industrial Disputes Act, 1947 (for short 'the Act').

2. The facts as stated in the order dated 21.8.2001 of the learned single Judge are that the respondent No.2 raised an industrial dispute before the Assistant Labour Commissioner (Central) by its letter dated 23.2.1995 contending inter-alia that 152 contract workers deserve to be regularised and by not doing so, the Management has committed a gross illegality. The conciliation proceeding failed

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and the Conciliation Authority submitted a failure report dated 15.12.1995 to the Central Government. The Central Government by its order dated 27.12.1996 declined to make the reference on the ground that the respondent No.2 Union failed to give any documentary evidence to prove that the workmen in question were engaged directly by the Management of the SECL and the dispute had been raised belatedly after 11 years and the Union had failed to give any justification for the inordinate delay. The respondent No.2 challenged the order dated 27.12.1996 of the Central Government in W.P.No.3088 of 1998 before this Court and the learned single Judge held in his order dated 14.1.2000 that the order passed by the Central Government was unsustainable and directed the Central Government to take a fresh decision in accordance with law after applying its mind within a period of two months from the date of receipt of the order of the Court. Thereafter, the Central Government passed a fresh order dated 11.4.2000 referring the following dispute to the Central Government Industrial Tribunal, Jabalpur:

"Whether the action of the management of M/s South Eastern Coalfields Ltd. in not regularising the services of 152 contract workers (list enclosed) is legal and justified? If not, to what relief the workmen concerned are entitled?"

3. Aggrieved by the order dated 11.4.2000 of the Central Government, the petitioner management filed the present writ petition contending that the dispute referred to the Industrial Tribunal was a stale one as the 152 contract workers were removed in the year 1984 and the dispute was raised before the Conciliation Officer in the year 1995. In support of this contention, the petitioner relied upon the decision of the Supreme Court in *Nedungadi Bank Limited vs. K.P. Madhavankutty and others*¹.

4. The respondent No.2, on the other hand, contended before the learned single Judge *inter-alia* that in *Ajaib Singh vs. Sirhind Cooperative Marketing-cum-Processing service Society Ltd.*², the Supreme Court has taken a view that a plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and this can only be done by the employer before the Industrial Tribunal and that the order of reference made by the Government under Section 10 (1) of the Act, therefore, should not be quashed by the Court. The respondent No.2 also relied on a decision of a Division Bench of

(1) 2000 (2) S.C.C. 455.

(2) 1999 (6) SCC 82.

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this Court in *Anand Kumar Dubey vs. Union of India and others*¹, and a decision of a learned single Judge in *Ramsewak vs. Union of India and others*², in which refusal on the part of the appropriate Government to make a reference on the ground that the dispute was a belated one had been held to be bad.

5. After considering the contentions of learned counsel for the petitioner and the respondent No.2 and the decisions cited by them, the learned single Judge observed in paragraph 6 of the order dated 21.8.2001 that the core question that falls for consideration is whether stale claims can be rejected by the Central Government on the ground that the Industrial Dispute does not exist, and in paragraph 12 of the order, further observed that this was an important question of law which should be adjudicated by a larger Bench so that an authoritative pronouncement in this regard is made available for future guidance. The reference has accordingly been made to this Full Bench.

6. Mr. N.S. Kale, learned Senior Counsel assisted by Mr. Kapil Patwardhan, learned counsel appearing for the petitioner submitted that a plain reading of Section 10 (1) of the Act makes it clear that where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, make a reference. He submitted that where therefore a stale claim is made on behalf of the workmen and at the time of making the reference, the industrial dispute does not really exist, the order of reference passed by the Government referring the dispute is without jurisdiction and has to be quashed by this Court in exercise of its powers under Art. 226 of the Constitution. He has cited the decisions of the Supreme Court in *Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and others* (supra) and *Haryana Cooperative Land Development Bank vs. Neelam*³, in support of his contention that a reference of an industrial dispute, which is stale and belated, is incompetent and without jurisdiction and is liable to be quashed by the High Court in exercise of its powers under Art. 226 of the Constitution. He submitted that the facts of the present case would show that the contract workers were terminated as far back as in 1984 and that the conciliation proceedings were started in 1995, 11 years after the termination of the contract workers and, therefore, the reference that is made by the Central Government by its order dated 11.4.2000 is without jurisdiction and is liable to be quashed under Art. 226 of the Constitution by the Court.

(1) 2000 (3) MPLJ 461.

(2) W.P.No.3695 of 2000 decided on 29.3.2001.

(3) 2005 (5) SCC 91.

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7. Mr. Naman Nagrath, learned counsel appearing for the respondent No.2, on the other hand, relied on the decision of the Supreme Court in *Ajaib Singh vs. Sirhind Cooperative Marketing-cum-Processing Service Society Limited and others* (supra) and contended that an order of reference made under Section 10 (1) of the appropriate Government to the Industrial Tribunal cannot be challenged on the ground that the industrial dispute referred to in the order of reference is a belated one because there is no limitation provided in the Act for making a reference under Section 10 (1) of the Act. He submitted that the Management, however, can raise a plea before the Industrial Tribunal or the Labour Court to whom the reference is made that the relief claimed by the workmen should not be granted considering the fact that the dispute raised by the workmen is a stale one and it is for the Industrial Tribunal and the Labour Court to consider the facts and circumstances of the case and mould the relief accordingly. He also cited the decision of this court in *Anand Kumar Dubey vs. Union of India and others* (supra) in which the Division Bench quashed the order of the Government refusing to make the reference on the ground that the dispute had been made belatedly without giving justifiable reasons and was patently stale after holding that the workmen had in that case undoubtedly justifiable reasons for raising the industrial dispute in view of his removal from service in domestic enquiry and had also explained the delay quite satisfactorily. He also cited the decision of the Supreme Court in *Madras State vs. C.P. Sarathy*¹, for the proposition that so long as an industrial dispute exists or is apprehended, the order of the appropriate Government making a reference under Section 10 (1) of the Act cannot be challenged because a wide discretion has been vested with the Government under Section 10 (1) of the Act to make a reference where an industrial dispute exists or is apprehended. He submitted that the decision of the Supreme Court in *Madras State vs. C.P. Sarathy* (supra) was relied upon by the Supreme Court in *Secretary, Indian Tea Association vs. Ajit Kumar Barat and others*², to hold that the order made by the appropriate Government under Section 10 of the Act was an administrative order and such an order was made on the subjective satisfaction of the appropriate Government and it will however be open for the party to show what was referred by the appropriate Government was not an industrial dispute within the meaning of the Act. He submitted that thus so long as an industrial dispute exists or is apprehended and the appropriate Government makes the reference under Section 10 (1) of the Act for industrial adjudication of the dispute, the High Court in

(1) AIR 1953 S.C. 53.

(2) 2000 (3) SCC 93.

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exercise of its powers under Art. 226 of the Constitution cannot interfere with the order of reference passed by the appropriate Government.

8. Section 10 (1) of the Act, which is to be interpreted in this case is quoted herein below:

"10. Reference of disputes to Boards, Courts or Tribunals -

(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing -

(a) refer the dispute to a Board for promoting a settlement thereof; or

(b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or

(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or

(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:

Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c):

Provided further that where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced:

Provided also that where the dispute in the relation to which the Central Government is the appropriate Government, it shall be competent for the Government to refer the dispute to a Labour

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Court or an Industrial Tribunal, as the case may be, constituted by the State Government."

The language of Section 10 (1) of the Act would show that where the appropriate Government is of the opinion that an industrial dispute exists or is apprehended, it may at any time by order in writing refer the industrial dispute to one of the authorities mentioned in Clauses (a) to (d) thereof for industrial adjudication. Thus, the pre-condition for making an order of reference under Section 10 (1) of the Act is the existence or the apprehension of an industrial dispute. Once an industrial dispute exists or is apprehended, the appropriate Government has the jurisdiction or power to make an order of reference under Section 10 (1) of the Act. The word 'may' in Section 10 (1) of the Act confers a wide discretion in the appropriate Government whether to exercise such jurisdiction or power conferred on it under Section 10 (1) of the Act.

9. In *Madras State vs. C.P. Sarathy* (supra), a Constitution Bench of the Supreme court considered the power of the appropriate Government under Section 10 (1) of the Act and held that in making a reference under Section 10 (1) of the Act, the appropriate Government is doing an administrative act and the fact that it was to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character and the Court cannot, therefore, canvass the order of reference closely to see if there was any material before the appropriate Government to support its contention as if it was a judicial or quasi judicial determination. Relevant portion from para 14 of the judgment of the Supreme Court as reported in the AIR is quoted herein below:

"..... But it must be remembered that in making a reference under Section 10 (1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within

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the meaning of the Act and, that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters..."

It will be clear from the observations of the Supreme Court in para 14 of the judgment quoted above that where the appropriate Government makes a reference so long as an industrial dispute exists or is apprehended, it was not competent for the court to hold that the reference was bad and quash the proceedings for want of jurisdiction and whether it was expedient to make a reference or not was entirely within the wide discretion of the appropriate Government.

10. Following the aforesaid decision of the Supreme Court in the *State of Madras vs. C.P. Sarathy* (supra), the Supreme Court held in *Secretary, Indian Tea Association vs. Ajit Kumar Barat and others* (supra) that an order of reference made by the appropriate Government is an administrative order and not a judicial or quasi-judicial one and as such, an order is made to the subjective satisfaction of the appropriate Government but it would be open to a party to show that what was referred by the appropriate Government was not an industrial dispute within the meaning of the Act.

11. A Division Bench of this court in *Rewa Coal Fields Ltd. Vs. Central Government Industrial Tribunal*¹, has also held that sub-section (1) of Section 10 of the Act is worded in wide language and enables the appropriate Government to make a reference at any time when it is of the opinion that any industrial dispute exists or is apprehended and the power conferred by the sub-section is administrative in nature and, therefore, the principles applicable to exercise of judicial or quasi-judicial powers cannot be applied for construing the provision.

12. In the aforesaid two decisions of the Supreme Court and this Court, however, the question whether an order of reference made by the appropriate Government

(1) AIR 1969 M.P. 174.

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under sub-section (1) of Section 10 of the Act can be quashed by the Court where the industrial dispute had become stale did not arise for decision. We may now take note of the decisions in which the Supreme Court has considered the plea of stale industrial dispute for holding an order of reference to be bad.

13. In *Western India Watch Co. Ltd. Vs. Western India Watch Co. Workers Union*¹, Section 4-K of the U.P. Industrial Disputes Act, 1947 which is similarly worded as Section 10 (1) of the Act was the subject matter of interpretation before the Supreme Court. The facts of the case were that the workman was not a member of the Union in the beginning of 1959 when the State Government refused to make a reference under Section 4-K of the U.P. Industrial Disputes Act, 1947 and the workman became a member of the Union in July 1962 and it was thereafter that the respondent Union revived the dispute which had ceased to be alive after the Government's refusal and it was at the instance of the Union that the Government later on changed its mind and in August, 1963 agreed to make the reference. The contention before the Court was that the Government having once declined to refer the dispute could not change its mind after a lapse of nearly six years after the dispute arose and that though the expression 'at any time' in Section 4-K of the U.P. Industrial Disputes Act did not apparently signify any limit, it must be construed to mean that once the Government had refused to make the reference after considering the matter and the employer thereupon had been led to believe that the dispute was not to be agitated in a tribunal and had consequently made his own arrangement the Government cannot, on a further agitation by the Union, take a somersault and decide to refer it for adjudication. The Supreme Court held that the Legislature had left the question of making or refusing to make a reference for adjudication to the discretion of the Government but the discretion is neither unfettered nor arbitrary because the section clearly provides in express terms that an industrial dispute exists or is apprehended so that the Government may decide to refer it to adjudication. The passage in para 8 of the decision of the Supreme Court as reported in the AIR in which the expression 'at any time' in Section 4-K of the U.P. Industrial Disputes Act has been interpreted is quoted herein below:

" Therefore, the expression 'at any time', though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the

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conciliation officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent case, it can 'at any time', i.e., even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression 'at any time' thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression 'at any time', in the context in which it is used, postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence."

14. It is thus clear from the above quoted passage that the expression 'at any time' was construed by the Supreme Court in the context in which it has been used to postulate that the reference can only be made if an industrial dispute exists or is apprehended and no reference is contemplated where the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence. In the aforesaid decision, the Supreme court also took note of its earlier authoritative pronouncement in the *State of Madras vs. C.P. Sarathy* (supra) as well as the Division Bench decision of this Court in *Rewa Coal Fields Ltd. Vs. Central Government Industrial Tribunal, Jabalpur* (supra) that the function of the appropriate Government under Section 10 (1) of the Act is an administrative function. The passage in paragraph 9 of the judgment in *M/s Western India Watch Co. Ltd. Vs. The Western India Watch Co. Workers Union and others* (supra) which is relevant for deciding the issue in the present case is quoted herein below:

"..... There is thus a considerable body of judicial opinion according to which so long as an industrial dispute exists or is apprehended and the Government is of the opinion that it is so, the fact that it had earlier refused to exercise its power does not preclude it from exercising it at a later stage. In this view, the mere fact that there has been a lapse of time or that a party to the dispute

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was, by the earlier refusal, led to believe that there would be no reference and acts upon such belief, does not affect the jurisdiction of the Government to make the reference."

It will be clear from the law laid down by the Supreme Court that the mere fact that there has been a lapse of time from the date when the dispute originated does not affect the jurisdiction of the appropriate Government to make the reference but as has been held in the two passages, quoted above, at the time the reference is made, the dispute must exist and if the dispute no longer exists, the reference made by the Government would be beyond its powers under Section 10 (1) of the Act. This is because under Section 10 (1) of the Act, the appropriate Government can make a reference only if the industrial dispute 'exists' or is 'apprehended' and not otherwise.

15. In *Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and others* (supra) cited by Mr. Kale, the facts were that disciplinary proceedings were initiated against a Clerk of the Bank for having misappropriated a sum of Rs. 1185/- and for having falsified the books of the Bank. After the conclusion of the enquiry, he was served with a notice dated 13.10.1972 to show cause why punishment of dismissal from service be not imposed upon him because of grave misconduct which had been proved against him. He admitted his guilt and prayed for mercy. Considering the circumstances of the case, however, he was dismissed from service with effect from 11.8.1972. He filed an appeal to the Board of Directors of the Bank and admitted that he had committed the misappropriation but expressed unconditional regret and prayed that highest penalty of dismissal from service be not imposed on him, but the Board of Directors of the Bank dismissed the appeal by order dated 30.1.1973. When the matter rested at that, after a period of about seven years, he served a notice to the Bank contending that he was discriminated as two other employees of the Bank under similar circumstances were reinstated in the service of the Bank. When the Bank did not reinstate him in service, he filed an application before the State Government under Section 10 of the Act on 24.7.1979 but the State Government rejected the application saying that the appropriate Government was the Central Government and not the State Government. On 31.10.1980, he moved the Assistant Labour Commissioner (Central) for relief, who by his order dated 11.3.1981 held that there was no scope for formal proceedings under the Act since the matter was one which arose way back in 1972. He then filed a writ petition before the High Court and the High Court directed the Assistant Labour Commissioner (Central) to send his report to the Central Government. Pursuant

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to the order of the High Court, the Assistant Labour Commissioner sent his report to the Central Government for consideration and the Central Government declined to make a reference by order dated 1.1.1983 with the direction to the Central Government to re-examine the matter. The Central Government filed an appeal before the Division Bench of the High Court but the same was dismissed and thereafter, the Central Government made a reference under Section 10 (1) of the Act by order dated 24.1.1995. The validity of the reference was challenged and the High Court held that the reference was valid. When the Bank moved the Supreme Court, the Supreme Court held that the Government cannot in exercise of its powers under Section 10 of the Act revive matters which have since been settled as no industrial dispute existed. Para 6 of the judgment of the Supreme Court in *Nedungadi Bank Ltd. Vs. K.P. Madhavankutty* (supra) as reported in the S.C.C. is quoted herein below:

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner."

16. It will be clear from the aforesaid decision of the Supreme Court that the reason why the Supreme Court held that the appropriate Government could not make the reference under Section 10 of the Act was that at the time the reference was made, no industrial dispute existed or could be even said to have been apprehended. Thus, in *Nedungadi Bank Ltd. Vs. K.P. Madhavankutty* (supra), the Supreme Court reiterated the position of law that existence or apprehension of an industrial dispute is the basis for the appropriate Government to assume the jurisdiction under Section 10 (1) of the Act for making a reference. It will be further clear from para 8 of the judgment in the said case as reported in the S.C.C. that the Supreme Court relied on its earlier observation in *National Engineering Industries Ltd. Vs. State of Rajasthan*¹, that the High Court has jurisdiction to entertain a writ petition when there is no industrial dispute and none is apprehended which could be the subject matter of reference for adjudication to Industrial Tribunal under Section 10 of the Act.

17. The aforesaid discussion of the authorities would show that in cases where a belated reference is made of an industrial dispute under Section 10 (1) of the

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Act, the High Court while exercising its powers under Art. 226 of the Constitution will examine only whether the industrial dispute which is claimed to be stale still exists or not and in case the industrial dispute still exists, the High Court will not interfere with the order of reference on the ground that the order passed by the appropriate Government is without jurisdiction. But if the stale dispute referred by the appropriate Government under Section 10 (1) of the Act for industrial adjudication no longer exists by lapse of time or otherwise, the High Court in exercise of its powers under Art. 226 of the Constitution will quash the order of reference on the ground that the appropriate Government did not have the power or jurisdiction to make the reference, inasmuch as under Section 10 (1) of the Act, the jurisdiction and power of the appropriate Government is available only when an industrial dispute exists or is apprehended.

18. Mr. Kale, learned counsel for the petitioner, however, submitted that the language of Section 12 (5) of the Act would show that the appropriate Government must be satisfied that there is a case for reference and only then it can make such a reference. He submitted that where, therefore, a belated claim is made on behalf of any of the parties, the appropriate Government must refuse to make a reference under Section 10 (1) read with sub-section (5) of Section 12 of the Act. In support of this submission, Mr. Kale has relied on the decision of the Supreme Court in *Bombay Union of Journalists and others vs. State of Bombay and another*¹.

19. We have perused the aforesaid decision of the Supreme Court in *Bombay Union of Journalists and others vs. State of Bombay and another* (supra) and we find that in the aforesaid decision, the Supreme Court while relying upon its earlier decision in *State of Bombay vs. K.P. Krishnan*², held that if the claim made is patently frivolous or clearly belated, the appropriate Government may refuse to make a reference in exercise of its powers under Section 12 (5) of the Act. In *State of Bombay vs. K.P. Krishnan* (supra) to which a reference has been made in the decision in the *Bombay Union of Journalists and others vs. State of Bombay and another* (supra) cited by Mr. Kale, the facts were that the State of Maharashtra refused to make a reference of an industrial dispute with regard to some service conditions of the workmen on the ground that the workmen resorted to go slow during the year 1952-53 by its order dated 11th December, 1954 and it is this order of the Government of Maharashtra under Section 12 (5) of the Act which was in dispute first before the High Court and thereafter before the Supreme

(1) AIR 1964 S.C. 1617.

(2) AIR 1960 S.C. 1223.

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Court and the Supreme Court, after construing the provisions of Sections 10 and 12 of the Act held that the question as to whether a case for reference has been made out within the meaning of Section 12 (5) of the Act can be answered in the light of all the relevant circumstances which would have a bearing on the facts of the case as well as on the incidental questions as to whether a reference nevertheless should be made or not. The relevant passage from para 11 of the judgment of the Supreme Court as reported in the AIR is quoted herein below:

"11. The problem which the Government has to consider while acting under S. 12 (5) (a) is whether there is a case for reference. This expression means that Government must consider whether a prima facie case for reference has been made on the merits. If the Government comes to the conclusion that a prima facie case for reference has been made then it would be open to the Government also to consider whether there are any other relevant or material facts, which would justify its refusal to make a reference. The question as to whether a case for reference has been made out can be answered in the light of all the relevant circumstances which would have a bearing on the merits of the case as well as on the incidental question as to whether a reference should nevertheless be made or not. A discretion to consider all relevant facts which is conferred on the Government by S. 10 (1) could be exercised by the Government even in dealing with cases under Section 12 (5) provided of course the said discretion is exercised bona fide, its final decision is based on a consideration of relevant facts and circumstances, and the second part of S. 12 (5) is complied with."

It will be clear from what has been held by the Supreme Court in *State of Bombay vs. K.P. Krishnan and others* (supra) that even if a dispute exists or is apprehended, the appropriate Government in its discretion may consider all relevant facts and circumstances and decide whether or not to make the reference. By way of illustration, the Supreme Court observed in the said case that it may be open to the appropriate Government to consider the question of expediency to enquire whether the dispute raises a claim which is very stale. Thus, while refusing to make a reference under Section 12 (5) of the Act, the appropriate Government may be satisfied that there exists an industrial dispute but may still refuse to make an order of reference on the ground that an industrial dispute raises a claim which is very stale. The circumstance of the industrial dispute being a stale claim may be relevant circumstance, as pointed out by the Supreme Court in the cases of *State of Bombay*

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vs. K.P.Krishnan as well as in Bombay Union of Journalists and others vs. State of Bombay and another (supra), for the appropriate Government not to make a reference in exercise of its discretion under Section 10 (1) and 12 (5) of the Act.

20. The decision of the Supreme Court in *Haryana State Cooperative Land Development Bank vs. Neelam* (supra) cited by Mr. Kale is not a case in which the order of the appropriate Government under Section 10 (1) of the Act was challenged on the ground that the reference was competent. In the said case, after the reference, an award has already been made by the Labour Court and the Supreme Court having found that the workman in that case had approached the Labour Court after more than seven years held that this was a relevant factor which the Labour Court took into consideration for refusing to grant relief to the workman and the question of interfering with the award of the Labour Court by the High Court in exercise of discretionary jurisdiction under Art. 226 of the Constitution did not arise.

21. Similarly in *Ajaib Singh vs. Sirhind Cooperative Marketing-cum-Processing Service Society Limited and another* (supra) cited by Mr. Naman Nagrath, the order of the appropriate Government under Section 10 (1) of the Act to make a reference was not under challenge. The reference of an industrial dispute made to the Labour Court and the award passed by the Labour Court granting the relief to the workman was challenged before the High Court under Article 226/227 Constitution of India on the ground that the claim of the workman was belated and the High Court interfered with the award on the ground of delay of seven years. The Supreme Court held that the workman appears to be justified in objecting that the management had not taken the plea and had not led any evidence regarding delay before the Labour Court and the High Court appears to have substituted its opinion for the opinion of the Labour Court which was not permissible in proceedings under Articles 226/227 of the Constitution. The Supreme Court, however, observed that the Labour Court ought to have appropriately moulded the relief by denying the workman some part of the back wages considering the delay.

22. In *Anand Kumar Dubey vs. Union of India and others* (supra), the order passed by the appropriate Government under Section 10 (1) of the Act making a reference was not challenged and what was challenged was an order passed by the appropriate Government under Section 12 (5) of the Act refusing to make a

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reference of an industrial dispute on the ground that the claim of the workman was belated and the Division Bench held that since the workman had satisfactorily explained the delay, the appropriate Government should have made the reference as per demand of the workman as per the facts of the case. Following the aforesaid decision of the Division Bench in *Anand Kumar Dubey vs. Union of India and others* (supra), a learned single Judge of this Court in *Ramsewak vs. Union of India and others*¹ quashed the order passed by the appropriate Government under Section 12 (5) of the Act refusing to make the reference on the ground of delay. This is also not a case where the order under Section 10 (1) of the Act of the appropriate Government making a reference of an industrial dispute for industrial adjudication was challenged.

23. On the aforesaid analysis of the provisions of Sections 10 (1) and 12 (5) of the Act as well as the principles laid down by the Supreme Court in various cases, we are of the considered opinion that a belated claim giving rise to an industrial dispute can be referred by the appropriate Government under Section 10 (1) of the Act if the appropriate Government finds that the industrial dispute exists at the time of making the reference notwithstanding the fact that the claim is belated and such an order passed by the appropriate Government under Section 10 (1) of the Act cannot be interfered with by the High Court under Article 226 of the Constitution on the ground that the reference is incompetent or without jurisdiction. But at the same time, the appropriate Government while exercising its wide discretion under Sections 10 (1) and 12 (5) of the Act may refuse to refer an industrial dispute which exists but which has become stale if it is not expedient to refer the same as this would be a relevant circumstance while examining the question whether a case for reference is made out or not for industrial adjudication. These are the conclusions we have arrived at on examining various decisions of the Supreme Court under Sections 10 and 12 of the Act discussed above and we answer the reference accordingly.

Since we have answered the reference which has been made to us, the case will now be placed before the appropriate Bench for hearing on merits.

I.L.R.[2007] M.P., 1203

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha

5 September, 2007

SMT. ANUBHA MUNJARE

--- Appellant*

Vs.

STATE ELECTION COMMISSION & Ors.

--- Respondents

Municipalities Act, M.P. (XXXVII of 1961)-Section 47-Recalling of President-Appellant elected President of Municipal Council-Affidavits by 3/4th Councillors for no-confidence submitted before Collector-Proposal for recall-cum-no confidence also submitted before Collector-Collector decided to send proposal to Govt. for taking action-State Govt. made reference to State Election Commission to arrange voting for recall-Held-Collector has to satisfy himself with regard to conditions precedent engrafted under Section 47 (1)-Councillors appeared before Collector and signed the proposal-Collector recommended the proposal-Affidavits indicating vote of no-confidence motion-Conjoint reading of affidavits and proposal leaves no doubt that Collector had rightly verified signatures and recorded his satisfaction-Section 47 does not postulate that Councillors should have sat at a combined place and passed a resolution-Writ Appeal dismissed.

On a perusal of the original records it is clear as noon day that a proposal was put forth before the Collector for recall. The term of the proposal uses the word "Prithak" which means 'recall'. The Collector has given a note to his 'Reader'. Submission of Mr. Arya is that the 'Reader' of Collector has written the note. On a keener scrutiny of the record the Collector has himself written directing what has to be done by the 'Reader'. The Collector had noted that on 28.3.2007 barring two councillors, namely, signatories No. 8 and 19 all the twenty five (25) councillors were present. The said twenty five (25) councillors signed the proposal letter in presence of the Collector. As the Collector had doubt with regard to the signatory no. 27 he took exception to the same. Thereafter, signatory no. 27 remained present and signed the proposal and verified the earlier signature. After obtaining the said signatures the Collector expressed the opinion that out of 33 councillors, 26 had signed the proposal and as a result thereof the requirement as contemplated under Section 47 (2) was met with. Thereafter, he recommended the proposal.

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We would like to clarify that the proposal, as submitted to the Collector, clearly indicates for recall of the President. Affidavits have been produced. Affidavits may indicate vote on no confidence motion but if the same are read conjointly with the proposal for recall there can be no scintilla of doubt that the Collector had rightly and correctly verified the signatures and recorded his satisfaction with regard to the signatures purforth by the councilors. Affidavits only reinforce the same. (Para 16)

The affidavits and proposal can be read conjointly to show the desire of recall of the President. There is no necessity to delve into the same as there is satisfaction that there was proposal before the Collector and the Collector was satisfied with regard to the condition precedent as engrafted under Section 47 of the Act. (Para 17)

What is contended by Mr. Arya is that all the members should have sat at a combined place and passed a resolution and then only there would have been a proposal for recall, is without any substance as the provision contained in Section 47 does not so postulate. The postulates engrafted under Section 47 have been satisfied. (Para 18)

Cases Referred.:

Smt. Pallvika Patel v. State Election Commission and Ors., AIR 2001 MP 306; *Smt. Naravadi Bai Choudhary and Ors. v. State of M.P. and Ors.* 2005 (2) MPHT 119; *State of M.P. and anr. v. Mahenda Kumar Saraf and Ors.* 2005 (4) MPHT 185; *Mohanlal Tripathi v. District Magistrate, Rai Bareli* (1992) 4 SCC 80.

Rohit Arya, alongwith *Bramhadatt Singh*, for the appellant

V. S. Shroti, alongwith *A.P. Shroti*, for the respondent No. 1.

T. S. Ruprah, Addl. Advocate General and *Kumaresh Pathak*, Government Advocate for the respondents nos. 4 and 5.

Sanjay Agrawal, for the intervenors.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.**:-Substantiality and legal acceptability of the order dated 27-7-2007 passed by the learned Single Judge in W.P. No.9663/2003 is called in question

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in this appeal preferred under Section 2(1) of the M.P. Uchch Nayalaya (Nyay Khandpeeth Ko Appeal) Adhiniyam, 2001 [for brevity 'the Act'].

2. The facts which are imperative to be adumbrated are that the appellant had contested in the election of the President, Municipal Council, Balaghat as an independent candidate in the election held in November, 2004. The election was a direct one. As pleaded, he had defeated the rival candidate by large margin of votes. The Municipal Council, Balaghat consists of 33 councilors. Various asseverations have been made about the political rivalry and how adroit endeavours have been made to dislodge her from the post. It is put forth that she has been functioning in the President, Municipal Council, Balaghat from January, 2005 and while holding the said post she had done extensive work for improvement of civil amenities of the Municipality. Reference has been made to Section 41-A of the M.P. Municipalities Act, 1961 [hereinafter referred to as 'the Act'] to highlight that an elected President can either be removed under Section 41A of the Act or recalled under Section 47 of the Act. It is contended that Section 41A empowers the State Government to remove a President or a Vice-President on certain conditions precedent being satisfied. In the case at hand we are not required to dwell upon the said facet. We, as the factual matrix commands, are required to deal with the basic conception and the ultimate conceptual eventuality as engrafted under Section 47 of the Act.

3. The further expose' of facts are that 3/4th of the councilors of the Municipal Council filed affidavits before the Collector, Balaghat moving a no confidence motion against the petitioner as a result of which the Collector took a decisions to send the proposal to the Government for taking appropriate decisions as contemplated under Section 47(2) of the Act. The State Government as envisaged under Sub-Section (2) of Section 47 of the Act made reference to the State Election Commission which under Sub-section (3) arranged a voting on the proposal of recall.

4. The date was fixed on 8-8-2007 by the State Election Commission for voting for recall of the President.

5. Being dissatisfied with the aforesaid action taken the petitioner invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India contending, *inter alia*, that the affidavits were filed before the Collector in support of no confidence motion though the Act does not envisage any kind of no

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confidence motion as the same has been repealed from the enactment and second the proposal, as is understood in law, was not there before the Collector but the Collector in a perfunctory and mechanical manner recommended the matter to the State Government and the concerned authorities acted on the recommendation and directed for holding of election. It was canvassed before the learned Single Judge that the sending of a proposal is the pre-requisite and is an imperative facet of Section 47 of the Act but in the case at hand, the Collector, despite no proposal, had recommended on the basis of affidavits which were only meant for passing of a vote of no confidence motion.

6. The learned Single Judge referred to the affidavits, language contained in Section 47 of the Act, the knowledge of the petitioner as evincible from Annexure-P/2, she had admitted that a proposal for recall-cum-no confidence motion against her had been submitted came to hold that it could not be stated that there was no proposal for recall of the petitioner from the post of the President of Municipal Council, Balaghat. Being of this view the learned Single Judge dismissed the writ petition.

7. Mr. Rohit Arya, learned Senior Counsel appearing for the appellant questioning the correctness of the order has raised the following contentions:

(A) The affidavits which have been placed reliance upon cannot constitute, by any stretch of imagination, a proposal as is understood in law, more so, when the affidavits clearly show that the deponents wanted to have a vote of no confidence against the petitioner.

(B) The concept of recall is totally different than the move or motion for vote of no confidence and when the provision relating to vote of no confidence motion has been repealed a proposal has to be passed showing the intention in exactitude for recall and in the absence of it the said action cannot be taken recourse to as that would be an anathema to fundamental facet of democracy.

(C) A proposal must show in an unequivocal manner that there has been a resolution from which meeting of minds would get reflected, because solemnity of proposal inherently engulfs meeting of minds, combination of thoughts and culmination of the same in a resolve.

(D) The duty of the Collector as per enactment is a sacrosanct

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one and the verification of the proposal has to be done in a strict manner and any kind of deviation is totally impermissible as a step towards recall of a democratically elected person has serious consequences.

(E) The verification which is required to be done by the Collector is to be carried out by himself from the beginning till the end and there cannot be any kind of delegation of any aspect as that would tantamount to negation of duty giving an indecent burial to the requirement of the provision.

(F) In the case at hand there has been no proposal in law, therefore, the recommendation by the Collector and the subsequent decision to hold the election for recall of the petitioner is totally improper, unjust and unfair.

8. Mr. T.S. Ruprah, learned Additional Advocate General and Mr. Kumaresh Pathak, learned Deputy Advocate General for the State, countering the aforesaid submissions of Mr. Arya, have propounded as under:

(i) The proposal cannot be equated with the motion of no confidence, for Section 47 of the Act is a complete Code in itself and nothing should be read into it.

(ii) The proposal must show intention and if the intention is clear and decipherable the Collector is bound to proceed to record his satisfaction with regard to factum enumerated under Sub-Section (1) of Section 47 and not beyond the same.

(iii) When an application is signed it is a proposal and the same need not be in the form of a resolution because passing of a resolution is not the requirement of law.

(iv) No proforma has been prescribed for passing of a proposal and, therefore, the colossal complaint that there should have been a meeting of minds in a combined manner is neither the prescription of law nor does the same flow by taking aid of any interpretation of any of the words used in Section 47 of the Act.

(v) The Collector has not delegated the power to anyone but has religiously recorded his satisfaction and hence, his recording of satisfaction cannot be found fault with.

9. Mr. V.S. Shroti, learned senior counsel appearing for the respondent No. 1, State Election Commission, has raised the following contentions:-

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(a) The meeting of minds for any kind of resolution is not a condition precedent to send the proposal for recall to the Collector concerned.

(b) The satisfaction of the Collector does not envisage any kind of causation of enquiry with regard to any other aspect than what has been provided for in the statute. The Collector's satisfaction is a limited one and he is not required to dwell into the merits of the proposal.

(c) In the absence of any format when there is a proposal and there is a further support by the affidavit that they want a vote of 'No Confidence Motion' against the President both are to be read conjointly and on such effective conjoint reading it would be crystal as clear that the council had lost faith in the President for various reasons and that is a ground for which the procedure for recall should be adverted to and the President should face the electorate again.

10. At the outset it is condign to state, as the edifice of argument of Mr. Arya was built on the primary factum that there was no proposal, this Court had directed the Additional Advocate General to produce the original record and accordingly the original record has been produced. We have carefully perused the original record.

11. Prior to referring to the documents that find place in the original record it is seemly to refer to the provisions and the law in the field. A President of Municipality is the Chairperson and is elected by direct election from the municipal area as per Section 19(1)(a) of the Act. The election of a President should be challenged as per the provision contained in Section 20 of the Act. Section 41-A deals with removal of President by the State Government if in the opinion of the government his continuance as such is not desirable in public interest or in the interest of the councillor and on certain other grounds. The provision dealing with 'No Confidence Motion' against the President has been substituted and the present section 47 has been brought on the statute book by amending Act No. 11 of 1999. The provision as amended reads as under:-

"47. Recalling of President. (1) Every President of a Council shall forthwith be deemed to have vacated his office if he is recalled through a secret ballot by a majority of more than half of the total number of voters of the municipal area casting the vote in accordance with the procedure as may be prescribed:

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Provided that no such process of recall shall be initiated unless a proposal is signed by not less than three fourth of the total number of the elected Councillors and presented to the Collector:

Provided further that no such process shall be initiated:-

- (i) within a period of two years from the date on which such President is elected and enters his office;
- (ii) if half of the period of tenure of the President elected in a by-election has not expired:

Provided also that process for recall of the President shall be initiated once in his whole term.

(2) The Collector, after satisfying himself and verifying that the three fourth of the Councillors specified in sub-section (1) have the proposal of recall shall send the proposal to the State Government and the State Government shall make a reference to the State Election Commission.

(3) On receipt of the reference, the State Election Commission shall arrange for voting on the proposal of recall in such manner as may be prescribed."

The constitutional validity of the said provision has been upheld in the case of *Smt. Pallvika Patel Vs. State Election Commission and others*¹.

12. The Full Bench of this Court in the case of *Smt. Naravadi Bai Choudhary and others Vs. State of M.P. and others*², dealt with certain aspects of Section 47 of the Act. They are of immense significance. The Full Bench after reproducing the provision came to hold in paragraphs 12, 13, 14 and 16 as under:-

"12. Again we have to refer to the language used in Section 47 of the Act. Sub-section (2) of this section requires that the Collector, after satisfying himself and verifying that the 3/4th of the Councillors specified in sub-section (1) have signed the proposal of recall, shall send the proposal to the State Government. The provision nowhere mandates that the verification shall be made in the presence of signatories. Need not to say that verification of signatures of signatories after procuring their presence may be one of the modes for such verification but it is not the only or exclusively provided mode,

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because nothing can be read in the proviso itself to this effect, therefore, to put fetters on the discretion of the Collector in selecting the mode of verification by making the personal presence of signatories mandatory while the law is framed to give him more elbow room in the matter would be clearly against the legislative intent.

13. The authorities, entrusted with the task of verification of signatures, being responsible, are expected to conduct themselves in an independent and unbiased manner. The process of verification may be akin to the one adopted by the bank authorities regarding genuineness of signatures of the drawer on a cheque.

14. If the physical presence of the Councillor concerned is made a sine qua non for verification of the signatures, at times it may defeat the purpose. There may be a situation where a Councillor may not be able to appear before the authority concerned due to old age, infirmity, serious illness etc., though he/she was certainly in a position to put his/her signatures on the proposal. In such a situation if the authority can not forward the proposal to the State Government for want of personal appearance though sufficient material is placed before the authority for his satisfaction regarding the genuineness of the signatures, such as filing of the affidavit or submission of specimen signature of the Councillor duly attested, then the same will defeat the proposal itself and in turn the democratic process.

15. xxx xxx xxx

16. Therefore, we hold that proviso to Section 47 of the Act does not contemplate that the proposal should be presented by the 3/4th of the Councillors in person or that for the purpose of verification of signatures of the signatories their personal presence is necessary."

13. In *State of Madhya Pradesh and another Vs. Mahendra Kumar Saraf and others*¹, the Full Bench of this Court reiterated the principle in paragraph 21 as under:-

"21. Therefore, we hold that proviso to Section 47 of the Act does not contemplate that the proposal should be presented by the 3/4th of the Councillors in person or that for the purpose of verification of signatures of the signatories their personal presence is necessary."

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Thereafter, the Full Bench proceeded to state as under:-

"47. Therefore, we are in complete agreement with the learned Single Judge that after having sent the proposal to the State Government, Collector becomes *functus officio*.

48. Section 47 of the Act does not give any authority to the State Government to entertain any objection to the proposal sent by the Collector to it. Therefore, the State Government can not entertain any objection to the proposal duly forwarded by the Collector. In the absence of any express provision to that effect in Section 47 of the Act. State Government can not sit over the finding of the Collector.

49. xxx xxx xxx

50. When the law requires the satisfaction of the Collector, the same can not be interpreted in a manner so as to substitute it by the satisfaction of the State Government. Once the proposal has been sent by the collector after verification and satisfaction the State Government has no role but to forward the same to the State Election Commission."

14. Keeping in view the aforesaid enunciation of law, the factual matrix is required to be scrutinized. Submission of Mr. Arya is that the recall is a serious affair and a candidate elected by a direct election is supposed to be recalled by proposal moved by 3/4th total number of elected councillors and presented to the Collector. It is also canvassed by him that the Collector has to record his satisfaction. On a reading of Section 47 in entirety and especially sub-section 2 of Section 47 there can be no scintilla of doubt that the Collector has to satisfy himself with regard to the conditions precedent engrafted under Section 47(1), namely, that the proposal has been signed by not less than 3/4th of total number of elected councillors, the proposal has not been initiated within a period of two years from the date on which such President is elected and enters his/her office; that half of the period of tenure of the President elected in by-election has expired; and that the process for recall is the first proposal in the whole term of the elected candidate and he must verify the proposal that 3/4th of the total number of elected councillors have signed the proposal for recall. Further submission of Mr. Arya is that the Collector himself shall record his satisfaction that there has been any kind of mal-functioning or non-functioning of the President and, therefore, recall is warrantable. In our considered opinion, the aforesaid submission is extremely spacious and is not in consonance

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and accord with the provisions contained in Section 47 which deals with recalling of the President. Section 47 is a complete Code in itself which deals with recall and nothing should be added to or extracted from it. As we understand the provision, such a kind of recording of satisfaction, as propounded by Mr. Arya, is alien to the provisions and hence, not acceptable.

15. It is further contended by learned senior counsel for the petitioner that in a democratic polity an elected candidate should not be lightly thrown. As has been indicated earlier, the provision is held to be constitutional in the case of *Smt. Pallvika Patel* (supra). In this context, we may refer with profit to the decision rendered in *Mohanlal Tripathi Vs. District Magistrate, Rai Bareilly*¹, wherein it has been held as under:-

"Democracy is a concept, a political philosophy, an ideal practised by resorting to governance by representatives of the people elected directly or indirectly. But electing representatives to govern is neither a 'fundamental right' nor a 'common law right' but a special right created by statutes, or a 'political right' or 'privilege' and not a 'natural', 'absolute' or 'vested right.' "Concepts familiar to common law and equality must remain stranger to 'election law' unless statutorily recognized". Right to remove an elected representative, too, must stem out of the statute as 'in the absence of constitutional restriction it is within the power of a Legislature to enact a law or recall of officers.' Its existence or validity can be decided on the provision of the Act and not, as a matter of policy. Therefore, the validity or otherwise of a no-confidence motion of removal of a President would have to be examined on applicability of statutory provision and not on political philosophy...."

16. Democracy as is understood today, still is a government 'of the people, by the people and for the people'. The said definition, as we are disposed to think, is the quintessential definition and has to reign supreme. A democratic process has to be democratic and no one's lawful rights are to be taken away by any prejudiced, motivated, fraudulent unhesitatingly undemocratic methods, but, a true democracy cannot live without the respect of rule of law. Law in a democratic set up has to be given due veneration and it must have paramountcy. The safeguard of democracy has to be real and cannot be a facade, for true and efficient governance in a democracy the right of a voter, as by law prescribed, has to be given due weightage. Not for nothing it has been said as follows:-

(1) (1) (1992) 4 SCC 80.

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"The foundation of all democracy is that the people have the right to vote..... At the bottom of all the tributes paid to democracy is the little man, walking into the little booth...."

Keeping the aforesaid pronouncement of law and the basic conception of democracy in view it has to be seen that whether there has been any proposal. On a perusal of the original records it is clear as noon day that a proposal was put forth before the Collector for recall. The term of the proposal uses the word "Prithak" which means 'recall'. The Collector has given a note to his 'Reader'. Submission of Mr. Arya is that the 'Reader' of the Collector has written the note. On a keener scrutiny of the record the Collector has himself written directing what has to be done by the 'Reader'. The Collector had noted that on 28.3.2007 barring two councillors, namely, signatories No.8 and 19 all the twenty five (25) councillors were present. The said twenty five (25) councillors signed the proposal letter in presence of the Collector. As the Collector had doubt with regard to the signatory no. 27 he took exception to the same. Thereafter, signatory no.27 remained present and signed the proposal and verified the earlier signatures. After obtaining the said signatures the Collector expressed the opinion that out of 33 councillors, 26 had signed the proposal and as a result thereof the requirement as contemplated under Section 47(2) was met with. Thereafter, he recommended the proposal.

17. Quite apart from that affidavits have been brought on record. Each deponent has stated about the irregularities committed by the petitioner and there was a desire to move a vote of no confidence motion and pass it against him. We would like to clarify that the proposal, as submitted to the Collector, clearly indicates for recall of the President. Affidavits have been produced. Affidavits may indicate vote of no confidence motion but if the same are read conjointly with the proposal for recall there can be no scintilla of doubt that the Collector had rightly and correctly verified the signatures and recorded his satisfaction with regard to the signatures purforth by the councillors. Affidavits only reinforce the same. Submission of Mr. Arya is that the affidavits alone cannot substitute the proposal of recall. What could have been the effect of the affidavits alone without the proposal duly signed by the councillors could have been a matter of interesting debate but the same does not ensue as there is a proposal. Submission of Mr. Ruprah, learned Additional Advocate General is that if the affidavits are not taken into consideration still then the proposal would hold the field. The term of vote of no confidence motion would go a long way to show that they have lost the confidence in the elected President and they desired a recall. The affidavits and proposal can be

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read conjointly to show the desire of recall of the President. There is no necessity to delve into the same as there is satisfaction that there was proposal before the Collector and the Collector was satisfied with regard to the condition precedent as engrafted under Section 47 of the Act.

18. Be it placed on record that barring signatures all other conditions have been satisfied. The said facets have been conceded to before us at the Bar. What is contended by Mr. Arya is that all the members should have sat at a combined place and passed a resolution and then only there would have been a proposal for recall, is without any substance as the provision contained in Section 47 does not so postulate. The postulates engrafted under Section 47 have been satisfied.

19. We may also hasten to add that the present case frescoes a picture and projects a scenario whereby the councillors had gone before the Collector and signed. As per the decision rendered in *Mahendra Kumar Saraf* (supra) there was no need to present the proposal for recall of the President. But, in the case at hand, the requisite councillors had gone to the office of the Collector. The statutory requirement has been met with. At this juncture, we may add that the councillor who had presented the proposal and had sworn the affidavits have intervened in the petition and stated that they have signed the proposal. True it is, had there been any deficiency in the proposal that could not have been cured by such affidavits before this Court. But we have only taken note of the same for the sake of completeness.

20. Consequently, the writ appeal, being sans substratum, stands dismissed. However, in the peculiar facts and circumstances of the case there shall be no order as to costs.

Writ appeal dismissed.

I.L.R. [2007] M.P., 1215

WRIT PETITION

Before Mr. Justice K.K.Lahoti

3 August, 2007

NAND KISHORE CHOUDAHA

.....Petitioner*

vs.

UNION OF INDIA

.... Respondent

A. Constitution of India, Articles 226/227-Disputed Questions of Fact-Premises of Petitioner taken on rent by respondent-CPWD assessed monthly rent at the rate of Rs. 32,080-Possession of Premises handed over by respondent after accepting the rent fixed by CPWD-Petitioner alleged that possession of room situated at 2nd floor was also taken by respondent although it was not included in rented premises-Petitioner claimed refixation of rent-Executive Engineer CPWD assessed rent of one room at Rs.2124 per month and refixed the entire rent to Rs. 45,750/- -Enhanced rent claimed by Petitioner from the date of delivery of possession- Held-Initial rent of Rs. 32,080 per month was accepted by Petitioner without any objection-Entire circumstances were taken into consideration while fixing rent at initial stage- Petitioner not entitled to get rent re-fixed on the ground that previously rent was wrongly fixed-Petition involved disputed questions of fact as petitioner is claiming higher rent whereas respondents are making payment as per initial assessment.

Apart from this, letter Annexure P-2 was sent by the petitioner for fixation of the fair rent of the building and alongwith this letter, petitioner himself sent all the information in the form namely 'furnishing necessary information for fixation of fair rent by CPWD'. The location of the building was shown in the form and on the basis of this, while determining the rent by Annexure P-3 the C.P.W.D. had looked into the locality of the building and prevailing market rent in the locality and thereafter issued the certificate Annexure P-3. So at the time of assessment of the fair rent by Annexure P-3, the entire circumstances were taken into consideration and the aforesaid rent was applicable for a period of 5 years and during this period the petitioner was not entitled to get re-fix the rent of the building even on the ground that previously the rent was wrongly fixed as a non-commercial building and the petitioner was entitled for a rent of commercial building. That too after accepting the rent and terms by letter Annexure P/5. (Para 8)

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B. Constitution of India, Articles 226/227--Alternative Remedy-Writ Petition is not a proper forum to decide dispute in respect of contractual matters- In respect of Bare Contractual obligations--Writ Petition is not to be entertained when remedy of civil suit is available-Dispute in respect of rent cannot be agitated under Article 226 of Constitution-Petitioner has remedy of filing suit under M.P. Accommodation Control Act to determine the question.

It is a settled law that for deciding dispute in respect of contractual matters, writ court is not a proper forum and the aforesaid disputes may be settled in a Civil Court. Though the learned counsel for the petitioner relied on various judgment of Apex Court but the aforesaid judgment relates to statutory contracts or non-performances of statutory obligations of the authorities. But in respect of bare contractual obligations, when the remedy of civil suit is available, ordinarily, writ petition is not to be entertained, particularly when a serious dispute has been raised which deserves adjudication of the facts.

The dispute in respect of the rate of rent or its payment cannot be agitated under Art. 226 of the Constitution of India. The petitioner is having efficacious alternative remedy under M.P. Accommodation Act, 1961 to file a suit in this regard and the Civil Court is having jurisdiction to determine all the aforesaid questions. (Para 12)

C. Contract Act, Indian (IX of 1872)--Section 188-Extent of Agent's authority-Writ Petition filed by holder of power of attorney in his own name-Petitioner was not entitled to file petition in his name in absence of specific authority that he can file petition in his own name-Petitioner may be entitled to file petition but in the name of Principal showing the petitioner as his agent.

Now the last objection raised by the respondent may be seen, that this petition has been filed by the petitioner in his own name without impleading principals as petitioner or filing an authority showing that principals authorised petitioner to initiate legal proceedings in his own name. Sec. 188 of Indian Contract Act, 1872 specifically provide that an agent having an authority to do an act has authority to do every lawful things which is necessary in order to do such act. But in the absence of any specific authority in favour of the petitioner that the petitioner shall be entitled to file petition or legal proceedings in his own name, the petitioner was not entitled to file this petition. Though on the strength of power of attorney, petitioner

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may be entitled to file a petition but in the name of principal showing the petitioner as the Agent of the principal. Power of attorney must specifically vest such a power in his favour. Though during the course of hearing the petitioner has shown the power of attorney dated 22.5.2001 but from the perusal of the aforesaid, there is no specific or implied authority to the petitioner to file proceedings before the court of law in his own name. In the Full Bench judgment of Nagpur High Court in Jiwi Bai it is held that an agent can act on behalf of principal under the authority given to him but the facts of the present case are different and the judgment of Jiwi Bai is not applicable in the present case. (Para 14)

Cases Referred :

Shrilekha Vidhyarthi Vs. State of Uttar Pradesh, AIR 1991 SC 537; *Kasturi Lal Lakshmi Reddy Vs. State of Jammu & Kashmir*, AIR 1980 SC 1992; *Dwarkadas Marfatia & Sons Vs. Board of Trustees of the Port of Bombay*, AIR 1989 SC 1642; *Mahabir Auto Stores Vs. Indian Oil Corporation*; AIR 1990 SC 1031; *L.I.C. of India Vs. Consumer Education & Research Centre*; (1995) 5 SCC 482.

Case Distinguished :

Jiwi Bai Vs. Ramkumar, 1947 Nagpur Law Journal 1.

J.P. Sanghi, for the petitioner

Dharmendra Sharma, Assistant Solicitor General for the respondent

Cur.adv.vult.

ORDER

K.K. LAHOTI, J. :-The petitioner has sought following reliefs :-

1. *Mandamus* commanding the respondents to pay rent of the premises @ Rs.45,750/- per month and pay all arrears of rent from the date of occupation, namely 1.3.2004 upto date.
2. Writ of *mandamus* commanding the respondent to execute lease deed from the date of occupation for 5 years.
3. *Mandamus* commanding the respondent to vacate the premises after completion of 5 years namely 1.3.2007.
4. *Mandamus* commanding the respondent to pay interest on the arrears of rent at such rate as this Hon'ble Court may deem fit.

2. (a) Case of the petitioner is that the respondent issued an advertisement for procuring premises for the office and hospital run by the Central Government.

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Petitioner in response to the advertisement offered his premises on commercial basis at the rate of Rs.50,000/- per month. The respondent intended to take full ground floor, first floor and part of the second floor of the premises and requested the petitioner to carry out certain additions and alterations. The petitioner agreed to do so and also agreed to accept the rent as per the Fair Rent Certificate to be issued by the Central Public Works Department (hereinafter referred as C.P.W.D. in short) on commercial basis for commercial purposes. A copy of the letter sent by the petitioner to the respondent in response to advertisement and negotiations is on record as Annexure P-2. Alongwith Annexure P-2 the petitioner submitted particulars of the building proposed to be let out for fixing of fair rent by the C.P.W.D.

(b) "The C.P.W.D. sent a letter Annexure P-3 dated 14.8.2001 by which the department assessed the rent of the building at Rs.32,367/- on the basis of prevailing market rate in the locality as a reasonable rent. As per the letter Annexure P-3 this assessment was for a period of 5 years and inclusive of municipal taxes, maintenance and repair charges to be borne by the landlord. Respondent on receipt of the letter Annexure P-3 sent a copy to the petitioner informing the rent payable at the rate of Rs.32,080/- per month alongwith letter Annexure P-4.

(c) The petitioner's case is that relying on the rent assessment certificate of C.P.W.D., petitioner sent a consent letter Annexure P-5 on 24.8.2001 accepting the rate fixed by C.P.W.D. by Annexure P-3. Then the petitioner sent a letter to the respondent on 31.1.2002 intimating that the proposed alteration had been carried out and the building was ready for occupation.

(d) That by letter Annexure P-7 dated 18.3.2002, the respondent acknowledged of taking over possession of the building on 1.3.2002 alongwith the fittings and fixtures.

(e) The petitioner sent a letter Annexure P-8 dated 8.4.2002 to the respondent that the occupation by the respondent was in excess to the previous conditions of occupation that the full ground floor, first floor and part of the second floor will be occupied, while entire second floor was occupied with some addition. The petitioner requested the respondent for re-fixation of the rent. The respondent on 29.4.2002 sent a letter to the Executive Engineer, C.P.W.D. for re-fixation of the rent as a portion of the house was left out from the assessment.

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(f) The petitioner sent a letter Annexure P-10 on 4.12.2002 for expediting the matter for re-fixation of the rent. Reminders were sent by the petitioner as per Annexure P-11, P-12 and P-13. The Executive Engineer, C.P.W.D. by letter Annexure P-14 intimated the measurements of the building occupied by the respondent. The respondent again sent a letter Annexure P-5 dated 24.12.2003 to the Director of respondent for re-fixation of the rent.

(g) The Executive Engineer, C.P.W.D. by letter Annexure P-16 dated 16.12.2004 intimated the respondent that the previous assessment was wrongly made and in fact locality of the building is of commercial and fair rent was assessed to Rs. 45,750/-. In the aforesaid letter it was also intimated that in previous assessment one room was not included, of which fair rent was assessed at Rs. 2124/- per month and the commercial fair rent of the aforesaid room was assessed to Rs.2841/- per month. On getting this letter Annexure P-16, the petitioner insisted for the payment of rent of the accommodation from 1.3.2002 on the basis of the rent assessed by annexure P-16 and claimed difference and balance of rent as per Annexure P-16. The respondent on getting the letters of the petitioner and notice Annexure P-18 intimated the petitioner that the rent assessed by the Executive Engineer, C.P.W.D, cannot be treated as actual rent till it is accepted by the respondent and the petitioner was asked to raise monthly bills on the basis of sanctioned and agreed rent at the rate of Rs.32080/- p.m.

(h) This subsequent fixation of rent by the C.P.W.D. as per Annexure P-16 and non-payment of the rent as per Annexure P-16 has caused dispute between the parties. The contentions of the petitioner are:- (i) that initially rent was wrongly fixed by the C.P.W.D. treating the accommodation as non-commercial accommodation while it was a commercial accommodation located in the commercial area and the executive engineer has rightly accepted the mistake and has fixed the fair rent as per Annexure P-16 for which the petitioner is entitled.

(ii) That the respondent entered into the premises forcibly without fixing the rent and executing an agreement as envisaged under Art. 299 of the Constitution of India and has committed fraud on the petitioner.

(iii) That in the contract the respondent is expected to act

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fairly, reasonably and in accordance with law laid down by the Apex Court in *Shreelekha vidhyarthi vs. State of Uttar Pradesh*¹.

It is prayed that on the basis of the aforesaid facts, petition be allowed and reliefs as indicated hereinabove be granted.

3. (a) The respondent has filed reply in which respondent has raised preliminary submissions that the building house No. 236 of Napier Town was taken on rent for the office and dispensary purposes w.e.f. 1.3.2002. Before taking the possession of the building it was clearly informed to the petitioner by the respondent by letter dated 23.8.01 Annexure P-4 that the rent of the proposed building has been fixed at Rs. 32080/- by the competent authority and the liability of municipal tax, maintenance and repairing charges will be of the petitioner. The aforesaid rent was effective for the period of 5 years and was to remain unchanged during this period. The petitioner was specifically asked, if after all the proposed additions alterations and repairing the proposed rent is acceptable to the petitioner then a written consent may be sent. The petitioner in response to Annexure P-4, by letter dated 24.8.2001 Annexure P-5 intimated that the rent Rs.32080/- is acceptable to him. On 31.1.2002 by Annexure P-6 the petitioner intimated the respondent that the proposed additions alterations were carried out and the building was ready for handing over. Respondent took possession of the building on 1.3.2002 and the date of occupying the building was intimated to the petitioner by letter dated 18.3.2002 Annexure P-7. Alongwith the same letter the petitioner was sent a Lease agreement for a period of 5 years w.e.f. 1.3.2002 with a request to execute the Lease Agreement on requisite non-judicial stamp paper.

(b) Thereafter by letter dated 29.11.2002, 18.7.2003, 20.12.2005 and 14.3.2006 the petitioner was reminded for the execution and submission of the Lease Deed but he had not submitted the Lease deed. The petitioner was requesting for revision of rent, hence the request of the petitioner to revise the rent w.e.f. 1.3.2002 was forwarded to the Headquarter of the respondent which was turned down by the Internal Finance Division of Ministry of Health and Family Welfare because the building was hired for a period of 5 years w.e.f. 1.3.2002. the date of possession of the building, at the rate of Rs.32080/- p.m. It was accepted in categorical terms by the petitioner, hence the revision of rent was permissible only after 1.3.2007. The decision of the Ministry was conveyed to the petitioner by letter dated 2.6.2006 Annexure P-22.

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(c) That initially a portion of second floor was intended to be taken on lease but subsequently the entire second floor was intended to be taken for which the C.P.W.D. was requested to assess the rent for this additional portion. But the Headquarter of the respondent had not agreed to occupy this additional portion, hence the possession of this portion was returned back to the petitioner. Later on as per the directions of the Headquarter of the respondent the rent was assessed by the CPWD for this portion at the rate of Rs.2841/- per month and has been offered to the petitioner for future. In this regard response from the petitioner has been not received.

(d) That the Lease Deed was sent to the petitioner for execution by the respondent by letter dated 18.3.2002 with four reminders. The petitioner had not executed the Deed and forwarded to the respondent. The rent of building was finalized well before taking the possession of the building and the rent was fully accepted and agreed by the petitioner also for a period of 5 years by letter dated 24.8.2001 Annexure P-5.

(e) That the building was occupied after accepting the rent by the petitioner as assessed by C.P.W.D. by Annexure P-3 and with the consent of the petitioner. The petitioner had not executed the Lease deed for which petitioner cannot blame the respondent.

(f) It is submitted that as per para 5.1 of the petition, the landlords are Smt. Kamla Devi, Shri Nitish Kumar, Smt. Mamta and Smt. Vidya Choudaha and the house was offered on their behalf by the petitioner as a Power of Attorney Holder, so the present petition filed by the Power of Attorney holder in his own name without impleading the landlords as party is not maintainable and deserves to be dismissed.

4. During the course of arguments, Shri Dharmendra Sharma, Assistant Solicitor General or India, submitted that this petition involves disputed question of facts and has been filed for the enforcement of contractual obligations by the Power of Attorney in his own name is not maintainable and may be dismissed.

5. Shri Sanghi, learned counsel appearing for the petitioner opposed the contention and submitted that the Power of Attorney is entitled to file this petition on the basis of the authority given to him and is maintainable. Reliance is placed to full Bench judgment of Nagpur High Court in *Jivi Bai vs. Ramkumar*¹. It is

(1) 1947 Nagpur Law Journal page 1.

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submitted by Shri Sanghi that for a contractual obligations writ petition can be entertained. Reliance is placed to the Apex Court judgment *Kasturi Lal Lakshmi Reddy vs. State of Jammu & Kashmir*¹, *Dwarkadas Marfatia & sons vs. Board of Trustees of the Port of Bombay*², *Mahabir Auto Stores vs. Indian Oil Corpn.*³, *Shrilekha Vidhyarthi vs. State of U.P.*⁴ and *L.I.C. of India vs. Consumer Education & Research Centre*⁵.

6. On consideration of the rival contentions of the parties, the following factual position emerges :-

a. That the petitioner offered an accommodation to the respondent in view of advertisement issued by the respondent for providing an accommodation for the aforesaid office.

b. That after negotiations the petitioner's building was finalized and as agreed, the petitioner was to carry out certain additions alterations and thereafter the petitioner was entitled for rent as may be fixed by the CPWD.

c. That the CPWD by letter dated 14.8.2001 Annexure P-3 fixed the rent of the accommodation for Rs.32367/- inclusive of municipal tax and maintenance to be borne by the landlord. And respondent by letter dated 23.8.2001 Annexure P/4 offered rent at the rate of Rs. 32080/- per month.

d. That the petitioner by letter Annexure P-5 dated 24.8.2007 had accepted the aforesaid rent @ Rs. 32080/- after additions and alterations proposed and intimated respondent without any conditions or qualifying clause.

e. The building was occupied by respondents on 1.3.2002 and thereafter by Annexure P-8 dated 8.4.2002 the petitioner insisted for re-fixation of rent on the ground that some additional construction was made, fixtures and fittings were affixed and a portion of the second floor was left from the assessment of the fair rent. On getting this letter, respondent by letter Annexure P-10 dated 4.12.2002 referred the matter to C.P.W.D.

7. The aforesaid facts specifically show that till 1.3.2002, the date of occupation of the building, there was no dispute between the parties in respect of rate of rent and the rent fixed by C.P.W.D. by Annexure P-3 was accepted by the

(1) 1980 SC 1992.

(2) 1989 SC 1642.

(3) 1990 SC 1031.

(4) 1991 SC 537.

(5) (1995 Vol.(5) SCC 482.

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petitioner in unequivocal terms. While determining the rent, the CPWD in the letter Annexure P-3 has specifically stated that the building is situated at main road near Shashtri Bridge crossing, Napier Town belonging to Smt. Kamla Chodaha, for determining the rent principles laid down in the Directorate General of Works, C.P.W.D were followed and the rent was assessed on the basis of prevailing market rent in the locality.

8. A copy of the certificate Annexure P-3 was sent to the petitioner along with the letter Annexure P-4 and the petitioner was very specifically asked by letter Annexure P-4 that if he was agreeing to the aforesaid rent and terms, the petitioner may submit his consent to the respondent so that the matter may be processed further. In the same letter it was intimated that the entire electricity, water and sanitary fittings were to be renewed. The petitioner in the letter Annexure P-5 had not denied any of the condition and in unequivocal terms accepted the letter Annexure P-4. The petitioner if was not satisfied with the assessment of the rent fixed by Annexure P-3 and communicated by Annexure P-4, the petitioner ought to have objected immediately before accepting the aforesaid terms by Annexure P-5. Apart from this, letter Annexure P-2 was sent by the petitioner for fixation of the fair rent of the building and along with this letter, petitioner sent a form in proforma-namely 'furnishing necessary information for fixation of fair rent by CPWD'. The location of the building was shown in the form and on the basis of this, while determining the rent by Annexure P-3 the C.P.W.D. had looked into the locality of the building and prevailing market rent in the locality and thereafter issued the certificate Annexure P-3. So at the time of assessment of the fair rent by Annexure P-3, the entire circumstances were taken into consideration and the aforesaid rent was applicable for a period of 5 years and during this period the petitioner was not entitled to get re-fix the rent of the building even on the ground that previously the rent was wrongly fixed as a non-commercial building and the petitioner was entitled for a rent of commercial building. That too after accepting the rent and terms by letter Annexure P/5.

9. Though, it appears that one extra room of second floor was intended to be occupied by the respondent as it was suitable to necessity and for this purpose, the respondent sought fixation of the rent but it does not mean that the petitioner was entitled for re-fixation of the rent of the entire accommodation and was entitled for enhanced rent as per annexure P-16. The aforesaid exercise was not at all warranted in view of unequivocal terms settled between the parties as appears from Annexure P-4 and 5. Apart from this as admitted during the course of

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hearing up to February, 2007, petitioner accepted the rent of the accommodation at the rate which was fixed by Annexure P-3. The aforesaid rent was applicable up to February, 07 as agreed between the parties.

10. In this case the dispute is in regard to the rate of rent and the petitioner is claiming higher rent of the accommodate, while the respondent were paying the rent as per Annexure P-3 which was accepted by petitioner vide Annexure P-5 and this dispute between the parties in respect of the rate of rent, cannot be agitated and decided in the writ jurisdiction.

11. So far as one additional room at second floor of the house is concerned, it appears that initially the aforesaid room was occupied, but when the proposal was turned down by the Headquarter of the respondent, the aforesaid room was returned back to the petitioner. This fact is also in dispute. The petitioner's contention is that the aforesaid room is still with the respondent while in the return the respondent has specifically stated that the aforesaid room was returned back to the petitioner immediately after getting communication from the headquarter for not accepting this additional commendation. Anyhow the petitioner has not filed any rejoinder or counter affidavit in this regard. For recovery of the rent and deciding the aforesaid questions, whether this writ petition can be entertained is a question is to be decided.

12. It is a settled law that for deciding dispute in respect of contractual matters, writ court is not a proper forum and the aforesaid disputes ought to have been settled in a civil Court. Though the learned counsel for the petitioner relied on various judgment of Apex Court but the aforesaid judgment relates to statutory contracts or non-performance of statutory obligations of the authorities. But in respect of bare contractual obligations, when the remedy of civil suit is available, ordinary writ petition is not to be entertained, particularly when a serious dispute has been raised which deserves adjudication of the facts. In this case the petitioner is claiming higher rent as per Annexure P-16 while agreed rent between the parties as per Annexure P-3, 4 and 5 is Rs.32080/-. The occupation of one additional room at second floor is also in dispute. Apart from this the M.P. Accommodation Control Act, 1961 is applicable in respect of the accommodation situated within the municipal area. For determination of aforesaid questions, the aforesaid Act provides a remedy before a civil Court. The petitioner can very well claim rent or eviction of the respondent on the basis of the provisions of the Act. Even if the contention of the petitioner is accepted that the respondents or its officials had not complied with the terms of contract (which has not been come in existence till date) the appropriate remedy is not by way of filing a petition under Art. 226 of

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the Constitution of India but ordinary civil suit is the proper remedy. The dispute in respect of the rate of rent or its payment cannot be agitated under Art. 226 of the Constitution of India. The petitioner is having efficacious alternative remedy under M.P. Accommodation Act, 1961 to file a suit in this regard and the civil Court is having jurisdiction to determine all the aforesaid questions.

13. Another question which has been raised by the petitioner is that without execution of an agreement under Art. 229 of the Constitution, the respondent ought not to have occupied the accommodation and infact they forcibly took the possession of the accommodation. The aforesaid contention also cannot be accepted on the perusal of the facts that the petitioner accepted the rent by Annexure P-5 and handed over the accommodation willfully to the respondent which can very well be gathered from the perusal of Annexure P-8, in which the petitioner had welcome the transfer of the office of respondent in the accommodation of petitioner. Merely there was some dispute in respect of rate of rent or the occupation of the additional accommodation will not make the occupation of the respondent unauthorized or forcible. So far as execution of the lease deed is concerned, from the perusal the documents it is apparent that the petitioner was at fault. The lease deed was sent to the petitioner alongwith the letter Annexure P-7 long back on 18.3.2002 and the petitioner never returned it back after execution or controverted this fact. The case of the respondent is that for the execution of the lease Deed the petitioner was sent reminders on 29.11.2002, 18.7.2003, 20.12.2005 and 19.3.2006, but the lease Deed was not executed by the petitioner, hence this fact also goes against the petitioner.

14. Now the last objection raised by the respondent may be seen, that this petition has been filed by the petitioner in his own name without impleading principals as petitioner or filing an authority showing that principals authorised petitioner to initiate legal proceedings in his own name. Sec. 188 of Indian Contract Act, 1872 specifically provide that an agent having an authority to do an act has authority to do every lawful things which is necessary in order to do such act. But in the absence of any specific authority in favour of the petitioner that the petitioner shall be entitled to file petition or legal proceedings in his own name, the petitioner was not entitled to file this petition. Though on the strength of power of attorney, petitioner may be entitled to file a petition but in the name of principal showing the petitioner as the Agent of the principal. Power of attorney must specifically vest such a power in his favour. Though during the course of hearing the petitioner has shown the power of attorney dated 22.5.2001 but from the perusal of the aforesaid,

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there is no specific or implied authority to the petitioner to file proceedings before the court of law in his own name. In the Full Bench judgment of Nagpur High Court in Jiwi Bai it is held that an agent can act on behalf of principal under the authority given to him but the facts of the present case are different and the judgment of Jiwi Bai is not applicable in the present case.

15. As this Court has found that this petition involved disputed question of facts and alternative remedy is available to the petitioner to file suit before the Court of law, hence this petition is accordingly dismissed, with liberty to the petitioner to avail alternative remedy permissible under the law.

16. Considering the facts of the case, petitioner shall bear the cost of respondent. Counsel fee Rs.2000/-.

Petition dismissed.

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WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice and Mr. Justice Ajit Singh

16 August, 2007.

CADBURY INDIA LIMITED & anr.

--- Petitioners*

Vs.

UNION OF INDIA & Ors.

--- Respondents

A. Prevention of Food Adulteration Rules, 1955-Rule 32 (e)-Package of food to carry a label-Validity of Proviso to Rule 32(e) of Prevention of Food Adulteration Rules challenged-In case of canned food, it should be mentioned on the body of container that batch number given at the bottom or on lid of container-Held-In absence of such provision purchaser may not be able to know that batch number has been given either on bottom or lid of container-Proviso to Rule 32(e) is not unnecessary or unreasonable causing any substantial Prejudice to the legal rights of a person-Proviso to Rule 32(e) not *ultra vires* to the Constitution.

A reading of Clause (e) of Rule 32 quoted above would show that the distinctive batch number or lot number or code number either in numericals or alphabets or in combination representing the batch number or lot number or code number should be mentioned on the label of the package. The provision of Clause

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(e) of Rule 32 further states that in the case of canned food, the batch number may be given at the bottom or on the lid of the container. The word "may" indicates that a choice has been given to the manufacturer to place the batch number of the canned food either at the bottom of the container or on the lid of the container. To ensure that the purchaser or a member of the public is able to locate the batch number of the canned food, the proviso required that on the body of the container it should further be mentioned that the batch number is given at the bottom or on the lid of the container. The intention of the rulemaking authority in providing that the words 'batch number given at the bottom or at the lid' must also appear on the body of the container, thus appears to be that the purchaser or a member of the public is able to know where the batch number is mentioned, on the lid or at the bottom of the container. Without such provision in the proviso, the purchaser or a member of the public may not be able to know that batch number has been mentioned at the bottom or on the lid of the container. Thus it is difficult to accept the contention of Mr. Aney that the provision in the provision to Clause (3) of Rule 32 that the words 'batch number given at the bottom or on the lid or the container' should appear on the body of the container is unnecessary and unreasonable. In our considered opinion, it is for the rule making authority namely the Central Government, to decide what provision should be made in the rules for the purposes of carrying out the provisions of the Act and the Court cannot strike down a provision as *ultra-vires* on the ground that in the opinion of the court the provision was unnecessary or unreasonable unless the provision said to be unnecessary and unreasonable is shown to be causing any substantial prejudice to the legal rights of a person. (Para 8)

B. Prevention of Food Adulteration Act (XXXVII of 1954)-Section 19-Penalties-Mens Rea-Container of Cadbury Drinking Chocolate manufactured and sold by Petitioner did not contain the words Batch No. given at the bottom or on the lid-Complaint filed by Food Inspector-Petition Under Section 482 of Cr.P.C. for quashing the complaint dismissed-Held-Mens rea is essential ingredient of criminal offence unless statutory provision creating offence expressly or by necessary implication excludes mens rea-Batch No. mentioned either at the bottom or on the lid of container-If words that *Batch No. is given at bottom or on lid* do not appear on the body of container it cannot be said that there is mens rea in not complying with provisions of proviso to Rule 32(e)-magistrate to keep in mind observations while deciding the complaint pending before it.

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The object of the second limb of the provision to clause (e) of Rule 32 of the Rules requiring that the words "Batch No. given at the bottom or on the lid shall appear on the body of the container" is only to inform the purchaser or a member of the public that the batch number of the canned produce is at the bottom or on the lid of the container, as the case may be. In a given case, where the batch number is in fact mentioned at the bottom or on the lid of the container but on the body of the container it is not mentioned that the batch number has been given at the bottom or on the lid of the container, all that happens is that the purchaser or the member of the public may lose sight of the fact that the batch number has been mentioned at the bottom of the container or on the lid of the container. But so long as the batch number is in fact stated at the bottom or on the lid of the container, the quality and character of the food contents of the container can be traced to the batch number of the manufacturer and the provisions of the Act and the Rules in this regard can be enforced. In our view, therefore, if the words "Batch No. at the bottom or on lid of the container" do not appear on the body of the container but the batch number is in fact given at the bottom or on the lid of the container, it cannot be held that there is mens rea is not complying with the provisions of the proviso to Clause (e) of Rule 32 of the Rules.

(Para 10)

Case Referred :

State of Maharashtra v. M.H. George, AIR 1965 SC 722;

S.G. Aney, with *Anoop Nair* and *Ms. Jasmeet Chana*, for the petitioners
O.P. Namdeo, for the respondent no. 1.

Kumaresh Pathak, Deputy Advocate General for the respondent Nos. 2 to 4.

*Cur. adv. vult.***ORDER**

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :—Petitioner No.1 is a Company incorporated under the Indian Companies Act, 1913 and carries on the business, inter alia, in various kinds of chocolates, cocoa liquor and other cocoa based products and the petitioner No.2 is the Director of the petitioner No.1 Company. The proviso to Rule 32(e) of the Prevention of Food Adulteration Rules, 1955 (for short 'the Rules') made under the Prevention of Food Adulteration Act, 1954 (for short 'the Act') provides that in case of canned food, the batch number may be given at the bottom of the container or on the lid of the container, but on the body of the container it should be mentioned that the batch number has been given at the

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bottom or at the lid of the container. On 1.1.1987, the Food Inspector, Ujjain, respondent No.4 collected some samples of Cadbury Drinking Chocolate manufactured and sold by the petitioner No.1 Company and a report on the samples was submitted by the Public Analyst to the following effect :

"Package label : Cadbury Drinking Chocolate-Manufactured by -
Cadbury India Limited, 19 B. Desai Road,
Mumbai 400 026 Net wt. 200 gm (Batch No./Lot
No. not appear On the body of the container

and am of the opinion that the sample is misbranded vide Section 2(ix)(k)."

Pursuant to the report, a complaint was filed in the Court of the learned Judicial Magistrate First Class, Ujjain which was registered as Case No. 1698/03 against the Proprietor of the shop from whom the samples were collected. The petitioner No.2 appeared before the learned JMFC, Ujjain on 4th August, 2004 and thereafter filed Misc. Criminal Case No.2489/2004 under Section 482 of the Criminal Procedure Code in the Indore Bench of this Court for quashing Case No.1698/2003 pending in the Court of JMFC, Ujjain. But by order dated 6.12.2004, a learned Single Judge of the Indore Bench of this Court dismissed the said Misc. Criminal Case No.2489/2004. The petitioners have filed this writ petition challenging the proviso to Rule 32(e) of the Rules as ultra vires Articles 14, 19(1)(g) and 300-A of the Constitution. The petitioner has also prayed for writ of certiorari/prohibition/other writ or order directing the Judicial Magistrate First Class, Ujjain to dismiss Case No.1698/03 pending in his file.

2. Mr. S.G. Aney, learned senior counsel for the petitioners submitted that proviso to Rule 32(e) of the Rules states that in case of canned food, the batch number may be given at the bottom or on the lid of the container. He submitted that this provision in the proviso requiring the batch number to be mentioned at the bottom of the container or lid of the container is reasonable and valid but the further provision in the proviso requiring a statement to be made on the body of the container that 'batch number has been given at the bottom or lid of the container' is absolutely unnecessary and unreasonable and should be struck down by the Court as ultra-vires Articles 14, 19(1)(g) and 300A of the Constitution. In this context, he referred to the Section 23(1) of the Act which confers powers on the Central Government to make rules inter alia restricting the labeling of any article of food and the design of such label with a view to preventing a member of the public or the purchaser being deceived or misled as to the character, quality or quantity of that article and submitted that so long as the container contains a batch number

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either on the lid or at the bottom of the container, a member of the public or the purchaser is not deceived or misled as to the quality of the article. He submitted that the additional provision made in the proviso to Rule 32(e) of the Rules that it should be mentioned on the body of the container that the batch number is mentioned on the lid or at the bottom of the container is thus ultra-vires Section 23(1) of the Act.

3. Mr. Aney, alternatively, submitted that in the event this Court holds that the provision in the proviso to Rule 32(e) of the Rules that on the body of the container a mention is to be made that the batch number is mentioned on the lid or at the bottom of the container is not *ultra-vires* Articles 14, 19(1)(g), 300-A of the Constitution or Section 23 of the Act, the Court should hold that where the batch number is in fact mentioned either on the lid or at the bottom of the container but there is no mention on the body of the container that the batch number has been mentioned on the lid or at the bottom of the container, the proviso to Rule 32(e) is substantially complied with. He cited the decision of the Bombay High Court in *Carona Ltd. And another vs. Union of India and others*, in which, it was found that the petitioners instead of mentioning the month of manufacture on the box containing the footwear had mentioned the number of the week and the year in which the footwear had been manufactured and the Bombay High Court took the view that there was a substantial compliance with the rules made under the Standards of Weights and Measures Act, 1976. He also cited the decision of the Patna High Court in *Jagdish Prasad Didwanja and another vs. State of Bihar and another*, in which, the expiry period of article was not indicated exactly in the manner as required by the Rule 32(1) of the Rules made under the Prevention of Food Adulteration Act and the High Court held in the facts and circumstances that there was more than substantial compliance of the rules and any prosecution of the petitioners therein on grounds of breach of Rule 32(i) of the Rules would be nothing but an abuse of process of the Court.

4. Mr. Kumares Pathak, learned Deputy Government Advocate, appearing for the respondents 2, 3 and 4 on the other hand submitted that the proviso to Rule 32(e) clearly required a statement to be made on the body of the container that 'the batch number has been given at the bottom or on the lid of the container and since the same has not been given on the body of the container of the samples collected by respondent No. 4, the proviso to Rule 32(e) had been violated and for this reason a complaint had been filed before the Magistrate.

5. Mr. O.P. Namdeo, learned counsel appearing for respondent No. 1,

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submitted that under Section 23 of the Act the Central Government has been vested with the powers to make rules to carry out the provisions of the Act including those mentioning in sub-section (1-A) of Section 23 of the Act and the provisions in the proviso to Rule 32(e) of the Rules requiring a statement to be made on the body of the container that the batch number has been given at the bottom or on the lid of the container is thus within the powers of the Central Government and cannot be held to be *ultra-vires*.

6. We find a lot of force in the submission of Mr. Namdeo that wide powers have been vested in the Central Government to make rules to carry out the provisions of the Act. Without prejudice to the generality of the powers under sub-section (1) of Section 23 of the Act vested in the Central Government to make rules to carry out the provisions of the Act, Central Government has also been vested with the powers under sub-section (1)(a) of Section 23 to make rules providing for all or any other matters specified therein including rules restricting the labeling of any article of food and the designing of any label with a view to preventing a member of the public or the purchaser being deceived or misled as to the character, quality or quantity of article or to prevent adulteration.

7. In exercise of these powers, the Central Government has made provisions in Rule 32 that every package of food shall carry a label and unless otherwise provided in the rules, there shall be specified on every label the various matters as mentioned in the various clause of Rule 32 of the Rules. Clause (e) and the proviso thereto of Rule 32, which is relevant for the purpose of deciding this case, is quoted herein below:

(e) A distinctive batch number or lot number or code number, either in numerals or alphabets or in combination, the numerals or alphabets or their combination, representing the batch number or lot number or code number being preceded by the words Batch No., or Batch, or Lot No., or Lot or any distinguishing prefix:

Provided that in case of canned food, the batch number may be given at the bottom,

Or on the lid of the container, but the words 'Batch No.' given at the bottom or on the lid, shall appear on the body of the container.

8. A reading of Clause (e) of Rule 32 quoted above would show that the distinctive batch number or lot number or code number either in numerals or alphabets or in combination representing the batch number or lot number or code

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number should be mentioned on the label of the package. The proviso to Clause (e) of Rule 32 further states that in the case of canned food, the batch number may be given at the bottom or on the lid of the container. The word "may" indicates that a choice has been given to the manufacturer to place the batch number of the canned food either at the bottom of the container or on the lid of the container. To ensure that the purchaser or a member of the public is able to locate the batch number of the canned food, the proviso further requires that on the body of the container it should further be mentioned that the batch number is given at the bottom or on the lid of the container. The intention of the rule making authority in providing that the words 'batch number given at the bottom or at the lid' must also appear on the body of the container, thus appears to be that the purchaser or a member of the public is able to know where the batch number is mentioned, on the lid or at the bottom of the container. Without such provision in the proviso, the purchaser or a member of the public may not be able to know that batch number has been mentioned at the bottom or on the lid of the container. Thus it is difficult to accept the contention of Mr. Aney that the provision in the proviso to Clause (e) of Rule 32 that the words 'batch number given at the bottom or on the lid of the container' should appear on the body of the container is unnecessary and unreasonable. In our considered opinion, it is for the rule making authority namely the Central Government, to decide what provision should be made in the rules for the purposes of carrying out the provisions of the Act and the Court cannot strike down a provision as ultra-vires on the ground that in the opinion of the court the provision was unnecessary or unreasonable unless the provision said to be unnecessary and unreasonable is shown to be causing any substantial prejudice to the legal rights of a person.

9. But this is not to say that if on the body of the container, it is not mentioned that the batch number is given on the lid or at the bottom of the container, there is contravention of the provisions of the rules so as to warrant prosecution for violation of the second limb of the proviso to Clause (e) of Rule 32 of the rules. It is settled by the Supreme Court that mens rea is an essential ingredient of a criminal offence unless the statutory provision creating the offence expressly or by necessary implication excludes mens rea. Paragraph 13 of the judgment of the Supreme Court in *State of Maharashtra vs. M. H. George*¹ which lays down this proposition, is quoted herein below :

"13. The law on the subject relevant to the present enquiry may

(1) AIR 1965 SC 722.

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briefly be stated as follows. It is a well settled principle on common law that mens rea is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. To put it differently, there is a presumption that mens rea is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State in the enforcement of the law : can he do anything to promote the observance of the law ? A person who does not know that gold cannot be brought in India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof."

10. We have perused the provisions of Section 2(ix)(a), 7 and 16(1)(a)(i) of the Act and we do not find therein any provision to show that *mens rea* has been expressly excluded from the offence of misbranding. In *State of Maharashtra vs. M. George* (Supra), it has been held that mens rea by necessary implication can be excluded from the statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability of their act or omission to assist the promotion of the law and the nature of mens rea that will be implied in the statute creating an offence depends upon object of the Act and the provisions therein. The object of the second limb of the proviso to clause (e) of Rule 32 of the Rules requiring that the words "Batch No. given at the bottom or on the lid shall appear on the body of the container" is only to inform the purchaser or a member of the

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public that the batch number of the canned produce is at the bottom or on the lid of the container, as the case may be. In a given case, where the batch number is infact mentioned at the bottom or on the lid of the container but on the body of the container it is not mentioned that the batch number has been given at the bottom or on the lid of the container, all that happens is that the purchaser or the member of the public may loose sight of the fact that the batch number has been mentioned at the bottom of the container or on the lid of the container. But so long as the batch number is infact stated at the bottom or on the lid of the container, the quality and character of the food contents of the container can be traced to the batch number of the manufacturer and the provisions of the Act and the Rules in this regard can be enforced. In our view, therefore, if the words "Batch No. at the bottom or on the lid of the container" do not appear on the body of the container but the batch number is infact given at the bottom or on the lid of the container, it cannot be held that there is mens rea is not complying with the provisions of the proviso to Clause (e) of Rule 32 of the Rules.

11. With the aforesaid observations, this writ petition is disposed of. The learned Magistrate before whom Case No.1698/03 is pending will keep in mind the aforesaid observations while deciding the complaint pending before it. The LCR be sent back to the trial Court. The petitioners may raise the contention on the basis of the observations made in this judgment before the trial Court at the appropriate stage.

Writ petition disposed of.

I.L.R. [2007] M.P., 1234

WRIT PETITION

Before Mr. Justice Dipak Misra & Ms. Justice S.R. Waghmare

5 September, 2007

JAYANT PRATAP SINGH

...Petitioner*

Vs.

DIRECTOR, TECHNICAL EDUCATION & Ors.

..Respondents

**Pre Engineering Pharmacy Test, Pre Agriculture Test-2004 Rules-2.4.1.1-
Question whether student who was declared pass in qualifying
examination can be declared disqualified merely on the ground that
individually main subjects have not been cleared by him referred
to Division Bench-Petitioner completed Class XII Board**

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Examination conducted by ISCE-Petitioner was declared pass as per rules although he had not obtained minimum passing marks in Mathematics-Petitioner was declared successful in Pre Engineering Pharmacy Test and Pre-Agriculture Test-He was given admission in B.E. course-Admission was cancelled as he had not cleared qualifying examination-Held-Words Passing of Examination and with the main subjects cannot be read in isolation-Candidate may have been declared pass in qualifying examination but he can be declared disqualified on the foundation that he has not passed individually in the main subjects-Reference answered accordingly.

Therefore the rule prescribing the eligibility criteria has to be read with the intendment framed by the State Government. The Rule therefore, should be understood to mean that the candidate must have passed the examination with Physics, Chemistry and Mathematics. If the construction is placed, a candidate would become eligible even if he fails in the main subjects that would nullify the Rule and also make the Rule nugatory. In fact, it would frustrate the purpose of the Rule. Thus, the interpretation has to be based on the context in which it has been used. 'Passing of examination' and 'with the main subjects' cannot be read in isolation. They have to be read in a composite and adjunctive manner to give a purposeful meaning to the said Rule. Though the Rule does not specifically state that a candidate should have passed in each subject yet the intention is clear as day that it is incumbent on the candidate to have passed in all the main subjects. If a candidate becomes eligible failing in one of the main subjects but has passed the examination that would not make him eligible to take admission in a technical course. (Para 21)

Cases Referred :

Ankita Sinha Vs. Rajiv Gandhi Proudyogiki Vishwavidyalaya and others; 2006(1) MPLJ 489, *Jugalkishore Saraf Vs. M/s Raw Cotton Co. Ltd.*, AIR 1955 SC 376; *Principal Patna College, Patna Vs. Kalyan Srinivas Raman*, AIR 1966 SC 707, *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd.*, (1987)1 SCC 424, *District Mining Officer Vs. Tata Iron and Steel Co.*, (2001) 7 SCC 358, *D. Saibaba Vs. Bar Council of India and Another*; AIR 2003 SC 1502, *Modern School Vs. Union of India and others*; AIR 2004 SC 2236, *K. Sujatha Vs. Marathwada University and others*; 1955 Supp(1) SCC 155.

A.P. Singh, for the Petitioner

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Deepak Awasthy, G.A. for the respondent no.1.

Paritosh Gupta, for the respondents Nos. 3 & 4.

Alok Aradhe & K.P.Kushwaha Amicus Curiae;

None, for the respondents No.2 and 5.

Cur.adv. vult.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.**—The present writ petition preferred under Article 226 of the Constitution of India was dealt with by the learned Single Judge of this Court who faced with the decision rendered in the case of *Ankita Sinha Vs. Rajiv Gandhi Proudyogiki Vishwavidyalaya and others*¹, expressed his respectful disagreement with the view opined therein and thereafter proceeded to refer the following two questions of law to be determined by the Larger Bench:—

“(i) Under Rule 2.4.1.1 of the Rules (Annex.P/5), once the criteria has been fixed to pass the qualifying examination with main subjects Mathematics, Physics and Chemistry and the students who have been declared passed in the aforesaid examination by a recognized examination conducted by a recognized institution whether he may be declared as disqualified merely on the ground that individually the main subjects has not been cleared by him?

(ii) Whether the respondent who has granted recognition to an institution for the purpose of qualifying examination under Rules (P/5), whether the admission in B.E. Course can be denied merely on the ground that the candidate has passed the qualifying examination but still he is not qualified to get the admission in B.E. Course?”

That is how the matter has been placed before us.

2. The facts in a nutshell are that the writ petitioner completed his XIIth Class Board Examination from Springer Public School Gorakhpur, Jabapur conducted by the Council for the Indian School Certificate Examination, New Delhi (hereinafter referred to as 'the ISCE'). As per the Rules of ISCE he was declared passed. He had not obtained minimum passing marks in the subject of Mathematics. He applied for admission in B.E. Course and appeared in Pre Engineering Pharmacy Test and Pre-Agriculture Test 2004 conducted by the Professional Examination Board, Bhopal on 12.6.2004. He was declared successful in the aforesaid examination

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and was given admission in the College of the respondent No.5. He had deposited the requisite fee for the first semester and the examinations were scheduled to commence 05.2.2005. Before the date of examination the respondent No.4, Chairman, Central Counselling Committee, Rajiv Gandhi Proudyogik Vishwa Vidyalaya, Bhopal issued a letter on 12.1.2005 by which the respondent No.5-College was informed that the admission of the petitioner had been cancelled because he had not cleared the qualifying examination.

3. It was contended before the learned Single Judge that he was declared passed in the qualifying examination with main subjects, namely, Mathematics, Physics and Chemistry and, therefore, he was entitled to the admission in B.E. Course and such a qualification meets the criteria postulated under Rule 2.4.1.1 for admission in B.E. Course. It was put forth that he had passed with the main subjects, namely, Mathematics, Physics and Chemistry and it was not necessary that he should pass in each individual subject. The second plank of argument was that he had not concealed any material fact and the respondents, being well aware that he had cleared the qualifying examination with the main subjects had extended the benefit of admission and hence, there was no rhyme or reason to cancel the same.

4. The learned Single Judge referred to Rule 2.4.1.1 of Pre Engineering Pharmacy Test, Pre Agriculture Test-2004 Rules and was of the opinion that a candidate was required to pass the examination by opting the main subjects, namely, Mathematics, Physics and Chemistry and Class XIIth (10+2) from the Board of Secondary Education, M.P. or any other equivalent or higher education from other recognized Board or recognized University or examination conducted by any recognized Board or recognized University or who had passed the final examination of Diploma from Engineering Branch or Architecture from M.P. Technical Education Board, Bhopal (Rajiv Gandhi Proudyogiki Vishwavidyalaya, Bhopal). Being of this view he disagreed with the view taken in the case of *Ankita Sinha* (supra).

5. We have heard Mr. A.P. Singh, learned counsel for the petitioner, Mr. Dipak Awasthy, learned Government Advocate for the respondent No.1, Mr. Paritosh Gupta, learned counsel for the respondents 3 and 4 and Mr. Alok Aradhe, learned senior counsel who was appointed as *amicus curiae*.

6. It is submitted by Mr. AP Singh, learned counsel for the petitioner that the interpretation placed by the learned single Judge in the case of *Ankita Sinha* (supra) is neither correct nor sound and it requires reconsideration. It is urged by

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him that if Rule 2.4.1.1 is read in proper perspective it conveys that a candidate must have passed the examination with Physics, Chemistry and Mathematics as main subjects. It is canvassed by him that the aforesaid interpretation would be in consonance with the rule and if it is construed to mean that he has to pass in each and every main subject that would cause violence to the Rule.

7. Mr. Paritosh Gupta, learned counsel for the respondents 3 and 4, in his turn, submitted that the interpretation placed in the case of *Ankita Sinha* (supra) is absolutely correct as the learned single Judge therein had dealt with the facet of intention of the rule makers and the concept of intendment has to be given due weightage in a case of this nature.

8. Mr. Alok Aradhe, learned *Amicus Curiae* submitted that the rule has to be read in the context in which it features inasmuch as under the Rule there has been contemplation as regards eligibility criteria for admission in BE Course. It is put forth by him that on a first flush it may appear that a candidate once has passed the examination with main subjects it should be held that he has the eligibility criteria and in that case it would remain in the realm of total literal interpretation which really does not subserve the purpose. Submission of the learned friend of the Court is that the rule in question has a purpose, for it provides the requisite eligibility criteria for being eligible to seek admission in BE course. It is propounded by him that a particular Board may have a rule or bylaw to declare a student to have passed despite the factum that he has not obtained the pass marks in the aforesaid three subjects by providing different yardsticks. Submission of Mr. Aradhe is that the passing of the examination with the main subjects would be in a different compartment and he may be declared to have passed that particular examination but when there is a mandate for qualifying for a admission to a technical course it has to be viewed differently inasmuch as the concept of purposive construction would come into play. Incrementing the aforesaid submission it is put forth by him that the import of the rule has to be understood when it postulates that it is imperative to have passed the relevant examination with Physics, Chemistry and Mathematics as main subjects. Learned senior counsel has commended us to the decisions rendered in *Jugalkishore Saraf Vs. M/s Raw Cotton Co. Ltd.*¹, *Principal Patna College, Patna Vs. Kalyan Srinivas Raman*², *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd.*³, *District Mining Officer Vs. Tata Iron and Steel Co.*⁴, *D. Saibaba Vs. Bar Council of India and Another*⁵, and *Modern School Vs. Union of India and Others*⁶.

(1) AIR 1955 SC 376.

(2) AIR 1966 SC 707.

(3) (1987)1 SCC 424.

(4) (2001) 7 SCC 358.

(5) AIR 2003 SC 1502.

(6) AIR 2004 SC 2236.

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9. To appreciate the rival submissions raised at the Bar it is necessitous to refer to Rule 2.4.1.1. Hindi version of the aforesaid rule is available on record. The English translation of the same reads as under:

“2.4.1.1 For admission in BE course, the candidate must have passed any of the following examinations with Mathematics, Physics and Chemistry as main subjects.

1. Class XII examination from Board of Secondary Education, Bhopal
2. Any other equivalent or higher examination from any recognised Board or University.

Or

Those who have passed the final year examination of Diploma Course of MP Board of Technical Education, Bhopal (Rajive Gandhi Prodyogiki Vishwavidyalaya, Bhopal) from any branch Engineering or Architecture.”

10. The singular question that emanates for consideration is what interpretation should be placed on the aforesaid Rule. Before we proceed to place the interpretation, it is apposite to refer to certain decisions that have been commended to us at the Bar.

11. In *Jugalkishore Saraf* (supra) it has been held as under:

“The cardinal rule of construction of statutes is to read the statutes literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the Court may adopt the same. But if no such alternatively construction is possible, the Court must adopt the ordinary rule of literal interpretation.”

12. In *Peerless General Finance and Investment Co. Ltd.* (supra) it has been ruled thus:

“33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted.”

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13. In *District Mining Officer* (supra) the Apex Court expressed the opinion as under:

“...A statute is an edict of the legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the legislature.”

In the aforesaid case it has been further held as under:

“Most fair and rational method for interpreting a statute is by exploring the intention of the legislature through the most natural and probable signs which are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law. In the Court of law what the legislature intended to be done or not to be done can only be legitimately ascertained from that what it has chosen to enact, either in express words or by reasonable and necessary implication. But the whole of what is enacted 'by necessary implication' can hardly be determined without keeping in mind the purpose or object of the statute. A bare mechanical interpretation of the words and application of legislative intent devoid of concept or purpose will reduce most of the remedial and beneficent legislation of futility. The Courts however, are always warned that they are not entitled to usurp legislative function under the disguise of interpretation and that they must avoid the danger of determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somehow fitted.”

14. In *D. Saibaba Vs. Bar Council of India and Another*¹, it has been expressed thus:

“A construction which would render the provision nugatory ought to be avoided. True, the process of interpretation cannot be utilized for implanting a heart into a dead provision; however, the power to construe a provision of law can always be so exercised as to give throb to a sinking heart.”

Their Lordships further proceeded in to express the view in paragraph 18 as under:

“18. Reading word for word and assigning a literal meaning to

(1) AIR 2003 SC 1502.

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Section 48AA would lead to absurdity, futility and to such consequences as the Parliament could have never intended. The provision has an ambiguity and is capable of being read in more ways than one. We must, therefore, assign the provision a meaning - and so read it - as would give life to an otherwise lifeless letter and enable the power of review conferred thereby being meaningfully availed and effectively exercised."

15. In *Modern School* (supra) the majority speaking through Kapadia, J while interpreting Section 24(3) of the Delhi School Education Act and Rule 177 of Delhi School Education Rules, 1973 expressed the opinion as under:

"26. To sum up, the interpretation we have placed on the provisions of the said 1973 Act is only to bring in transparency, accountability, expenditure management and utilization of savings for capital expenditure/investment without infringement of the autonomy of the institute in the matter of fee fixation. It is also to prevent commercialization of education to the extent possible."

16. In this context it is also apposite to refer to a three Judge Bench of the Apex Court rendered in the case of *K. Sujatha Vs. Marathwada University and Others*¹, wherein the Apex Court while interpreting the ordinance No.211(a) of the Marathwada University Ordinances expressed the view as under:

"3. It is not disputed that the appellant passed the qualifying examination in two attempts. Ordinance 211 (a) clearly lays down that a candidate for admission against the open seat to the medical course must have obtained not less than 50 per cent of the total marks in the four subjects taken together at one and the same attempt in the qualifying examination. Since the appellant did not pass the qualifying examination at one and the same attempt, she was not eligible in terms of Ordinance 211(a) of the University Ordinances."

17. Their Lordships in paragraph 5 observed that there cannot be a different eligibility rule for different candidates admitted from different sources.

18. We may hasten to add we have referred to the aforesaid decision as the same has been referred to in the body of the writ petition.

19. Learned single Judge in *Ankita Sinha* (supra) while interpreting the aforesaid Rule has held as under:

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"10. A perusal of the aforesaid rule indicates that a candidate is required to pass from any recognized Board as detailed therein the Class XII (10+2) examination with Mathematics, Physics and Chemistry as the main subjects. Even though there is no specific mention in the rule that a candidate should pass in each of the subjects separately, implication of the rule is that a candidate should have passed Class XII examination with Mathematics, Physics and Chemistry as the main subjects. Passing Class XII examination with the aforesaid three subjects as the main subjects would necessarily mean passing individually each of the subjects. This could be the only meaning of the rule because any other meaning would lead to a peculiar situation. For example; if a specific rule applicable in a particular Board or University provides that a candidate even though securing less than the pass marks in the subjects of Physics, Chemistry and Mathematics may still be declared as passed as per the provisions of rules applicable in that Board or University, a candidate may be declared as passed Class XII examination and on the ground that the candidate has passed Class XII examination, admissions could be granted to students even though he or she failed in all or any of the main subjects. This could never be the intention of the rule makers. It would also mean that a candidate should have passed Class XII examination and passing individually in each of the aforesaid three subjects is also necessary to be eligible for admission."

20. The learned single Judge while disagreeing with the same has observed as under:

"(11) From the perusal of para 2.4.1.1, it is clear that eligibility criteria is of passing of the examination from any of the institutions as stated hereinabove with the main subjects Mathematics, Physics and Chemistry. The qualifying examination should be passed with aforesaid three subjects and passing of the examination, in Class XII is necessary. The aforesaid provision does not say that it is necessary to pass all the subjects Mathematics, Physics and Chemistry individually though it provides that the main subjects should have been opted in the qualifying examination. It is not in dispute that respondent has recognized the Indian School Certificate examination 2004 conducted by Council for Indian School Certificate Examinations, New Delhi. Before grant of recognition, the respondents must have examined the rules of the business and regulation of the aforesaid institution. While granting such a

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recognition, the respondents must have examined the Rules of the council who conducted the examination of the petitioner and has passed him in the Higher Secondary by Annexure P/2. As per certificate issued (Annex.P/2), the petitioner has passed the Indian School Certificate Examination 2004 which is equivalent to $10 + 2 = 12$ th class of Madhyamik Shiksha Mandal. The respondents must have considered the aforesaid provisions of the aforesaid council that the aforesaid council is having its rule to declare a student pass, who could not clear any of the main subjects, which he opted for the examination, and after knowing it well, the aforesaid examination must have been recognized by the respondents. Once after considering the entire rules and regulations of the aforesaid examination, the respondent has granted recognition to the aforesaid examinations, and the petitioner who has passed the equivalent examination whether he may be denied admission in BE course, because he has not cleared Mathematics subject individually though he has passed the qualifying examination? From the perusal of Rule 2.4.1.1, it is apparent that the candidate should have passed the qualifying examination with the main subjects Mathematics, Physics and Chemistry. The respondents while framing this rule, were having the knowledge or must be aware that one among the recognized institution is having such rule that students may be declared passed, though he has not cleared one of the main subjects individually. Considering aforesaid, respondents have provided provision that he must have cleared the qualifying examination with the aforesaid main subjects. Even from the perusal of the entire rule, passing of the qualifying examination with the aforesaid subjects is necessary. If a student has passed the qualifying examination as per Rules and Regulations of the recognized Board, though he could not clear individually one main subject whether he may be denied admission in BE course? If the aforesaid analogy is adopted, the student on one hand has passed the qualifying examination and on the other hand, he will be denied admission on the ground that he has not passed the qualifying examination, as he has not passed individually one main subject. If this was the intention of the framers of the aforesaid Rules, they ought to have couched the Rules in a manner that the candidate should have passed the qualifying examination and main subjects also. The qualification must specify that he should pass all the main subjects individually also. In absence of this, when the petitioner has passed the qualifying examination with main subjects, he cannot be denied with the admission by the respondents.

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The main criteria for admission in B.E. Course is to pass the qualifying examination and once the petitioner has passed the qualifying examination with the aforesaid main subjects, he cannot be denied admission in the BE Course by interpreting the Rules of recognized institution otherwise. This ought to have been taken into consideration by the respondents while granting recognition to the aforesaid examination conducted by the Council."

21. In our considered opinion the concept of purposive construction has to be made applicable to the Rule at hand. In the case of *Ankita Sinha* (supra) the candidate had failed in Chemistry theory paper having obtained 11 marks but the result was declared declaring her to have passed by applying a particular rule of the Central Board of Secondary Education. In the present case the candidate has been declared to have been passed by the Council for the Indian School Certificate Examination, New Delhi despite the fact he has failed in Mathematics having secured 17 marks. Thus, it is seen that various Boards have different criteria. Therefore the rule prescribing the eligibility criteria has to be read with the intendment framed by the State Government. The Rule therefore, should be understood to mean that the candidate must have passed the examination with Physics, Chemistry and Mathematics. If the construction is placed, a candidate would become eligible even if he fails in the main subjects that would nullify the Rule and also make the Rule nugatory. In fact, it would frustrate the purpose of the Rule. Thus, the interpretation has to be based on the context in which it has been used. 'Passing of examination' and 'with the main subjects' cannot be read in isolation. They have to be read in a composite and adjunctive manner to give a purposeful meaning to the said Rule. Though the Rule does not specifically state that a candidate should have passed in each subject yet the intention is clear as day that it is incumbent on the candidate to have passed in all the main subjects. If a candidate becomes eligible failing in one of the main subjects but has passed the examination that would not make him eligible to take admission in a technical course. The word 'uttrin' has to have nexus with the main subjects as well as with the examination and not singularly and exclusively with the examination. To elaborate: there may be some Boards which would not give laxity to the candidates to declare them passed if they fail in any of the subjects and there may be Boards which would allow such benefits. The disharmony and discrimination are required to be avoided. The purposive and contextual reading of the rule would lead to only one solitary conclusion that the candidate seeking admission in BE course must have passed in all the main subjects. The said interpretation flows from the Rule. We are disposed to think that is the legitimate ascertainment of the Rule and if any

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other interpretation is placed that would create anomaly making Rule lifeless. Therefore, we conclude and hold that the decision rendered in the case of *Ankita Sinha* (supra) has been correctly decided.

22. In view of the aforesaid analysis we answer the two questions framed by the learned single Judge in the following manner:

(a) Under the Rule 2.4.1.1 of the of Pre Engineering Pharmacy Test, Pre Agriculture Test-2004 Rules even if a candidate has been declared to have passed the examination with the main subjects, namely, Mathematics, Physics and Chemistry by a recognised institute yet the candidate can be declared as disqualified on the foundation that he has not passed individually in the main subjects.

(b) Though recognition has been granted to an institute for the purpose of qualifying examination which has nexus with passing of the examination would not ipso facto or per se make a candidate qualified for admission in B.E. Course if he has not secured passing marks in all the main subjects. To elaborate: even though he has passed the basic qualifying examination yet he has not qualified in the subjects of Mathematics, Physics and Chemistry as postulated under Rule 2.4.1.1 of the Pre Engineering Pharmacy Test, Pre Agriculture Test-2004 Rules, he will not be qualified to get the admission in B.E. course.

23. The reference is answered accordingly.

24. Registry is directed to place the matter before the appropriate single Bench.

Order passed accordingly.

I.L.R.[2007].M.P., 1245

APPELLATE CIVIL

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

10 August, 2007

SMT. ZUBEDA & ors.

...Appellants*

Vs.

SMT. NAJMA AFZAL

...Respondent

Specific Relief Act (XLVII of 1963)- Section 10, 16(C), 20(2)(b)- Agreement to sell-Specific performance-Readiness and willingness- Suit filed for specific performance of contract on the ground that defendant

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had agreed to sell suit house for consideration of Rs. 3,70,000/- - Rs. 40,000/- paid at the time of agreement-Owner of suit house refused to execute the sale deed and sold the house to another person during operation of temporary injunction order- Notice of fact of agreement was published in news paper- Another notice was given to seller by plaintiff mentioning therein that she is ready and willing to pay remaining amount and to get sale deed executed- Expenses of registration were to be borne by plaintiff- Plaintiff went to office of Sub-Registrar but defendant did not turn up -Defendant claimed agreement to be a forged document-Defendant pleaded that agreement to sell was entered into with husband of plaintiff and Rs. 40,000 in cash and a cheque of Rs. 70,000 was given by husband of plaintiff- Cheque was dishonoured and Rs. 40,000 were also returned- Subsequent purchaser is a bona fide purchaser- Held- Pleadings made in plaint sufficient as per requirement of Stamp Act, T.P. Act and Section 16(c) of Specific Relief Act-Plaintiff clearly stated in her evidence that she was willing to make payment of balance amount- Arrangement of fund and readiness and willingness proved by plaintiff- Execution of Agreement to sell duly proved by plaintiff- Specific Performance has to be decreed once agreement is proved - Appeal dismissed.

Cases Referred :

Motilal Vs. Kamala Devi; (2000) 6 SCC 420, *Phoolchand Garg Vs. Gopal Das Agrawal & others*; 2002 (1) MPJR SN 32, *Phoolchand Garg Vs. Gopal Das Agrawal & others*; 2001 (II) MPJR SN 12 (LPA 104/2000); *N.P. Thirugnanam Vs. R. Jagan Mohan Rao*; AIR 1996 SC 116, *Sirmul S/o Atalmal Vs. Smt. Annapurna Devi Ravi Kumar Awasthi*; 2001 (2) MPLJ 339, *Kamalrani Rajaram Guru and others Vs. Kumari Pinki D/o Hari Shankar Guru*; 2001 (2) MPLJ 677, *Maroti Bansi Teli Vs. Radhabai*; AIR 1945 Nagpur 60, *M/s Chuni Lal Dwarka Nath Vs. Hartford Fire Insurance Co. Ltd. and another*; AIR 1958 Punjab 440, *Kunwarlal Amritlal Vs. Rekhilal Koduram*; AIR 1950 Nagpur 83, *Sukhbir Singh and others Vs. Brijpal Singh and others*; (1997) 2 SCC 200, *Manzoor Ahmed Vs. Gulam Hassan*; (1999) 7 SCC 703, *Aniglase Yohannan Vs. Ramlatha & others*; 2005 AIR SCW 4789.

Imtiyaz Hussain, for the appellants

A.S.Jha with *B.M.Prasad*, for the respondent.

Cur.adv.vult

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J U D G M E N T

The Judgment of the Court was delivered by ARUN MISHRA, J.:— This appeal has been preferred by the defendants aggrieved by judgment and decree dated 8.12.2004 passed by Second Additional District Judge, Sehore in Civil Suit No. 5-A/2003.

2. The plaintiff respondent filed a suit for specific performance of an agreement to sale dated 10.3.1995. The suit was filed as against Kalimurrahman (since deceased, represented by defendants appellants No. 1(a) to 1(g)) and defendant Abdul Qadeer (since deceased, represented by defendants appellants No. (a) to 3(g)). An agreement was entered into for a consideration of Rs. 3,70,000/-, plaintiff paid part of consideration of Rs. 40,000/- to Kalimurrahman at the time of agreement through her deceased husband. Kalimurrahman refused to execute the sale-deed and to transfer the suit house in the name of defendant and ultimately sold suit house to original defendant in two parts vide sale deeds dated 18.9.1996 which the plaintiff claimed to be null and void.

3. The defendants No. 1 and 2 in their written statement contended that agreement dated 10.3.1995 had never been executed by Kalimurrahman; same is forged and fabricated document. Abdul Qadeer was a bonafide purchaser for valuable consideration. Abdul Qadeer had already purchased a part of suit house from Kalimurrahman vide registered sale deed (D-2) dated 7.2.1990. It was also contended that plaintiff was in occupation as tenant, earlier an agreement was entered into with late Afzal Ahmad, husband of plaintiff, sum of Rs. 40,000/- was paid in cash and Rs. 70,000/- was paid by cheque. As the cheque was dishonoured, plaintiff's husband had no arrangement of money. The sum of Rs. 40,000/- was also refunded to him. Thereafter, there was no question of executing the agreement dated 10.3.1995. The defendant No. 3 also took similar stand in the written statement.

4. On the basis of purchase made by Dr. Anees Ansari he had filed a suit for ejectment under section 12(1)(a)(c)(g)(h) of M.P. Accommodation Control Act. It was not disputed that earlier the house in question was owned by late Kalimurrahman. Husband of the plaintiff namely Afzal Ahmad was a tenant in the suit premises @ Rs. 65 per month. Afzal died on 15.3.1995. Kalimurrahman has also died. Two sale deeds were executed in favour of Dr. Anees Ansari on 18.9.1996. Transfer was made in favour of Dr. Ansari by late Kalimurrahman. Temporary injunction was operating against Kalimurrahman not to alienate the

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property. Plaintiff Najma had also filed a regular Civil Suit 12-A/98 against Dr. Anees Ansari and others, in that also injunction was granted in favour of plaintiff. It was directed that possession of the plaintiff not to be interfered with otherwise then in due course of law. Plaintiff Najma had served a notice on Kalimurrahman for specific performance of agreement to sale. Kalimurrahman had sent a reply to the notice.

5. The Trial Court as per the impugned judgment and decree has decreed the suit filed by plaintiff Najma C.S. No. 5-A/03 whereas suit filed by Dr. Anees Ansari C.S. No. 4-A/03 for ejectment has been dismissed. Specific performance of agreement to sell the property has been ordered. Dissatisfied with the judgment and decree passed in Civil Suit No. 5-A/2003 this appeal has been preferred by the defendants.

6. Shri Imtiyaz Hussain, learned counsel appearing for appellants has submitted that plaintiff has not been able to establish readiness and willingness to purchase the property. She had arrangement of fund for purchase of property, has not been established. It is necessary upon the plaintiff to aver that she is ready to bear the stamp duty and registration charges in view of provisions of Section 29(1)(c) of Stamp Act and 55(1)(d) of T.P. Act. Decree has been granted including part of house sold to Kalimurrahman vide sale deed Ex.D-2 dated 7.2.1990. He has further submitted that plaintiff may at the most be entitled for refund of Rs.40,000/- in case agreement Ex.P-1 is found to be proved.

7. Shri A.S.Jha, learned Sr. Counsel with Shri B.M.Prasad appearing on behalf of respondent has submitted that readiness and willingness has been averred and proved. Buyer had been ready and willing to perform her part of agreement. She had arrangement of necessary fund also, availability of which has been stated by the plaintiff. In spite of notice in newspapers and injunction granted by the Court, property had been sold by Kalimurrahman. The order of the Court was to the knowledge of the defendants, the defendant could not be said to be bonafide purchaser. He has purchased the property for lesser consideration than agreed with the plaintiff.

8. First coming to the question whether readiness and willingness has been averred and proved. In the plaint it is averred that agreement had been entered into for a sum of Rs. 3,70,000/-, a sum of Rs. 40,000/- was paid as earnest money, remaining amount was to be paid at the time of execution of sale deed. Expenses to be incurred in the execution of sale deed were to be borne by the

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plaintiff. Agreement was executed on a stamp and it was notarized. In daily newspapers Dainik Bhaskar, Dainik Jagran and Dainik Afkar dated 13.10.1995, notice was published intimating the general public as to the factum of agreement. It was also mentioned that agreement was valid till 10.3.1996 and plaintiff had come to know that defendant was trying to sell the property for higher consideration to someone else. Yet another notice was sent by plaintiff through counsel on 4.11.1995, after about 20 days of publication of notice in the newspaper, in which it was mentioned that plaintiff had been ready and is willing to perform her part of agreement, to pay Rs. 3,30,000/- and to get the sale deed executed. Plaintiff went to the office of Sub-Registrar (Registration) on 30.11.1995 and waited for defendant No.1. The defendant No. 1 had promised to execute the sale deed on the said date. Thereafter, as defendant No. 1 has failed to turn up, she deposited Rs.10/-, intimated this fact to the Sub Registrar and obtained the receipt. In our opinion, the plaintiff has clearly pleaded readiness and willingness to purchase the property. It has been also clearly pleaded in the plaint that expenses to be borne by the plaintiff while getting the sale deed executed. She had published the notices in daily newspapers, thereafter, served a notice through counsel also for execution of the sale deed, as pleaded in the plaint she was present in the office of Sub Registrar (Registration), thus pleading with respect to readiness and willingness to perform her part of agreement has been made as per requirement of section 16(c) of Specific Relief Act, 1963. We are unable to accept the submission raised by Shri Imtiyaz Hussain, learned counsel appearing for appellants that as per requirement of section 29(1)(c) of the Stamp Act and 55(1)(d) of T.P. Act, it has not been pleaded that plaintiff is ready to bear the stamp duty and registration charges. In our opinion the pleading made in the plaint is sufficient as per requirement of the aforesaid sections of Stamp Act and T.P. Act including that of Section 16(c) of Specific Relief Act.

The Apex Court in *Motilal Vs. Kamala Devi*¹ has laid down that there need not be any specific phraseology or language of averment of readiness or willingness in the plaint. The averment made in the plaint as a whole must indicate readiness or willingness of the plaintiff to fulfill his part of obligation under the contract

9. Coming to the question of proof of readiness and willingness and availability of funds to purchase the property. The plaintiff Najma (PW-1) has stated in Para-4 of her deposition that she was willing to make payment of balance amount to Kalimurrahman, she was still ready to make the payment of remaining amount and

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to get the sale deed executed. She has denied in Para 13 of her deposition that she was not having the arrangement of fund for execution of sale deed. In para-14 also she has denied the suggestion that she was not having the money to make the payment of outstanding sale consideration. Cross examination has stopped on that though the plaintiff has clearly stated in examination in chief that she had arrangement of money. Plaintiff has further stated that she published the notices in newspapers when she came to know that Kalimurrahman was trying to alienate the property to Dr. Anees Ansari. She has filed an objection also. Objection Ex.P-5 was filed in the office of Dy. Registrar (Registration), Sehore. She has further stated that son of Kalimurrahman has demanded a sum of Rs. 6 lakhs instead of agreed amount; consequently there was refusal to execute the sale deed by the defendant. Husband of plaintiff died, as such she had waited for sometime, however, it is clear from the entire statement of plaintiff that Kalimurrahman wanted to resile from the agreement and to realize the higher amount and in disregard to the injunction granted by the Court, he sold the property. Plaintiff remained present in office of Sub-Registrar on 30.11.1995 to get sale deed executed shows that she had arrangement of fund to pay balance consideration. Thus arrangement of fund and readiness and willingness has been proved by the statement and conduct evidence of plaintiff. Whatever was possible for her, she has done to get the sale deed executed.

10. In *Phoolchand Garg Vs. Gopal Das Agrawal & others*¹ it has been held that financial status of the person being ordinary mere assertion of the plaintiff that he was ready and willing to pay the amount, is not sufficient. In the aforesaid case mere statement that he had always been ready and willing to perform his part of contract was not taken to be sufficient. In the instant case statement has been made with respect to availability of fund also and that is found to be reliable. The said decision was affirmed in the LPA 104/2000 (*Phool Chand Garg Vs. Gopal Das Agrawal & others*)² in which a Division Bench of this Court has observed that entry in the account books are not sufficient to charge any person with liability. The decision in the LPA has turned on the different set of facts.

In *N.P. Thirugnanam Vs. R.Jagan Mohan Rao*³ the Apex Court has observed that to adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. Availability of fund has to be proved on the date of execution of

(1) 2002 (I) MPJR SN 32.

(2) 2001 (II) MPJR SN 12.

(3) AIR 1996 SC 116.

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agreement. The plaintiff had not deposited amount of sale consideration nor has furnished bank guarantee as per directions of the Trial Court. He was never ready to fulfill his part of contract. In the aforesaid background, it was held that plaintiff was not ready and willing to perform his part of contract as found by the Trial Court. In the instant case plaintiff was not required to furnish the bank guarantee or deposit the amount of sale consideration in the Court. Thus the facts of *N.P. Thirugnanam Vs. R. Jagan Mohan Rao* (supra) are quite different.

Reliance has also been placed on decision rendered in *Sirmul S/o Atalmal Vs. Smt. Annapurna Devi Ravi Kumar Awasthi*¹, in which a Division Bench of this Court has laid down that plaintiff is required to prove his readiness and willingness to make payment of registration charges. In the instant case, as already discussed by us, there is averment made in the plaint with respect to the readiness and willingness to bear the expenses of execution of sale deed, thus the requirement of decision has been complied with in this case.

Yet another decision in *Kamalrani Rajaram Guru and others Vs. Kumari Pinki d/o Hari Shankar Guru*² has been pressed into service, in which this Court has held that it is incumbent upon the plaintiff to prove that he has performed and had always been ready and willing to perform with the essential terms of the contract. Availability of fund should also be proved. In the instant case we find that plaintiff has made statement with respect to availability of fund and except giving a suggestion in the cross-examination that she was not having the fund, cross examiner had stopped. It was the duty of cross examiner to cross examine her further as to her financial status etc., in case statement of plaintiff was to be assailed as incorrect as held in *Maroti Bansi Teli Vs. Radhabai*³; *M/s Chuni Lal Dwarka Nath Vs. Hartford Fire Insurance Co. Ltd. and another*⁴ and *Kuwarlal Amritlal Vs. Rekhlal Koduram*⁵. Cross examination has to be meaningful. The statement of plaintiff is found to be reliable that she was having the fund. She has issued the notices in different newspapers and also served notice through her counsel, she went to office of Sub-Registrar also for getting sale deed executed, all these things indicate that she was ready and willing to perform her part of agreement and had arrangement of necessary fund.

In *Sukhbir Singh and others Vs. Brijpal Singh and others*⁶ endorsement of the office of Sub Registrar to the effect that buyer was present in his office for having sale deeds executed and registered by seller, it was held that it was explicit

(1) 2001(2) MPLJ 339.

(2) 2001(2) MPLJ 677.

(3) AIR 1945 Nagpur 60.

(4) AIR 1958 Punjab 440

(5) AIR 1950 Nagpur 83.

(6) 1997 (2) SCC 200.

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that buyer was ready and willing to perform his part of contract and had necessary funds to pass on consideration. The Apex Court has laid down in Paras 4 and 5 thus:-

4. In paras 5,9 and 10 of the plaint the respondents have in substance pleaded that they had been and were still willing to perform their part of the agreement and the defendants did have notice in that behalf. It is seen that averments made in the above paras are in substance as per Forms 47 and 48 prescribed in Appendix AA of the Code as amended by the High Court. What requires to be considered is whether the essential facts constituting the ingredients in Section 16(1)(c) of the Act were pleaded and that found mentioned in the said forms do in substance point to those facts. The procedure is the handmaid to the substantive rights of the parties. It would, therefore, be clear from a perusal of the pleadings and the forms that the averments are consistent with the forms. When the respondents had pleaded and proved by the Sub-Registrar's endorsement as per paper No. 41/C that the respondents were present in the office of the Sub-Registrar for having the sale deed executed and registered by the petitioners, it would be explicit that the respondents were ready and willing to perform their part of the agreement. The facts that the petitioners did not attend the office would prove positively that the petitioners had avoided execution of the sale deed.

5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till the date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance to the respondents on sound principles of law.

11. In *Manzoor Ahmed Vs. Gulam Hassan*¹ when the plaintiff was ready to purchase the property defendant did not call upon the plaintiff to get the sale deed

(1) 1999 (7) SCC 703.

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executed. It was held that there was no unwillingness on the part of the plaintiff to perform his part of contract. In *Aniglase Yohannan Vs. Ramlatha & others*¹, it was held that when there was averment in the plaint that plaintiff was ready to get the sale deed executed after paying necessary consideration, order decreeing the suit for specific performance of the contract in favour of plaintiff was found to be proper.

12. In the instant case when we consider the facts, it is clear that inspite of Court's order of injunction, newspaper publication was made before lapse of agreed date in the agreement to sale, the property was sold by Kalimurrahman, as rightly found by the Trial Court that intention was to obtain higher consideration. Sale deeds (D-3 to D-22) were executed for a sum of Rs. 3 lakhs whereas market value was 6,71,000/- as apparent from sale deeds itself. Agreement with plaintiff was for 3,70,000/-. Thus it has been rightly concluded by the Trial Court that Kalimurrahman had refused to perform the agreement in his lifetime. Notice dated 4.11.1995 was given intimating that plaintiff would be present in the office of Sub Registrar (Registration) of 30.11.1995 to get the sale deed executed, notice was received by Kalimurrahman still he didn't turn up to execute the sale deed, had been rightly inferred by the Trial Court. Presence of plaintiff before Sub-Registrar (Registration) indicates that she was ready and willing and had adequate fund also.

13. Coming to the submission that due execution of the agreement (P-1) has not been established. We find that Salim (PW-2) has proved that Kalimurrahman had signed in portion F to F on the agreement in his presence. Consideration of Rs. 40,000/- was paid. It appears that plaintiff Najma is a parda-nasheen lady, she has clearly stated that a sum of Rs. 40,000/- was paid by her husband to Kalimurrahman. She has proved signatures on the agreement in portion A to A. After 5-6 months of the death of her husband, she asked Kalimurrahman to execute the agreement. After death of her husband she was unable to take steps for sometime but the fact remains that time was not the essence of the contract before sale deed was executed in favour of others on 18.9.96. Plaintiff had already taken the steps for purchase of the property still the sale deed was not executed by defendant Kalimurrahman in her favour and executed the sale deeds in favour of Dr. Anees Ansari inspite of injunction granted by the Court and despite of notices (P-2, P-3 and P-4) which were published in the newspapers. She has also stated that Salim Nawab and Pyare Miyan were present at the time of execution of the agreement.

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She was unable to state who has purchased the stamp as her husband was alive at the time obviously her husband was aware of all these things as apparent from her statement. Consideration was also paid by her husband. She appears to be a truthful witness and there was nothing to doubt correctness of her statement.

14. Dr. Mohd. Anees Ansari (DW-1) has stated that he was informed by Kalimurrahman that he has not executed the agreement in question in favour of plaintiff. Suit was filed on 23.5.1995 whereas sale deed (Ex.D-3) had been executed on 18.9.1996 in favour of Abdul Qadeer and Dr. Anees Ansari on the same date. Defendant has simply stated that agreement was forged but has not adduced any evidence to prove that agreement (Ex.P-1) is outcome of forgery. No handwriting expert had been examined by the defendant to prove the agreement to be a forged document. When we consider statement of Jiya-Ul-Rahman (DW-2) he has denied the signatures of his father on the agreement (Ex.P-1), he has even denied the signatures on receipts (Ex. P-13 to P-33), he has stated that these signatures are not of his father Kalimurrahman, the statement of the witness does not inspire confidence, even he has denied the signatures on the receipts which were in fact issued by Kalimurrahman, consequently it cannot be said that agreement (P-1) was a false/forged document.

15. It is settled law that specific performance has to be decreed once agreement has been proved. Apart from that readiness and willingness stands established.

16. It was also submitted by Shri Imtiyaz Hussain, learned counsel appearing for appellant that suit has been decreed even with respect to the property sold by Kalimurrahman on 17.9.90. It is clearly stated by Shri A.S.Jha, learned Sr. counsel appearing for respondent that property earlier sold does not form part of the decree. It is clarified that property sold in the year 1990 as per sale deed executed by Kalimurrahman, does not form part of the decree passed by the Court below. In the plaint map property was given with specific precision and decree is in that regard. Plaintiff's statement has to be read in that context.

17. Resultantly, we find no merit in this appeal. Appeal being devoid of merit deserves to be dismissed, same is hereby dismissed. However, we leave the parties to bear their own costs as incurred of this appeal.

Appeal dismissed.

I.L.R.[2007] M.P., 1255
APPELLATE CRIMINAL

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

2 August, 2007

REETA SONKAR

..Appellant*

Vs

STATE OF M.P.

..Respondent

A. Penal Code, Indian (XLV of 1860)-Section 300-Murder-Husband wanted to marry another girl with whom he had illicit relationship - He used to give threat of Chhor Chhuti and used to beat the deceased- Altercation took place between husband and deceased on the question of another girl-Deceased was brought to Doctor in burnt condition and three dying declarations were recorded-As per two dying declarations mother-in-law poured kerosene oil-As per third dying declaration she caught hold of her and husband poured kerosene oil and set her ablaze-Discrepancy as to who poured kerosene oil and who caught hold of her is not enough to give any benefit of doubt to husband and mother-in-law-Appeal of husband and mother-in-law dismissed.

In view of the aforesaid dying declarations, it is apparent that deceased Krishna Bai had been consistent with respect to accused Sushila Bai, her mother-in-law and Sunil, her husband. It was Sunil who set her ablaze, there was discrepancy in the statements, whether Sunil or mother-in-law poured kerosene oil or caught hold of deceased. Whatever that may be, this kind of discrepancy was not enough so as to give any benefit of doubt to the accused Sushila and Sunil, as we find that statements of Krishna Bai with respect to them were quite reliable. (Para 8)

B. Evidence Act, Indian (I of 1872)-Section 32(1)-Dying Declaration-Three dying declarations of deceased recorded - In first dying declaration no allegation made against sister-in-law-As per subsequent dying declarations sister-in-law brought the match box-Allegations of harassment by her made by relatives after death of deceased-Allegations of harassment appears to be after thought-Inconsistency in first dying declaration and subsequent dying declarations is significant-Conduct of sister-in-law in taking the deceased to Doctor

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and the fact that she is married and is living separately indicates that she was not culprit-Sister in-law acquitted.

It is rightly submitted at bar that each case has to be considered on its own facts. In our opinion, omission in first dying declaration has to be considered whether it could be said to be a material omission in the facts & circumstances of each case. In case in first dying declaration there was insignificant omission, it cannot be said that subsequent dying declaration giving the details has to be considered as an after thought. However, in the instant case, we find that inconsistency in first dying declaration with two later dying declarations is significant and coupled with the background of facts of the case that Reeta did not harass or beat at any point of time to the deceased Krishna Bai, she was married woman and residing with her husband in a different house though nearby the house in question where incident took place and she has taken the deceased Krishna Bai initially to Dr. Anil Dubey and thereafter to Victoria hospital, her conduct indicates that she was not a culprit, that is why her name was not mentioned in first dying declaration. (Para10)

C. Criminal Procedure Code, 1973(II of 1974)-Section 156-Investigation-Absence of Kerosene Oil- Burnt piece of blouse not sent for chemical examination by Investigating Officer- Irregularities and illegalities committed by investigating officer- Will not cast doubt on prosecution case.

Mere fact that the investigating officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account.

When we consider the facts of instant cases, kerosene bottle was seized from the spot though kerosene oil was not found on the floor, it was not the case that kerosene oil was poured on the head, it was poured only on the clothes and a piece of pink blouse was seized as per seizure memo but it was not sent for the reasons best known to the Investigating Officer for chemical examination. Consequently, dying declarations of deceased which had been found to be reliable with respect to husband and mother-in-law could not be overlooked.

(Para12)

Cases Referred :

Balbir Singh & another Vs. State of Punjab; AIR 2006 SCW 4950, State of Gujarat Vs. Mohan Bhai Raghbai Patel and another; AIR 1990 SC

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1379, *Smt. Kamla Vs. State of Punjab*; AIR 1993 SC 374, *Paras Yadav and others Vs. State of Bihar*; AIR 1999 SC 644, *State of Rajasthan Vs. Kishore*; AIR 1996 SC 3035.

Surendra Singh with Manish Mishra, for the appellant
T.K.Modh, Dy.AG for the respondent/State

Cur.adv.vult.

J U D G M E N T

The Judgment of the Court was delivered by ARUN MISHRA J.:—The three appeals have been preferred by 3 appellants Sunil, Sushila and Reeta. They have been convicted for committing offence u/s 302/34 of IPC and sentenced to rigorous life imprisonment and fine of Rs.2,000/- each, in default of payment of fine they have to undergo one year rigorous imprisonment. Apart from that accused Sunil has been convicted for committing offence u/s 498-A of IPC and sentenced to undergo 2 years rigorous imprisonment and a fine of Rs.2,000/-, in default of payment of fine he has to undergo 3 months rigorous imprisonment.

2. The prosecution case, in brief, is that marriage of deceased Krishna Bai was performed with accused Sunil 4 years before the incident. Sunil had illicit relationship with a "Sindhi" girl with whom he wanted to perform marriage and leave the deceased Krishna Bai. There used to be disputes between deceased Krishna Bai and accused Sunil, Krishna Bai was ill-treated. On the date of incident i.e. 21.2.96 Sunil poured kerosene oil on Krishna Bai, Sushila caught hold of her, Reeta brought a match-box handed it over to accused Sunil and Sunil set ablaze the clothes of Krishna Bai. Her brother-in-law Anil put a blanket over her to extinguish the fire. She was referred to Victoria hospital. Her 3 dying declarations were recorded. Initial dying declaration (Ex.P.18) was recorded at 4:30 p.m. Second dying declaration (Ex.P.9) was recorded at 8:45 p.m. Third dying declaration (Ex.P.12) was recorded in the form of "Dehati Nalishi" at 9:20 p.m. Krishna Bai succumbed to the burn injuries on 10.4.96 after 48 days of the incident. Spot map (Ex.P.3) was prepared. Certain articles - kerosene oil bottle, match-box, piece of blouse were seized as per seizure memo (Ex.P.4). Post-mortem was performed. Accused were charge-sheeted.

3. Accused abjured their guilt and contended that they had been falsely implicated, they were innocent. Sunil was not in the house at the time of incident. When he came back in the evening, he was informed by his sister Babita that

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Krishna Bai caught fire accidentally while cooking the food. Anil had saved her. In defence also evidence has been adduced. The prosecution in all examined 14 witnesses. In defence 2 witnesses had been examined Anil Kumar and Jagdish. The trial court had convicted the accused persons and sentenced them in the aforesaid manner. Consequently the appeals have been preferred by them.

4. Shri Surendra Singh, learned Sr. Adv. with Shri Manish Mishra, for appellants, has submitted that 3 dying declarations were recorded, out of them in the first dying declaration name of the accused Reeta was not mentioned that she has participated in commission of offence in any manner. In later 2 dying declarations her name had been mentioned. Learned Sr. counsel has further submitted that Reeta has taken the deceased to hospital. She was residing nearby. Her marriage stood performed, on date of incident her conduct indicates towards innocence, otherwise she would not have accompanied Krishna Bai to the hospital, thus, she ought to have been acquitted. There was no allegation of harassment against her, only after the incident has taken place such an allegation has come for the first time as an after thought. He has further submitted that with respect to role played by Sushila, mother-in-law of deceased, though her name finds place in the dying declaration but there is contradiction with respect to role played by her while the deceased was set ablaze. He has further submitted that role attributed to Sushila Bai in that she poured kerosene oil or caught hold of deceased Krishna Bai but no smell of kerosene oil was found in the hair nor kerosene oil was found at the spot of incident or in the clothes of Krishna Bai, absence of kerosene oil indicates that implication of Sushila Bai to be false and renders dying declaration to be doubtful. He has further submitted that as against the accused Sunil prosecution case stands falsified due to the improvement made in dying declarations and absence of kerosene oil renders the dying declarations and entire story to be unreliable. The deceased Krishna Bai had caught the fire accidentally while she was cooking food as stated by defence witnesses. Consequently, the appellants be acquitted. He has relied upon certain decisions to be referred later.

5. Shri T.K. Modh, learned Dy. Advocate General, appearing on behalf of respondent-State, has submitted that no case for interference in these appeals was made out. After 4 years of marriage accused Sunil got rid of deceased Krishna Bai. He wanted to perform marriage with a "Sindhi" girl and due to that reason used to harass deceased Krishna Bai. It has come in the evidence of witnesses that even Sushila and Reeta assisted to the husband and meted cruel treatment to the deceased. The dying declarations were reliable. In the initial dying declaration (Ex.P.18) omission of name of Reeta did not cause any dent the

prosecution case, as later 2 dying declarations were consistent, they had been recorded on the same day in close proximity of time and there was no chance of tutoring the deceased Krishna Bai, consequently dying declarations (Ex.P.9 & P.12) were reliable, beside there was evidence of oral dying declaration made by Krishna Bai. Consequently trial court has rightly convicted the appellants. Thus, appeals deserve dismissal.

6. We have to consider the case in the backdrop of the fact that accused Sunil used to harass deceased Krishna Bai as he had illicit relationship with a "Sindhi" girl with whom he wanted to perform marriage. He used to give threat of "Chhor Chhutti" a customary form of divorce, he used to beat Krishna Bai. On the date of incident after having the food she came in the bed room where Sunil was lying in the bed, at that time some altercation and exchange of hot words with respect to relationship with the "Sindhi" girl appears to have taken place. On that as per version of deceased, accused Sunil poured kerosene oil on her, Sushila Bai caught hold of her, Reeta brought the match box and she was set ablaze by Sunil by lighting match-stick. Krishna Bai was taken for treatment initially to Dr. Anil Dubey. Considering the extent of burn injuries Dr. Anil Dubey advised to take Krishna Bai to the Victoria hospital, where she reached at 2:30 p.m. as apparent from bed-head ticket. In Victoria hospital she was examined by Dr. A.K. Jain (P.W.5), he has mentioned in the bed-head ticket (Ex.P.7) that arrangement be made for recording her dying declaration. It appears that police had set in the investigation on receiving information u/s 174 of Cr.P.C.

7. First dying declaration (Ex.P.18) was recorded by Prem Singh, Head constable of concerned police station. This document was admitted by the prosecution as stated by concerned AGP before trial Court on 13.2.98, when prayer was made by defence counsel to call Prem Singh, Head constable, it was opposed by the prosecution stating that prosecution admits the document i.e. dying declaration (Ex.P.18), consequently it was marked as exhibit and read in evidence being an admitted document. It is not in dispute that Reeta had accompanied Krishna Bai initially to Dr. Anil Dubey and also to the Victoria hospital. Coupled with this fact when we go through the initial version in first dying declaration (Ex.P.18) recorded at 4:30 p.m., there was total absence of name of Reeta, this statement had been signed by Krishna Sonkar, the deceased. Time 4:30 p.m. and date has also been mentioned in the statement (Ex.P.18). It was mentioned in the dying declaration by Krishna Bai that her husband abused her and also beaten her with stick and stated that she should obtain "Chhod-Chhutti" (divorce), her husband caught hold of her, Sushila Bai, mother-in-law, poured kerosene oil on her and Sunil set her ablaze with the help of the match stick.

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When she cried, Baby wife of Laxman, Laxman, Omwati D/o Banshilal and others came to the house. Her brother-in-law Anil put a blanket on her to extinguish the fire. She was taken to the hospital by her father-in-law and sister-in-law. Not even the presence of accused Reeta has been mentioned in (Ex.P. 18) at the time of incident.

Then, we find on record yet another dying declaration (Ex.P.9) recorded subsequently on the same day. It was recorded at 8:45 p.m. Doctor had certified that Krishna Bai was in a fit condition to give statement. In her second dying declaration (Ex.P.9) Krishna Bai has mentioned that Sunil had kept one "Sindhi" girl and wanted to obtain divorce with Krishna Bai and used to close the door and after playing tape-recorder to suppress the noise and used to beat her. She had cooked the food by 12'0 clock in the noon and completed other work, when she came to room her husband was lying in the bed, started abusing her. Her mother-in-law Sushila Bai poured kerosene oil, her sister-in-law Reeta brought the match-box and thereafter her husband Sunil set her ablaze. Anil her brother-in-law had put the blanket over her. She was having a son of 2 years. Name of "Sindhi" girl was Indrana. Her marriage was performed prior to 4 years. She could not even write a letter to their parents. Earlier too also she had been badly beaten. She was not allowed to visit her parental house. In this statement (Ex.P.9) she has assigned the specific role to all the 3 accused persons, role was assigned to Reeta Sonkar that she brought the match-box. This dying declaration (Ex.P.9) was recorded in presence of Dr. Smt. Chandralekha Jain (P.W.8). Dr. Smt. Chandralekha Jain (P.W.8) has also stated that aforesaid dying declaration was recorded and patient was conscious and was in a position to give the statement and her dying declaration had been recorded by Executive Magistrate cum Naib Tehsildar in her presence.

We find on record yet another third dying declaration (Ex.P.12) in the form of "Dehati Nalishi" recorded at 9:20 p.m. by I.O. Jayant Temre (P.W.13) in which deceased Krishna Bai has stated that her husband had relationship with the "Sindhi" girl with whom he wanted to perform marriage. At about 12'0 clock her mother-in-law Sushila Bai, sister-in-law Reeta, her husband Sunil and brother-in-law Anil were in the house. Anil was sleeping. Sunil started quarreling and beating her with stick. Sunil poured kerosene oil on her. Sushila Bai caught hold of her. Reeta brought the match-box and handed it over to Sunil, Sunil set her ablaze, due to that she has suffered burn injuries. Anil had put a blanket in order to extinguish fire. Several persons assembled. Reeta and others took her to Dr. Anil Dubey, thereafter she was taken to the Victoria hospital.

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8. In view of the aforesaid dying declarations, it is apparent that deceased Krishna Bai had been consistent with respect to accused Sushila Bai, her mother-in-law and Sunil, her husband. It was Sunil who set her ablaze, there was discrepancy in the statements, whether Sunil or mother-in-law poured kerosene oil or caught hold of deceased. Whatever that may be, this kind of discrepancy was not enough so as to give any benefit of doubt to the accused Sushila and Sunil, as we find that statements of Krishna Bai with respect to them were quite reliable, however, when we consider the omission of name of Reeta in (Ex.P.18) and also considering the fact that her marriage stood performed at the time of accident, she was residing separately, there was no evidence on record of the period before incident to suggest that she used to harass or beat the deceased, no such complaint was ever made by deceased Krishna Bai to any one before the incident as against Reeta; she was residing separately, absence of her name in initial dying declaration (Ex.P.18) was significant and created a doubt as to the complicity of Reeta in the case itself. Deceased Krishna Bai was fully conscious when her initial statement (Ex.P.18) had been recorded, she was conscious at the time when her second dying declaration came to be recorded at 8:45 p.m., she was also conscious when her third dying declaration had been recorded at 9:20 p.m. There is no reason whatsoever why she would spare accused Reeta in case she had played the role in setting her ablaze. There was no whisper in the first dying declaration (Ex.P.18) that Reeta was present on the spot. It appears that Rajtilak Sonkar (P.W.1), cousin of deceased Krishna Bai reached in the Victoria hospital in the evening after receiving information as to the incident. He initially went to Dr. Anil Dubey's place and thereafter to Victoria hospital, thus, it appears that Rajtilak (P.W.1), cousin of deceased Krishna Bai had reached by the time when her second and third dying declarations were recorded and later on an improvement had been made in the story that Reeta had also assisted in setting her ablaze by bringing a match-box. Even otherwise, there was no reason for the different persons to bring kerosene oil and match-box in order to set ablaze Krishna Bai. There was possibility of improvement made in second and third dying declarations after talking with relatives and a doubt is created as to the complicity of accused Reeta in the instant cases. Recording of aforesaid three dying declarations has not been disputed at bar. One of dying declaration had been admitted to be recorded as Ex.P.18. Two other dying declarations had been proved by evidence of Jayant Temre (P.W.13) and J.L. Ahte (P.W.14), beside Dr. Smt. Chandralekha Jain has stated that dying declaration (Ex.P.9) was recorded in her presence. Dr. G.K. Upadhyay (P.W.7) has stated that deceased suffered with 35% of burns at the time when she

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was admitted in the ward, intimation was given to police, that supports the investigation set up u/s 174 of Cr.P.C. in the course of which dying declaration (Ex.P.18) came to be recorded by Prem Singh, Head constable of concerned police station.

9. Rajtilak Sonkar (P.W.1) has stated that when he reached Victoria hospital, he was informed by Krishna Bai that her husband, mother-in-law and sister-in-law were responsible to set her ablaze. She has stated about the demand of dowry. He is close relative of deceased Krishna Bai. Tulsiram Sonkar (P.W.3) has also stated about the demand of dowry of Rs.50,000/-, however, he has admitted in cross-examination in para-5 that he had not informed the police about the demand of dowry of Rs.50,000/-. He did not disclose this fact to the police till her daughter was alive. He was unable to give any reason for not disclosing the fact of demand of dowry to the police till the death of Krishna Bai, though she survived for 48 days. He has not levelled any specific allegation against accused Reeta and Sushila with respect to demand of dowry. Sewakram (P.W.4), brother of deceased, has also stated about the oral dying declaration made by deceased in which he had named Sunil, mother-in-law Sushila Bai and sister-in-law Reeta but that was made after several days of the incident and with respect to role of Reeta, her statement could not be said to be reliable, he has given the reason for incident that husband of deceased used to beat her on the issue of a "Sindhi" girl. He has not stated about the demand of dowry. Ram Bai (P.W.9), mother of deceased, has stated that Krishna Bai informed that all the accused persons used to beat her but that is not even the case of deceased Krishna Bai in any of the dying declarations, thus, there was exaggeration made in statement of Ram Bai with respect to Sushila and Reeta. Thus, we find that allegation of harassment of cruel treatment stands proved against husband in view of the dying declarations of Krishna Bai and statements of other witnesses in that regard.

10. The Apex Court has considered the effect of omission in the initial dying declaration and mention of name in subsequent dying declaration in *Balbir Singh & another v. State of Punjab*¹. It was a case of death by burns. Victim in her dying declaration recorded by doctor stated that her husband had put kerosene oil upon her and upon igniting, locked door of bathroom from outside. Victim was rescued by neighbours. Victim in second dying declaration before Investigating Officer not only named her husband but also her mother-in-law. The conviction of accused husband u/s 302 of IPC was held to be proper and mother-in-law was

(1) AIR 2006 SCW 4950.

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given the benefit of doubt in view of inconsistencies between two dying declarations. It is rightly submitted at bar that each case has to be considered on its own facts. In our opinion, omission in first dying declaration has to be considered whether it could be said to be a material omission in the facts & circumstances of each case. In case in first dying declaration there was insignificant omission, it cannot be said that subsequent dying declaration giving the details has to be considered as an after thought. However, in the instant case, we find that inconsistency in first dying declaration with two later dying declarations is significant and coupled with the background of facts of the case that Reeta did not harass or beat at any point of time to the deceased Krishna Bai, she was married woman and residing with her husband in a different house though nearby the house in question where incident took place and she has taken the deceased Krishna Bai initially to Dr. Anil Dubey and thereafter to Victoria hospital, her conduct indicates that she was not a culprit, that is why her name was not mentioned in first dying declaration.

In *State of Gujarat v. Mohan Bhai Raghobhai Patel and another*¹, the Supreme Court justified acquittal of accused holding that conduct of accused throwing mattress over deceased, a burning woman creates doubt about prosecution version of accused having poured kerosene and setting her on fire. There was also absence of motive. In the instant cases, the conduct of Reeta was to take the deceased Krishna Bai immediately to the hospital and she had no motive to harass or to cause injury of any kind to the deceased Krishna Bai. In *Smt. Kamla v. State of Punjab*², there were 4 dying declarations made by the deceased revealing glaring inconsistency vis a vis naming the culprit. In one of dying declaration it was indicated to be an accident. Consequently conviction was set aside. In *Paras Yadav and others v. State of Bihar*³, there was inconsistency in dying declaration with regard to part played by accused and participation of accused. Two of the accused were acquitted giving them the benefit of doubt. But in instant case all the three dying declarations mention about two other accused Sushila Bai and Sunil.

11. Shri T.K. Modh, learned Dy. AG for respondent-State, has relied upon decision of *State of Rajasthan v. Kishore*⁴, wherein the Apex Court has laid down that case of multiple dying declarations could not be thrown out on the basis of minor discrepancy, dying declarations have to be considered in material particulars, minor discrepancies were held to be inconsequential. We are of the same opinion. However, in the instant cases, we have found that Sushila cannot

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be given the benefit of doubt on the basis of minor discrepancies with respect to inconsequential deviation in the third dying declaration as to the role played by her, however, omission of name of Reeta in first dying declaration cannot be lost sight in the facts & circumstances of this case.

12. Coming to the submission raised by Shri Surendra Singh, learned Sr. counsel for appellants, that kerosene oil was not found in the hair, on the spot or in the clothes of deceased Krishna Bai, when we consider the kind of container from which the kerosene oil was poured, it was a bottle of hair oil converted into a "Chimni" and it was not a case of Krishna Bai that kerosene oil was put on her head, thus, absence of kerosene oil in her hair was of no consequence, the place where the incident had taken place was inhabited by several persons and the family was living therein, kerosene oil was not found on the floor was also not material as there was possibility of cleaning it and quantity in the hair oil bottle could not be said to be much mention in dying declaration with respect to pouring of kerosene oil and considering the extent of 35% burn injuries, it is obvious that she was set ablaze with the help of kerosene oil. The Apex Court in *State of Rajasthan v. Kishore* (supra) considered the case where the hair of deceased sent for chemical examination did not smell of kerosene oil, clothes belonging to the deceased seized by the police were not sent for chemical examination. The Apex Court observed in para-18 that the investigating officer P.W.8 committed grave irregularity in omitting to send the burnt clothes and other incriminating material for chemical examination to lend corroboration to the evidence. Mere fact that the investigating officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account. The Apex Court also considered the attempt to screen the offence by destroying the evidence. Therefore, the absence of smell of kerosene oil on the hair sent for chemical examination does not render the dying declaration of the deceased suspect nor would it become unbelievable. The Apex Court held that the High Court, therefore, has not considered the evidence in the proper and legal perspective but felt it doubtful like Doubting Thomas with vacillating mind to accept the prosecution case for invalid reasons and wrongly gave to the accused the benefit of doubt.

When we consider the facts of instant cases, kerosene bottle was seized from the spot though kerosene oil was not found on the floor, it was not the case that kerosene oil was poured on the head, it was poured only on the clothes and a piece of pink blouse was seized as per seizure memo but it was not sent for the

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reasons best known to the Investigating Officer for chemical examination. Consequently, dying declarations of deceased which had been found to be reliable with respect to husband and mother-in-law could not be overlooked. Thus, we find that prosecution had been able to establish guilt of Sunil and Sushila beyond reasonable doubt, however, accused Reeta for the aforesaid reasons was entitled to be given the benefit of doubt.

13. Resultantly, We dismiss the appeals (Cr.A.No.565/98 & Cr.A.No.566/98) filed by accused Sunil and Sushila and allow the appeal (Cr.A.No.559/98) filed by Reeta Sonkar and acquit her for commission of offence u/s 302 of IPC. Sushila is on bail. Her bail-bonds are cancelled. It is stated by learned counsel for appellants that Sunil has been released on probation by the State. We refrain to comment upon the aforesaid aspect in the appeals. However, fact is placed on record.

Appeal dismissed.

I.L.R. [2007] M.P., 1265

CIVIL REVISION

Before Mr. Justice S.S. Jha and Mr. Justice S.A. Naqvi

12 September, 2007

SMT. PARAMJEET KAUR BAMBA

--- Applicant

Vs.

SMT. JASBIR KAUR WADHWA.

--- Non-applicant

Accommodation Control Act, M.P. (XLI of 1961)-Sections 23-C, 23-D-
Question whether tenant can be permitted to file written statement or application for grant of leave to defend is sufficient and no further opportunity to file written statement be granted-Held-R.C.A. to commence hearing immediately after grant of leave-Filing of written statement is not mandate of legislature-There is no provision under Section 23-D to grant time to tenant to file written statement after grant of leave to defend-Rent Controlling Authority to decide application for eviction considering grounds on which leave to defend is granted after recording evidence-Reference answered accordingly.

Keeping the golden principle of the Interpretation of Statute and legislative

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intent in mind, language of section 23-D of the Act is clear and unambiguous. Rent Controlling Authority is bound to commence the hearing of the application as early as practicable and decide the same immediately after grant of leave to contest the application within a period of six months as far as may be. The legislature has nowhere provided for lengthy procedure after the grant of leave. When leave to defend is granted to the tenant on all or some grounds raised by the defendant, the Rent Controlling Authority is required to proceed with the application for eviction filed by the landlord and shall record evidence of the parties as there is no requirement of filing written statement by the defendant. Under section 23-D (3) there is a presumption of bona fide need in favour of the landlord. The presumption is rebuttable, therefore, after grant of leave to defend, Rent Controlling Authority shall proceed to decide the bona fide need of the landlord and grounds on which leave to defend is granted. He is not required to decide anything else except the bona fide need. Thus, on plain reading of section 23(D) the language is clear and simple and there is no provision for filing written statement by the tenant after leave to defend is granted to him. The grounds on which tenant is permitted to defend is to be considered and decided by the Rent Controlling Authority under the Scheme of Chapter III-A and he is not required to decide any other dispute.

Thus, the question referred is answered as under:

"under the scheme of Chapter III-A and the procedure laid down under section 23-D of the Act there is no provision for granting time to the tenant to file written statement after grant of leave to defend. The Rent Controlling Authority is required to proceed with the application for eviction and decide the application after considering the grounds on which leave to defend is granted to the tenant after recording evidence as provided under Order XVIII Rule 13 of the Code".
(Paras 19 and 20)

Cases Referred :

Inspecting Assistant commissioner of Income Tax, Gwalior v. Rajrani Sahi and anr., 1987 MPLJ 523; *Ramdas v. Smt. Shakuntala*, 1995 ILJ 272; *Dhannalal v. Kalawatibai & ors.*, (2002) 6 SCC 16.

Rajendra Tiwari with Thaman Khadka, for the Applicant
A.K. Jain, for the Non-applicant

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O P I N I O N

S.S. JHA, J.:— This revision is referred to the larger bench by learned Single Judge by order dated 11.11.2006 to determine the following question :

"Whether the application under section 23-C of the M.P. Accommodation Control Act, 1961, supported by an affidavit stating the grounds on which a tenant seeks to contest the application for eviction, on being granted, would itself serve the purpose of written statement and no opportunity of separate written statement in additional manner is contemplated in such a situation under Chapter III-A?"

2. Question involved in this case is that after grant of leave whether defendant can be permitted to file written statement or application for grant of leave supported by the affidavit is sufficient and no further opportunity to file written statement should be granted?

3. Shri Rajendra Tiwari, Senior Advocate, appearing for the petitioner submitted that under Chapter III-A of the M.P. Accommodation Control Act, 1961, (herein after referred to as 'the Act') there is no provision for filing of written statement. He submitted that once leave is granted under section 23-C of the Act then Rent Controlling Authority is required to proceed under the provisions of section 23-D of the Act. Section 23-D of the Act lays down that the Rent Controlling Authority shall proceed to decide the application within six months from the date of grant of leave. Learned counsel for the petitioner, therefore, submitted that there is no provision for filing the written statement. Tenant can defend on the grounds on which leave to defend is granted. Tenant has no right to take any other ground other than the grounds on which leave to defend is allowed. He submitted that intention of legislature will be frustrated if time to file written statement is granted. He submitted that special provision for eviction of tenant for specified categories of landlord is defined in section 23-J of the Act for their bona fide need. If opportunity to file written statement under the Code of Civil Procedure (hereinafter referred to as the Code) is given to the tenant after leave to defend is allowed then entire purpose of enactment shall be frustrated.

4. Learned counsel for the respondent placed reliance upon the judgment of this court in the case of *Inspecting Assistant Commissioner of Income Tax, Gwalior V. Rajrani Sahi and another*¹, and submitted that once permission to defend his case to the defendant is granted then he has right to contest the claim on

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all grounds. He submitted that in the case of *Inspecting Assistant Commissioner of Income Tax* (Supra) it has been categorically laid down that issues of "leave" and "eviction" must be tried separately as several and distinct issues. After leave is granted permission must be granted to file written statement and tenant has a right to contest eviction on all grounds raised in the written statement.

5. Learned counsel for the respondent submitted that section 23-D provides that the dispute shall be governed by the provisions under the Small Cause Courts Act. Under section 23-D of the Act it is provided that the Rent Controlling Authority shall, while holding an enquiry in a proceeding to which this Chapter applies, follow as far as practicable, the practice and procedure of a Court of Small Causes including the recording of evidence under the Provincial Small Cause Courts Act, 1887. The Rent Controlling Authority shall as far as possible, proceed with the hearing of the application from day to day. He submitted that the correct law has been laid down in the case of *Inspecting Assistant Commissioner of Income Tax* (supra). He submitted that under section 17 of the Provincial Small Cause Courts Act the court is required to follow the procedure laid down under the Code. Therefore, once leave is granted tenant has a right to file written statement. Learned referring Judge has referred this question doubting on the correctness of the judgment in the case of *Inspecting Assistant Commissioner of Income Tax* (supra).

6. The judgment in the case of *Inspecting Assistant Commissioner of Income Tax* (supra) is over ruled by the Division Bench of this court in the case of *Ramdas V. Smt. Shakuntala*¹, and it is held that *Inspecting Assistant Commissioner of Income Tax* (supra) has not laid down the correct law and the finding that the issues of 'leave' and 'eviction' are separate and distinct and have to be decided separately, distinctly and independently, the order cannot be held to be laying down a good law. As such, the law laid down in the case of *Inspecting Assistant Commissioner of Income Tax* (Supra) is no longer a good law.

7. Chapter III-A has been introduced by the M.P. Amending Act no.7 of 1985. The Statements of Objects and Reasons of Act 7 of 1985 are reproduced below :

Statement of Objects and Reasons.- The Madhya Pradesh Accommodation Control Act, 1961 (No.4 of 1961) was amended by Madhya Pradesh Act, No.27 of 1983 to provide a special forum

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for expeditious disposal of eviction proceeding filed by the land-lord in general on grounds of "bona-fide" need. However, it was brought to the notice of Government that the new forum provided by the said amendment was being misused by certain land-lords to evict tenants. It was, therefore, proposed to restrict the application of the provision relating to new forum only to the specified categories of land-lords like retired Government servants including members of Defence Services, widows and divorced wife, and physically handicapped persons etc.

This Chapter has provided a special forum for expeditious disposal of eviction proceeding filed by landlord in general on the grounds of "bona fide" need. New forum is related to only specified categories of landlord defined in section 23-J of the Act. The intention of legislature is to provide for expeditious decision on the eviction proceedings filed by the landlord and the procedure has been laid down under section 23-D of the Act. Judgment in the case of *Inspecting Assistant Commissioner of Income Tax* (supra) is expressly over-ruled by the judgment in the case of *Ramdas* (supra) by the Division Bench, therefore, question posed is examined in terms of the Act.

8. Now, the question is when the specified procedure is laid down for eviction of tenant whether defendant should be granted permission to grant leave. Chapter III-A is reproduced below :

23-A. Special provision for eviction of tenant on ground of bona fide requirement.- Notwithstanding anything contained in any other law for the time being in force or contract to the contrary, a landlord may submit an application, signed and verified in a manner provided in rules 14 and 15 of Order VI of the First Schedule to the Code, 1908 (V of 1908) as if it were a plaint to the Rent Controlling Authority on one or more of the following grounds for an order directing the tenant to put the landlord in possession of the accommodation, namely :-

(a) that the accommodation let for residential purposes is required "bona fide" by the landlord for occupation as residence for himself or for any member of his family, or for any person for whose benefit, the accommodation is held and that the landlord or such person has no other reasonably suitable residential accommodation of his own in his occupation in the city or town concerned.

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(b) that the accommodation let for non-residential purposes is required "bona fide" by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters, if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned:

Provided that where a person who is a landlord has acquired any accommodation or any interest therein by transfer, no application for eviction of tenant of such accommodation shall be maintainable at the instance of such person unless a period of one year has elapsed from the date of such acquisition.

23-B. Rent Controlling Authority to issue summons in relation to every application under section 23-A. (1) The Rent Controlling Authority shall issue to the tenant a summons, in relation to every application referred to in section 23-A, in the form specified in the Second Schedule.

(2) Save as otherwise provided in this Act, the provisions of Order V and Order XVI of the First Schedule to the Code, 1908 (V of 1908) regarding issue and service of summons to a defendant and summoning and attendance of witnesses to give evidence or to produce documents shall apply mutatis mutandis to issue and service of any summons to a tenant or opposite party or to a witness to give evidence or to produce documents in an inquiry or proceeding under this Chapter.

23-C. Tenant not entitled to contest except under certain circumstances.- (1) The tenant on whom the summons is served in the form specified in the Second Schedule shall not contest the prayer for eviction from the accommodation unless he files within fifteen days from the date of service of the summons, an application supported by an affidavit stating the grounds on which he seeks to contest the application for eviction and obtains leave from the Rent Controlling Authority as thereafter provided, and in default of his appearance in pursuance of the summons or in default of his obtaining such leave, or if such leave is refused, the statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant. The Rent Controlling Authority shall in such a case pass an order of eviction of the tenant from the accommodation :

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Provided that the Rent Controlling Authority may, for sufficient cause shown by the tenant, excuse the delay of the tenant in entering appearance or in applying for leave to defend the application for eviction and where "ex-parte" order has been passed, may set it aside.

(2) The Rent controlling Authority shall, within one month of the date of receipt of application, give to the tenant, if necessary, leave to contest the application, if the application supported by an affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order for the recovery of possession of the accommodation on the ground specified in section 23-A.

23-D Procedure to be followed by Rent Controlling Authority on grant of leave to tenant to contest.- (1) Where leave is granted to the tenant to contest the application, the Rent Controlling Authority shall commence the hearing of the application as early as practicable and decide the same, as far as may be, within six months of the order of granting of leave to the tenant to contest application.

(2) The Rent Controlling Authority shall, while holding an enquiry in a proceeding to which this Chapter applies, follow as far as practicable, the practice and procedure of a Court of Small Causes including the recording of evidence under the Provincial Small Cause Courts Act, 1887 (IX of 1887). The Rent Controlling Authority shall as far as possible, proceed with the hearing of the application from day to day.

(3) In respect of an application by a landlord it shall be presumed, unless the contrary is proved, the requirement by the landlord with reference to clause (a) and (b), as the case may be of section 23-A is *bona fide*.

23-J. Definition of landlord for the purposes of Chapter III-A.- For the purposes of this Chapter 'landlord' means a landlord who is -

- (i) a retired servant of any Government including a retired member of Defence Services; or
- (ii) a retired servant of a company owned or controlled either by the Central or State Government; or
- (iii) a widow or a divorced wife; or
- (iv) physically handicapped person; or
- (v) a servant of any Government including a member of defence

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services who, according to his service conditions, is not entitled to Government accommodation on his posting to a place where he owns a house or is entitled to such accommodation only on payment of a penal rent on his posting to such a place.

9. The specified categories of landlord have a right to file an application for eviction of tenant on the ground of their "bona fide" requirement. Section 23-C prohibits contest of application except under certain circumstances. Section 23-C lays down that a tenant who is served with summons in the specified form shall not contest the prayer for eviction from the accommodation unless he files within 15 days from the date of service of summons, an application supported by an affidavit stating the grounds on which he seeks to contest the application for eviction and obtains leave from the Rent Controlling Authority. It further provides that tenant shall submit an application supported by an affidavit stating the grounds on which he seeks to contest the application for eviction. Once this application is filed and is examined then the Rent Controlling Authority shall, within one month from the date of receipt of the application, examine the application supported by an affidavit by the tenant and grant him leave to defend on all the grounds mentioned in the application or on some limited grounds until and unless Rent Controlling Authority is satisfied that the tenant discloses such facts as would disentitle the landlord from obtaining an order of recovery of possession of the accommodation on the grounds specified in section 23-A.

10. Thus, the grant of leave is not automatic but it requires the application of mind by the Rent Controlling Authority and leave should be granted only after Rent Controlling Authority is satisfied that tenant has disclosed such facts which would disentitle the landlord from obtaining an order for the recovery of possession on the grounds specified under section 23-A.

11. Section 23-D lays down the procedure to be followed by the Rent Controlling Authority after the grant of leave to contest. Where leave is granted to the tenant to contest the application, the Rent Controlling Authority is required to commence the hearing of the application as early as practicable and decide the same, as far as may be, within six months of the order of grant of leave to the tenant to contest the application. Thus, section 23-D(1) clearly specifies that Rent Controlling Authority shall commence the hearing of the application as early as practicable. Thus, use of word "shall" clearly indicates a legislative intent that the Rent Controlling Authority has to proceed to decide the application after grant of leave.

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12. The contention of counsel for respondent is that Section 23-D(2) lays down the procedure as far as practicable, the practice and procedure of a Court of Small Causes including the recording of evidence under the Provincial Small Cause Courts Act, 1887. Counsel for respondent further contended that since the Code is applicable, therefore, opportunity to file written statement should be granted to the tenant after grant of leave.

Rent Controller is required to follow as far as practicable the practice and procedure of a Court of Small Causes including the recording of evidence under the Provincial Small Cause Courts Act, 1887. Procedure to be followed by a Court of Small Causes is provided under section 17 of the Provincial Small Cause Courts Act which is reproduced below :

17. Application of the Code.- (1) The procedure prescribed in the Code, 1908, shall save in so far as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits :

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.

(2) Whereas person has become liable as surety under the proviso to sub-section (1), the security may be realized in manner provided by Section 145 of the Code, 1908.

13. Section 23-D lays down that the Rent Controlling Authority shall follow the procedure as far as practicable of the Small Cause Courts. Thus, the procedure prescribed in the Code in so far as it relates to the proceedings under the Provincial Small Cause Courts Act is required to be followed by the Court of Small Causes.

14. As regards procedure is concerned, section 7 of the Code lays down that certain provisions in the body of the Code shall not apply to the Courts established under the Provincial Small Cause Courts Act, 1887 and the provisions shall not be extended to the Court of Small Causes. Section 7 is reproduced below :

7. Provincial Small Cause Courts.- The following provisions shall

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not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887(9 of 1887), [or under the Berar Small Cause Courts Law, 1905], or to Courts exercising the jurisdiction of a Court of Small Causes [under the said Act or Law], [or to Courts in] [any part of India to which the said Act does not extend] exercising a corresponding jurisdiction] that is to in say.-

(a) So much of the body of the Code as relates to-

- (i) Suits excepted from the cognizance of a Court of Small Causes;
- (ii) The execution of decrees in such suits;
- (iii) The execution of decrees against immovable property; and

(b) The following Sections, that is to say.-

Section 9,

Sections 91 and 92,

Sections 94 and 95 [so far as they authorize or relate to-

- (i) orders for the attachment of immovable property;
- (ii) injunctions,
- (iii) the appointment of a receiver of immovable property, or
- (iv) the interlocutory orders referred to in clause (e) of Section 94], and

Sections 96 to 112 and 115.

15. Thus, the provisions of sections 96, 104, 112 and 115 of the Code are not applicable to the Court of Small Causes. Similarly Order L of the Code excludes the applicability of some of the Rules and Orders to the Court of Small causes. Order L is reproduced below :

ORDER L 1. Provincial Small Cause Courts.-The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887 (9 of 1887) [or under the Berar Small Cause Courts Law, 1905] or to Courts exercising the jurisdiction of a Court of Small Causes [under the said Act or Law], [or to Courts in] [any part of India to which the said Act does not extend exercising a corresponding jurisdiction] that is to say-

(a) So much of this Schedule as relates to-

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- (i) Suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;
- (ii) The execution of decrees against immovable property or the interest of a partner in partnership property;
- (iii) The settlement of issues; and
- (b) The following Rules and orders:-
 - Order II, Rule 1 (frame of suit);
 - Order X, Rule 3 (record of examination of parties);
 - Order XV, except so much of Rule 4 as provides for the pronouncement at once of judgment;
 - Order XVIII, Rules 5 to 12 (evidence);
 - Orders XLI to XLV (appeals);
 - Order XLVII, Rules 2, 3, 5, 6, 7 (review);
 - Order LI.

Thus, limited sections and rules and orders of the Code are applicable to the proceedings under the Small Cause including recording of the evidence.

16. It is apparent that provisions of Order XVIII of the Code for recording evidence are not applicable to the proceedings under the Small Cause Courts Act. Therefore, Rent Controlling Authority is required to record memorandum of evidence as under the provisions of Order XVIII Rule 13 of the Code. It is not necessary for the authority to take down or dictate or record the evidence of the witnesses at length; but as the examination of each witness proceeds, shall make in writing, or dictate directly on the typewriter, or cause to be mechanically recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the Judge or otherwise authenticated, and shall form part of the record. Rent Controlling Authority is not required to record evidence either under Order XVIII Rule 4 or Rule 5 of the Code.

17. Apex court in the case of *Dhannalal V. Kalawatibai and others*¹, as held in para 9 of the judgment as under :

9. Broadly speaking, the main features of Chapter III-A are that it provides a summary procedure for the hearing of applications on the lines similar to those contained in Order 37 CPC. The tenant

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cannot contest the prayer for eviction from accommodation unless leave to defend is sought for by moving an application within the prescribed period of time and allowed. Default in appearance or refusal of leave results in the statement made by the landlord in the application for eviction being deemed to have been admitted by the tenant obliging the Rent Controlling Authority to pass an order of eviction. Where leave is granted to the tenant to contest the application, the Rent Controlling Authority shall hold an enquiry consistently with the practice and procedure of a Court of Small Causes. The requirement of the landlord is presumed to be bona fide unless the contrary is proved, that is to say, the burden of proof is placed on the tenant to rebut the case of the landlord contrary to the ordinary procedure in a civil court where the burden of proof lies on the landlord. As against an order of eviction passed by the RCA, a revision lies to the High Court and the remedy of appeal is excluded.

Thus, considering the scheme of the Act it is apparent that amendment is brought for providing speedy remedy to specified categories of landlords defined in Section 23-J of the Act following summary procedure.

18. Section 23-D of the Act provides that after grant of leave to the tenant to contest the application, the authority shall commence the hearing of the application as early as practicable and decide the same, as far as may be, within six months of the order of granting of leave to the tenant to contest the application. The mandate of legislature is clear and unambiguous. The authority is required to commence the hearing immediately after grant of leave. Filing of written statement is not the mandate of the legislature. Application is required to be decided on the grounds on which leave is granted to the tenant. Authority is required to decide the application on day to day basis, therefore, grant of time to file written statement under Order VIII Rule 1 of the Code will frustrate the mandate as tenant will be at liberty to seek adjournments on the grounds narrated by him and the adjournments may go beyond six months. Under section 23-D of the Act the procedure to be followed as far as practicable in a Court of Small Causes. Thus, if some provision is in conflict with the provisions of section 23-D of the Act then the procedure provided under section 23-D of the Act should be followed. Thus, permitting time to file written statement will frustrate the legislative intent. The intention of legislature is to provide expeditious decision of eviction proceedings filed by the landlord on the ground of *bona fide* need. On bare reading of section 23-D of the Act it is clear

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that there is no provision for filing of written statement as Rent Controlling Authority is required to decide the application within six months which indicates the intention of legislature for decision on the application on the grounds on which leave to defend is granted and there is no requirement for filing written statement.

19. Keeping the golden principle of the Interpretation of Statute and legislative intent in mind, language of section 23-D of the Act is clear and unambiguous. Rent Controlling Authority is bound to commence the hearing of the application as early as practicable and decide the same immediately after grant of leave to contest the application within a period of six months as far as may be. The legislature has nowhere provided for lengthy procedure after the grant of leave. When leave to defend is granted to the tenant on all or some grounds raised by the defendant, the Rent Controlling Authority is required to proceed with the application for eviction filed by the landlord and shall record evidence of the parties as there is no requirement of filing written statement by the defendant. Under section 23-D(3) there is a presumption of bona fide need in favour of the landlord. The presumption is rebuttable, therefore, after grant of leave to defend, Rent Controlling Authority shall proceed to decide the bona fide need of the landlord and grounds on which leave to defend is granted. He is not required to decide anything else except the bona fide need. Thus, on plain reading of section 23(D) the language is clear and simple and there is no provision for filing written statement by the tenant after leave to defend is granted to him. The grounds on which tenant is permitted to defend is to be considered and decided by the Rent Controlling Authority under the Scheme of Chapter III-A and he is not required to decide any other dispute.

20. Thus, the question referred is answered as under :

"under the scheme of Chapter III-A and the procedure laid down under section 23-D of the Act there is no provision for granting time to the tenant to file written statement after grant of leave to defend. The Rent Controlling Authority is required to proceed with the application for eviction and decide the application after considering the grounds on which leave to defend is granted to the tenant after recording evidence as provided under Order XVIII Rule 13 of the Code".

21. The reference is answered accordingly. File be placed before the appropriate Single bench for decision of the revision.

Order passed accordingly.

Court Room-13

24 April, 2007

BABULAL JAIN

...Petitioner*

v.

STATE OF M. P. & ors.

...Respondents

Service Law-Deputation-Person appointed on higher post from one Government Department to another-Question of higher pay-Held-F.R. 22 (D) (C.C.A. 1966) apply to only regular promotion to the post, not applicable to cases of Deputation-Where a purported order of Promotion has been affected from one cadre to another and that too without following statutory rules-Order of refixation of pay proper-However if the person discharged higher responsibility and fixation of his higher salary is not based on his misrepresentation or fraud-But, fixation of higher salary took place on misconception of Law-Excess pay recovery-Bad in the eye of Law.

Paranjit Singh Patwalia, (Amanpreet Singh Rahi, Manjeet Singh, Harikesh Singh, T. V. George, Satish Kumar and Ashwani Bhardwaj, for the Appellant.

G. P. Singh, Ms. Sushma Singh, Manohar Singh Bakshi, Debasis Misra, Naveen Sharma and B. S. Banthia, for the respondent.

Cur.adv.vult.

J U D G M E N T

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

2. The question which has been raised in this appeal arising out of a judgment and Order dated 27.4.2005 passed by the Madhya Pradesh High Court in Writ Petition (Civil) No. 2032/2003 centers around the interpretation of FR 22(D) of the M.P. Civil Services (CCA) Rule. Appellant was working as an Accountant. He was purported to have been recommended for his alleged promotion to the post of Election Supervisor by the Collector, District Dewas (MP) in terms of a letter dated 25.7.1998 addressed to the Chief Electoral Officer, Bhopal in the following terms:

"Election Supervisor posted in District Dewas has since superannuated. For filing of this vacant post, name of Shri R.B. Puranik was recommended to be promoted to the post election supervisor vide OM Sr. No. 1374/estab/98 dated 12.6.98. Thereafter Shri Babulal Jain, accountant, vide his application dated 25.7.98 has consented to be appointed to the post of election supervisor."

Thereafter, at the concerned Seniority list, being at serial No. 4 Mr. Babulal Jain is senior to Mr. Puranik and experienced in election related work.

Photo Copy of his ACRs are enclosed.

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Thereafter it is recommended that Shri Babulal Jain, accountant, be promoted to the post of election supervisor.

Encl :-
Photo Copy of ACRs
For the Years 93-97

Sd/-
Collector
District : Dewas (M.P.)"

3. The said recommendation having been accepted, he was appointed to the said post in the pay scale of Rs. 4000-100-6000 until further orders.

4. He was later on put in the pay scale of Rs. 4500-125-7000 with one increment as his personal pay. The Government of Madhya Pradesh, however, issued a circular letter on or about 9.2.1999 in regard to the fixation of pay on appointment to the post involving higher duties and responsibilities, stating;

"When any Government servant is appointed on higher post from one Department of Government to another department of the Government, the following guidelines are being issued to the State Government regarding pay fixation after careful consideration :

- i. Transfer from department of the Government to another on higher post shall not be treated as appointment rather posting.
- ii. On being appointed on higher post the pay fixation of the concerned Government servant shall not be fixed under FR 22(D) or 22(A) rather on pay being drawn by him on lower post."

5. On or about 13.12.2000, the Collector added the word "promotion" in his offer of appointment by way of Corrigendum after the words "until further orders";

"In the light of the objection dated 24.10.2000 raised at the time of pay fixation of Sh. Babulal Jain, then Asst. Grade-II/Accountant/now, Election Supervisor, Election Branch, Collocotrate, Dewas (M.P.) partial modification of OM Sr. No. 28.9.98/estab/98 Dewas dated 28.9.98 vide which he was appointed as Election Supervisor on the sanction of the Chief Election Officer (M.P.) the word "promotion" is added after until further order. Rest part of the order shall be effective as usual."

6. On and from 1.1.2000 he started drawing a salary of Rs. 6625/- per month. He was relieved of his duties as Election Supervisor with effect from 31.12.2001 by an Order dated 5.10.2001. On or about 26.12.2001, his pay was directed to be re-fixed in the light of the said Office Memorandum dated 9.2.1999 as on 1.1.2000 at Rs. 6000 + Rs. 179 as personal pay. It was directed that excess amount paid to him be recovered. He attained the age of superannuation on 31.12.2001.

7. Questioning the said order, he filed an original application before the Madhya Pradesh Administrative Tribunal.

8. Having regard to the fact that the appellant had filed a representation in respect of the said Order dated 13.12.2001 before the Chief Electoral Officer, Bhopal on 22.12.2001, the Tribunal in view of Section 21(b) of the Administrative Tribunals Act,

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1985 dismissed the said application summarily. A Writ Petition filed thereagainst has been dismissed by the High Court by reason of the impugned judgment stating;

"It is clear from the reply that the original post of the petitioner is Asstt. Grade-II, which is equivalent to Supervisor/Asstt. Superintendent. The petitioner had been given the pay-scale of Accountant/Election Supervisor, on which post he was not promoted as per law. In such circumstances, there is no illegality in the order of refixation of pay. The petitioner was himself working as Accountant. In such circumstances, there is no question for quashing the recovery."

9. Mr. Manjit Singh, the learned counsel appearing on behalf of the petitioner raised the following contentions in support of this appeal.

(i) The purported office memorandum dated 9.2.1999 is ultra vires Fundamental Rule 22(D) of the Rules, in terms whereof, promotion granted to the petitioner and consequent fixation of his salary on a higher scale of pay could not have been directed to be rescinded relying on or on the basis thereof and

(ii) In any event no recovery could have been directed to be made from the salary of the appellant.

10. Rule 22(D) of the M.P. Civil Services (CCA) Rule reads as under:-

"22. (1) Notwithstanding anything contained in these rules where a Govt. holding a post in a substantive temporary or officiating capacity is promoted or appointed in substantive temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing (his pay in respect of the lower post by one increment at the stage at which such pay has accrued)."

11. It is not the case of the appellant that the post of Assistant Grade-II provides for a channel of promotion to the post of Election Supervisor. Appellant, indisputably was an employee working in the Collectorate having been appointed by the State of Madhya Pradesh. A Collector of a District has many functions; one of them being to oversee holding of elections in his district as an Electoral Officer. He, therefore, although could have recommended for the posting of the appellant on the post of Election Supervisor, the question of his appointment or for that matter promotion thereto did not and could not arise. Appellant did not show that there exists any channel of promotion from the post of Assistant Grade-II to the post of Election Supervisor.

12. Thus, for all intent and purport, he was only deputed to that post. Having been placed on deputation to a post which carries higher responsibilities, some allowance could have been granted in his favour, but he could not have been placed on a higher scale of pay.

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13. In absence of any channel of promotion, the Collector of the District could not have, in law, appointed him on the post of Election Superintendent and later issue a corrigendum that he had been promoted thereto. Appellant before us has also not brought to our notice the extant rules of promotion operating in the field. It does not appear to be a case where the question of promotion to the said post was considered in terms of the rule by a competent authority. It furthermore does not appear that any Departmental Promotion Committee considered the cases of all eligible candidates therefor. Whereas in terms of the extant rules, the controlling authority may direct deputation of an employee from one post to the other, it is beyond any doubt that for the purpose of grant of promotion, it was obligatory on the part of the Collector to follow the statutory rules operating in the field.

14. It is, therefore, not a case as was sought to be made out that the Finance Department of the State of Madhya Pradesh could not have issued a clarification in this behalf as ultimately the financial burden would be on the State. Fundamental Rules 22(D) of the Rules to which our attention has been drawn by the learned counsel for the appellant refers to regular promotion to a post. It does not contemplate a situation of this nature. FR 22 (D) is not applicable to a case of deputation. It certainly would not apply where a purported order of promotion has been effected from one cadre to the other and that too without following the statutory rules. We, therefore, do not find any error in the judgment of the High Court in this behalf.

15. We, however, are of the opinion that in a case of this nature, no recovery should be directed to be made. Appellant has discharged higher responsibilities. It is not a case where he obtained higher salary on committing any fraud or misrepresentation. The mistake, if any, took place on a misconception of law. He was at least entitled to some allowances. In re-fixing his pay, his claim to that effect has not been considered. He has since retired. A sum of Rs. 22,000/- has been recovered from him. Such recovery has been effected without issuing any show cause notice. His case on merit in this behalf had not been considered by the Government and even by the Tribunal.

16. The Tribunal did not assign any reason in support of its order. The correct legal position was not brought to the notice of the tribunal.

17. For the reasons aforementioned, this appeal is allowed in part and to the extent mentioned hereinbefore.

18. We, therefore, while directing the respondents to refund the said sum of Rs.22,000/- to the appellant herein, also direct that his retirement benefit shall be calculated as if he had reached the age of superannuation only as an Accountant on the re-fixed pay and not on the scale of pay of the Election Supervisor. We issue this direction in exercise of our jurisdiction under Article 142 of the Constitution of India. No costs.

**M.P. STATE AGRO INDUSTRIES DEVELOPMENT
CORPORATION LTD. & anr.**

Appellants*

**v.
JAHAN KHAN**

Respondent

- A. Constitution of India—Articles 226/227—Alternative Remedy—Rule of exclusion of writ jurisdiction due to availability of alternative remedy is a rule of discretion and not one of compulsion—Writ Court may exercise discretionary jurisdiction of judicial review in atleast three contingencies where writ petition seeks enforcement of fundamental rights, where there is failure of principles of Natural Justice and where proceedings are wholly without jurisdiction or vires of an Act is challenged.**
- B. Departmental Action—Punishment—Respondent was working Branch Manager of Corporation—Respondent let out some machinery belonging to Corporation to one construction company—Respondent however failed to recover rent/charges under the agreement—Show Cause Notice was issued to respondent as to why the loss caused to Corporation and interest be not recovered from him and a penalty of stoppage of 3 increments with cumulative effect be not imposed—Explanation given by respondent was found unsatisfactory and recovery of Rs. 16,903.41 and stoppage of three increments with cumulative effect was ordered—High Court set aside the penalty of stoppage of three increments as it was a major penalty which cannot be imposed without holding departmental enquiry—Held—As per Regulations of Appellant stoppage of three increments with cumulative effect was a major penalty—High Court rightly held that imposition of impugned penalty without holding enquiry was illegal and without jurisdiction—Appeal dismissed.**

Before parting with the case, we may also deal with the submission of learned counsel for the appellants that a remedy by way of an appeal being available to the respondent, the High Court ought not to have entertained his petition filed under Articles 226/227 of the Constitution. There is no gainsaying that in a given case, the High Court may not entertain a writ petition under Article 226 of the Constitution on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or (iii) where the orders or

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proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar. (See: *Whirpool Corporation v. Registrar of Trade Marks*, (1998) 8 SCC 1. *Harbanslal Sahnia & Anr. v. Indian Oil Corporation Ltd. & Ors.*, (2003) 2 SCC 107. *State of H.P. v. Gujarat Ambuja Cement Ltd.* (2005) 6 SCC 499 and *Sanjana M. Wig v. Hindustan Petroleum Corporation Ltd.*, (2005) 8 SCC 242). (Para 10)

A bare reading of the scheme of the afore-extracted Regulations would show that there is a clear demarcation of quantum of punishment between the minor lapses, delinquencies and acts of misconduct. It is evident that having regard to the nature of acts of omission and commission, the punishment prescribed for minor lapses, and delinquencies, ostensibly not having perpetual effect, have been made non-appealable in comparison to the punishments for acts of misconduct, which include recovery of whole or a part of pecuniary loss, exceeding Rs.50/-, caused to the Corporation, withholding of increments for a specific period, termination of services, removal etc., which can all be characterized as major punishments. Precisely for this reason, all punishments falling in the latter category have been made appealable. The perceptive distinction in two sets of penalties, in our view, makes it abundantly clear that the Corporation has treated the punishments/penalties falling in the first category as minor punishments/penalties and the acts of misconduct, falling in the second category as major penalties. We may, however, hasten to add that it cannot be laid as a hard and fast rule that stoppage of increments, with or without hedge over it, is always to be treated as a major penalty, necessitating regular enquiry. It would depend on the Rules and Regulations governing the service conditions of the employee, though ordinarily, in the absence of specific Regulations, withholding of increments with cumulative effect is treated as a major penalty because it has a perpetual effect on the entire tenure of service of the employee.

Be that as it may, we are of the opinion that in the light of our interpretation of the aforementioned Regulations, the imposition of penalty vide composite order dated 19th December, 1989, directing recovery of loss of Rs.16903.41 and stoppage of three increments with cumulative effect, is a major penalty, clearly envisaging a regular enquiry before punishing the respondent. Since admittedly this procedure was not followed, the High Court was justified in coming to the conclusion that imposition of the impugned penalty without holding enquiry was illegal and without jurisdiction.

(Para 8)

J U D G M E N T

D. K. JAIN, J. :-Leave granted.

The M.P. State Agro Industries Development Corporation (hereinafter referred to as 'the Corporation') has preferred these appeals, questioning the correctness of the two orders dated 4th August, 2003 and 19th January, 2005 passed by the learned Single Judge of the High Court of Judicature at Jabalpur, in a writ petition filed by one of its employees' (the respondent herein), and the review application filed by the Corporation respectively. By the former order, the High Court has set aside order dated 19th December, 1989 passed by the Managing Director, in his capacity as the

disciplinary authority of the Corporation, imposing a penalty on the respondent in the form of recovery of an amount equivalent to the monetary loss suffered by the Corporation and stoppage of three increments with cumulative effect. By the latter order, the High Court has dismissed the application for review filed by the Corporation.

2. A few material facts, giving rise to the appeals, are as follows:

While working as the Branch Manager of the Corporation at its Satna Branch, the respondent entered into an agreement for letting out some machinery belonging to the Corporation, to one M/s. Universal Construction Company. It was alleged that the respondent failed to recover the rent/charges under the said agreement and thereby caused loss to the Corporation. Consequently, a notice was issued to the respondent to show cause as to why the loss of Rs.16,903.41 caused to the Corporation due to dereliction of duty on account of non-recovery of the estimated amount of rent and the interest be not recovered from him and a penalty of stoppage of three increments with cumulative effect be not imposed. In his reply to the show cause notice, the respondent, *inter alia*, stated that since he had been transferred from the said Branch and his successor had not taken any steps to recover rent etc. from the said Company, he was not responsible for the loss caused to the Corporation. The disciplinary authority, found the explanation to be unsatisfactory. He observed that the respondent had let out the machinery contrary to the instructions from the Headquarters as a result whereof the Corporation had suffered financial loss of the aforesaid amount. Accordingly, vide a composite order dated 19th December, 1989, he directed the recovery of Rs.16,903.41 from the salary of the respondent at 20% per month and stoppage of three increments with cumulative effect.

3. Being aggrieved, the respondent challenged the order by way of a writ petition filed under Articles 226/227 of the Constitution mainly on the ground that the penalty of stoppage of three increments with cumulative effect being a major penalty, it could not be imposed without holding a regular departmental enquiry as per the procedure laid down for imposition of a major penalty. The plea found favour with the High Court. The High Court was of the view that as per the Rules/Regulations, the stoppage of three increments with cumulative effect was a major penalty and, therefore, could not be imposed without holding a proper enquiry. Accordingly, the order passed by the disciplinary authority was quashed. Nevertheless, leave was granted to the Corporation to proceed against the respondent, if so advised. Not being satisfied with the order, the Corporation moved an application for review of the said order but without any success. As noted above, both the said orders are under challenge in these appeals.

4. Learned counsel for the Corporation has submitted that under M.P. State Agro Industries Development Corporation Limited Service (Recruitment and Selection) Regulations of 1976 (for short 'the Regulations'), punishment of stoppage of increments with cumulative effect is a minor penalty and, therefore, no regular enquiry is

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contemplated thereunder. It is contended that the High Court, lost sight of the relevant Regulations and going by the general notions, without referring to any other statutory provision, has erred in holding that the penalty imposed on the respondent was a major penalty. Learned counsel has also urged that an efficacious alternative remedy by way of an appeal being available to the respondent, the High Court should not have entertained the writ petition.

5. It is trite that the power of punishment to an employee is within the discretion of the employer and ordinarily the courts do not interfere, unless it is found that either the enquiry, proceedings or punishment is vitiated because of non-observance of the relevant Rules and Regulations or principles of natural justice or denial of reasonable opportunity to defend etc. or that the punishment is totally disproportionate to the proved misconduct of an employee. All these principles have been highlighted in *Indian Oil Corporation Ltd. & Anr. v. Ashok Kumar Arora*; (1997) 3 SCC 72 and *Lalit Popli v. Canara Bank & ors.*, (2003) 3 SCC 583.

6. Thus, the short question that arises for consideration is whether in the context of the Regulations governing the service conditions of the respondent, the recovery of the aforementioned amount and stoppage of three increments with cumulative effect is a major penalty and if so, the order of punishment is vitiated on any of the grounds noted above, warranting interference by the Court?

7. The Regulations relevant for the purpose of the instant case are as under:

"If the Managing Director is satisfied about the charges levied, he shall grant a personal hearing to the employee concerned, and if necessary, take oral examination of the witnesses named by the employee in his reply before taking a final decision.

An appeal shall

(a) Against orders of the Managing Director to the Chairman.

(b) Against the order of the Chairman to the Board.

(c) An aggrieved employee shall have a right to appeal provided it is preferred within 30 days of the receipt of the order against which the appeal is preferred. The appellate authority (except Board) shall decide the case within, 2 months from the date of the receipt of the appeal.

The following punishments may be awarded for good and sufficient reasons, including breaches of any rules of conduct or for committing any of the offences mentioned in the Schedule according to gravity of each case:-

"Class of misconduct	Punishment	Appealable or Non-Appealable
Minor Lapses and delinquencies	(a) Warning	Non-Appealable
	(b) Reprimand	Non-appealable
	(c) Fine upto 1/10th of pay	if the amount is not more than Rs.5/-

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	(d) Recovery from pay of whole or part of pecuniary loss caused to the corporation by negligence or breach of orders if within Rs.50/-	Non-Appealable
Acts of misconduct	(a) Recovery from pay of whole or part of pecuniary loss caused to the corporation by negligence or breach of orders if within Rs.50/-	Appealable
	(b) withholding increment for specific period	Appealable
	(c) stoppage of promotion	Appealable
	(d) reduction to a lower post or lower level pay	Appealable
	(e) termination of service	Appealable
	(f) removal	Appealable
	(g) discharge	Appealable
	(h) dismissal	Appealable
	(i) disqualifying the incumbent from any employment in the Agro Ind. Corpn.	Appealable

8. A bare reading of the scheme of the afore-extracted Regulations would show that there is a clear demarcation of quantum of punishment between the minor lapses, delinquencies and acts of misconduct. It is evident that having regard to the nature of acts of omission and commission, the punishment prescribed for minor lapses, and delinquencies, ostensibly not having perpetual effect, have been made non-appealable in comparison to the punishments for acts of misconduct, which include recovery of whole or a part of pecuniary loss, exceeding Rs.50/-, caused to the Corporation, withholding of increments for a specific period, termination of services, removal etc., which can all be characterized as major punishments. Precisely for this reason, all punishments falling in the latter category have been made appealable. The perceptive distinction in two sets of penalties, in our view, makes it abundantly clear that the Corporation has treated the punishments/penalties falling in the first category as minor punishments/penalties and the acts of misconduct, falling in the second category as major penalties. We may, however, hasten to add that it cannot be laid as a hard and fast rule that stoppage of increments, with or without hedge over it, is always to be treated as a major penalty, necessitating regular enquiry. It would depend on the Rules and Regulations governing the service conditions of the employee, though ordinarily, in the absence of specific Regulations, withholding of increments with cumulative effect

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is treated as a major penalty because it has a perpetual effect on the entire tenure of service of the employee.

9. Be that as it may, we are of the opinion that in the light of our interpretation of the aforementioned Regulations, the imposition of penalty vide composite order dated 19th December, 1989, directing recovery of loss of Rs.16903.41 and stoppage of three increments with cumulative effect, is a major penalty, clearly envisaging a regular enquiry before punishing the respondent. Since admittedly this procedure was not followed, the High Court was justified in coming to the conclusion that imposition of the impugned penalty without holding enquiry was illegal and without jurisdiction.

10. Before parting with the case, we may also deal with the submission of learned counsel for the appellants that a remedy by way of an appeal being available to the respondent, the High Court ought not to have entertained his petition filed under Articles 226/227 of the Constitution. There is no gainsaying that in a given case, the High Court may not entertain a writ petition under Article 226 of the Constitution on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar. (See: *Whirlpool Corporation v. Registrar of Trade Marks*, (1998) 8 SCC 1. *Harbanslal Sahnia & Anr. v. Indian Oil Corporation Ltd. & Ors.*, (2003) 2 SCC 107. *State of H.P. v. Gujarat Ambuja Cement Ltd.*, (2005) 6 SCC 499 and *Sanjana M. Wig v. Hindustan Petroleum Corporation Ltd.*, (2005) 8 SCC 242).

11. In the instant case, though it is true that the penalty order impugned in the writ petition was appealable in terms of the aforementioned Regulations but having coming to the conclusion that the order was per se illegal being violative of the principles of natural justice, it cannot be said that the High Court fell into an error in entertaining the writ petition filed by the respondent.

12. For the foregoing reasons, the appeals are devoid of any merit and consequently the same deserve to be dismissed, which we hereby do, leaving the parties to bear their own costs.

18 September, 2007

JAGANNATH

Appellant*

v.

STATE OF M.P.

Respondent

Penal Code, Indian (XLV of 1860)—Sections 34, 320, 326—Common Intention—Deceased and informant coming back to their houses after collecting wood from bank of river—Appellant and co-accused came there and committed theft of wood—During altercation another co-accused inflicted one axe blow on head of deceased—Other prosecution witnesses were assaulted by appellants—Deceased died on his way to Police Station—Appellant convicted under Section 302/34 of I.P.C.—Held—There had been a quarrel—No pre-mediation between appellant and another accused—Causing injury by another accused to deceased was an individual act—Common intention may develop on spot but must also be shared with other accused—Occurrence took place all of a sudden—Accused persons had acted on spur of moment having regard to altercations which preceded the incident—Difficult to lead to conclusion that appellant and another accused had developed common intention of causing death of deceased—Considering the nature of injuries sustained by injured witnesses appellant convicted under Section 326 of I.P.C. and sentenced to 10 years rigorous imprisonment—Appeal allowed accordingly.

Concededly, the occurrence took place all of a sudden. The act of theft on the part of the accused persons was complete. They had been taking away the wood. They were followed by the deceased and PW-11. They must have been obstructed from taking away the wood by them as the same were in their possession. It was at that juncture the deceased was said to have been assaulted by Prabhudayal and Dhan Singh. In a situation of this nature where the accused persons had acted at the spur of the moment having regard to the altercations which had preceded the incident, in our opinion, it is difficult to lead to the conclusion that Prabhudayal and the appellant had developed a common intention of causing death of the deceased. If the statements of the prosecution witnesses PWs 2, 11 and 12 are to be believed, they acted almost at the same time. We may notice that the third accused Dhan Singh has been acquitted. The State has not preferred any appeal thereagainst. The High Court has also convicted Prabhudayal under Section 302 of the Indian Penal Code holding that the same was his individual act. In this situation, we are of the opinion that it is difficult to uphold the contention of Ms. Makhija that the appellant is guilty under Section 302/34 of the Indian Penal Code.

(Para 14)

Noor @ Noordhin v. State of Karnataka 2007 (8) Scale 665*Lala Ram v. State of Rajasthan* 2007 (8) Scale 621.

*Jagannath v. State of M. P., 2007***J U D G M E N T**

S. B. SINHA, J :—Appellant before us with one Prabhudayal was tried for alleged commission of an offence under Section 302/34 of the Indian Penal Code. A First Information Report was lodged by one Dhoomsingh (PW-11) at Obeydullaganj Police Station on 16.09.1986 alleging that he and Ramsingh (since deceased) had collected pieces of wood from the bank of a river near their house, but the appellant and Prabhudayal, however, came there and committed theft thereof. An altercation took place. While the altercation was going on, Prabhudayal allegedly inflicted one axe blow on the head of the deceased causing an injury on his person. Two other prosecution witnesses, viz., Naval Singh (PW-2) and Hukumchand (PW-12) came to the scene of occurrence. They were also allegedly assaulted and consequently sustained injuries. The deceased while being taken to the police station breathed his last on the way.

2. Before the learned Trial Judge, the accused raised a defence that the deceased Ramsingh and Dhoomsingh (PW-11) accompanied by some other persons came to the house of Prabhudayal and asked his wife Kasturibai, who examined herself as DW-1, to serve them chicken and on her refusal to do so, they tried to outrage her modesty; injuries were caused to her in the process. A criminal case was instituted in that behalf. The incident is said to have taken place because of the said fact.

3. The learned Trial Judge, however, relying on the testimonies of the aforementioned witnesses and opining that they are injured witnesses, came to the conclusion that as the prosecution evidence was corroborated by medical evidence, the accused must be held to be guilty for the alleged commission of offence under Section 302 of the Indian Penal Code, and were sentenced to undergo rigorous imprisonment for life. An appeal preferred thereagainst by the accused has been dismissed by the High Court by reason of the impugned judgment.

4. Before embarking upon the questions raised before us, we may, however, notice that along with the appellant and the said Prabhudayal, one Dhan Singh was also prosecuted. He, however, was acquitted. The said judgment has not been questioned.

5. In its judgment, the High Court opined as under:

"From the evidence of the three eye witnesses of the prosecution corroborated by the medical evidence, it is amply proved that accused Prabhudayal caused the death of Ramsingh by causing injury by the axe on his head. This was a serious injury. Therefore, accused Prabhudayal must be held to have caused the death of Ramsingh intentionally. So far as appellant Jagannath is concerned, he has been convicted by the Trial Court with the aid of Section 34 I.P.C. It is found from the testimony of Dhoom Singh (P.W. 11), Hukumchand (P.W. 12) and Naval Singh (P.W.2) that accused Jagannath caused injuries to Dhoom Singh (P.W. 11) and Naval Singh (P.W. 2). Accused Jagannath was armed with an axe. He came with accused Prabhudayal. He caused injuries to Dhoom Singh (P.W.11) and Naval

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Singh (P.W.2) in furtherance of the common intention. From these facts it is borne out that he had also formed common intention with accused Prabhudayal to cause the death of Ramsingh. The trial court has rightly found appellant Jagannath guilty for the offence punishable under Section 302/34 I.P.C."

6. Mr. Balraj Dewan, learned counsel appearing on behalf of the appellant contended that having regard to the prosecution case itself and the evidence brought on record by the prosecution, the appellant herein cannot be said to have shared any common intention with Prabhudayal for causing the murder of the deceased Ramsingh.

7. Ms. Vibha Datta Makhija, learned counsel appearing on behalf of the State, however, supported the impugned judgment.

8. A short question, therefore, which arises for our consideration is as to whether the appellant is said to have shared any common intention with Prabhudayal in causing the death of Ramsingh.

9. For the aforementioned purpose, we may accept the statements of the prosecution witnesses and in particular the evidence of Naval Singh (PW-2), Dhoomsingh (PW-11) and Hukumchand (PW-12). As per these witnesses, both the brothers collected pieces of wood floating in the river Barkhukhar because of the flood, which were taken away by all the accused. According to the said witnesses, therefore, they had committed theft. They wanted to take away the same back from their possession. They had stopped the accused from taking the same away, whereupon Prabhudayal hit Ramsingh with an axe blow on his head. Appellant is said to have hit PW-11 on his back.

10. While the incident was going on, Naval Singh (PW-2) came to the spot. PW-2 was in his field which was at a distance of about one furlong from the place of occurrence. According to him, the deceased was being assaulted by all the three accused with axe and spear which were in their hands. Prabhudayal on his intervention is said to have caused an injury on the left temple of Naval Singh. It may be noticed that even PW-11 did not attribute any overt act on the part of the appellant herein so far as the deceased Ramsingh was concerned.

11. Hukumchand (PW-12) also categorically stated that the pieces of wood collected by the deceased and PW-11 were taken away by the accused and they had followed them.

12. It is, therefore, evident that there had been a quarrel. There was no pre-meditation between Prabhudayal and the appellant herein. Altercations had taken place. Injury caused upon the deceased by Prabhudayal, therefore, in our opinion, was an individual act. Similarly, causing of injury upon the prosecution witnesses by the appellant was his individual act. While embarking upon the question as to whether any intention had been shared by the appellant with the said Prabhudayal or not, the backdrop in which the incident had taken place, in our opinion, should be taken into consideration.

13. A common intention may be developed on the spot, but the same must not only be developed but also must be shared with the other accused.

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14. Concededly, the occurrence took place all of a sudden. The act of theft on the part of the accused persons was complete. They had been taking away the wood. They were followed by the deceased and PW-11. They must have been obstructed from taking away the wood by them as the same were in their possession. It was at that juncture the deceased was said to have been assaulted by Prabhudayal and Dhan Singh. In a situation of this nature where the accused persons had acted at the spur of the moment having regard to the altercations which had preceded the incident, in our opinion, it is difficult to lead to the conclusion that Prabhudayal and the appellant had developed a common intention of causing death of the deceased. If the statements of the prosecution witnesses PWs 2, 11 and 12 are to be believed, they acted almost at the same time. We may notice that the third accused Dhan Singh has been acquitted. The State has not preferred any appeal thereagainst. The High Court has also convicted Prabhudayal under Section 302 of the Indian Penal Code holding that the same was his individual act. In this situation, we are of the opinion that it is difficult to uphold the contention of Ms. Makhija that the appellant is guilty under Section 302/34 of the Indian Penal Code.

15. In *Noor @ Noordhin v. State of Karnataka*; [2007 (8) SCALE 665], this Court held as under:

"13. A common intention may be developed on the spot. Although a person may not be held guilty for having a common object, in a given situation, he may be held guilty for having a common intention, but such common intention must be shared with others..."

It was also observed:

"16. We have noticed hereinbefore that all the accused, other than the appellant, have been acquitted by the learned Trial Judge. The State did not prefer any appeal thereagainst. The prosecution, therefore, cannot say that the appellant had any common intention with any other accused persons who were named in the First Information Report. The matter might be different where a person is said to have formed common intention with other persons. The prosecution may succeed in obtaining a conviction against the appellant for commission of an offence under Section 34 of the Indian Penal Code if the names of the other accused persons and the roles played by them are known. Specific overt act of the accused is not only known but is proved. In this case the first information report was against known persons..."

16. In *Lala Ram v. State of Rajasthan* [2007 (8) SCALE 621], this Court observed:

"7. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons

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who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself

"10. The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch. Pulla Reddy and ors. v. State of Andhra Pradesh (AIR 1993 SC 1899)*, Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused."

17. Dr. J.P. Nayak (PW-5) examined Hukamchand and found abrasion on his body and a contusion $2 \times \frac{1}{4}$ " in the left side of chest and just above the left nipple and along with a contusion $2 \times \frac{1}{2}$ " was also found. One abrasion $1 \frac{1}{4}$ " was found in the middle part of the chest and blood was clotted on it.

18. Dr. V.K. Srivastava (PW-8) examined Naval Singh and found like a half moon size wound $\frac{1}{2}$ " $\times$ $\frac{1}{2}$ " on his body on the left side of his head which was deep to the above of the bone. According to Dr. Srivastava, this injury was caused by a hard and blunt weapon.

19. Dr. Srivastava also examined Dhoomsingh and found the following injuries on his person:

"(1) A incised wound $3 \times \frac{1}{6}$ " $\times$ $\frac{1}{6}$ " in a carve size on the back side of the chest.

(2) Incised wound on the wrist of the left hand $\frac{1}{3}$ " $\times$ $\frac{1}{3}$ " $\times$ $\frac{1}{3}$ ".

(3) Contused injury on the wrist of left hand $\frac{1}{4}$ " $\times$ $\frac{1}{4}$ ".

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According to Dr. Srivastava, these injuries were simple in nature.

20. Injuries caused to Naval Singh and Hukamchand were also simple in nature. In view of the nature of injuries caused by the appellant, he cannot be held to be guilty of commission of an offence under Section 302/34 of the Indian Penal Code. We, therefore, are of the considered view that the appellant is guilty of commission of an offence under Section 326 of the Indian Penal Code and not under Section 302/34 thereof.

21. Keeping in view of the facts and circumstances of this case, we are of the opinion that imposition of a sentence of 10 years Rigorous Imprisonment under the aforementioned provision shall meet the ends of justice. The Appeal is allowed in part and to the extent mentioned hereinbefore.

I.L.R. [2007] M.P., 1293

FULL BENCH

Before Mr. Justice A.K. Patnaik, Mr. Justice S.S. Jha, &

Mr. Justice A.M. Sapre

8 October, 2007

DIRECTOR GENERAL, INDIAN COUNCIL OF
MEDICAL RESEARCH, NEW DELHI and anr.

....Petitioner*

v.

DR. S.C. DIXIT and others

...Respondents

Reference made by Division Bench to Full Bench—Full Bench declined to answer the reference on the ground that when the question under reference was not involved before the referring Bench, it need not be answered.

Since the question referred to us did not arise for decision in the present W.P. No.13334/2004 and if at all it arose in W.P.(S) No.9832/2004 which stood disposed of by Division Bench by order dated 12.10.2004, this is not a case which should have been referred to a larger Bench for decision and accordingly we decline to answer the question. (Para 7)

Ashish Shrotri, Advocate for the petitioners.

M.P. Singh, Advocate for the respondent No.1.

Cur. adv. vult.

ORDER

A.K. PATNAIK, CHIEF JUSTICE :- By an order dated 20.5.2006, a Division Bench of this Court has referred the following question of law to a larger Bench and this is how the matter is placed before this Full Bench :

"Whether when the authority directs that a particular period will be treated as dies-non would it ipso facto mean that there would be continuity of service but the period would not be counted towards the pension, or the principles of natural justice are to be followed, as the said act visits the delinquent officer with adverse civil consequence ?"

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2. After hearing Mr. Ashish Shroti, learned counsel for the petitioners and Mr. M.P. Singh, learned counsel for the respondents, we decline to answer the question for reasons which follow.
3. The respondent No.1, Dr. S.C. Dixit while serving in the Regional Medical Research Centre for Tribals, Jabalpur, was served with a memo dated 29.6.1995 under Rule 14 of Central Civil Services (Classification, Control & Appeal) Rules, 1965 alleging that he had remained absent unauthorisedly with effect from 21.12.1993. After the inquiry that followed, the disciplinary authority considered the findings of the inquiry officer as well as the representation of the respondent No.1 against the findings of the inquiry officer and by order dated 8.2.2001 imposed a penalty of stoppage of one increment for a period of one year and further directed that the period of unauthorised absence of the respondent from 21.12.1993 to 31.7.2000 be treated as 'dies-non'. Aggrieved, the respondent filed OA No.209/2003 before the Central Administrative Tribunal, Jabalpur Bench, Jabalpur (for short 'the Tribunal') praying inter alia that the direction given by the disciplinary authority to treat the period from 21.12.1993 to 31.7.2000 as dies-non be quashed and the period from 21.12.1993 to 31.7.2000 be counted as qualifying service for all purposes i.e. salary, pensionary and other retiral benefits. The Tribunal in his its order dated 17.8.2004 held that principles of natural justice had been fully complied with before the order of penalty dated 8.2.2001 was passed and hence there was no ground to interfere with the order passed by the disciplinary authority and the period of unauthorized absence was rightly treated as dies-non. Aggrieved by the order dated 17.8.2004 of the Tribunal in O.A. No.209/2003, the respondent No.1 filed a writ petition under Articles 226 and 227 of the Constitution registered as W.P. No.9832/2004 and a Division Bench disposed of the writ petition by order dated 12.10.2004 declining to interfere with the order of penalty passed by the disciplinary authority but clarified that the usage of the term 'dies-non' would not amount to discontinuance of the respondent No.1, but the respondent No.1 will not be entitled for any interest.
4. In another O.A. No.191/2003 filed in the Tribunal, the respondent No.1 prayed for a direction to the Union of India, Director General of the Indian Council of Medical Research (for short 'ICMR') and the Director of the Regional Medical Research Centre (for short 'RMRC') to count the respondent No.1's services rendered from 22.7.1970 to 21.2.1989 for pensionary and other retiral benefits. By order dated 3.9.2004, the Tribunal allowed the OA with a direction to the authorities to count the services of the respondent No.1 rendered by him in National Nutrition Monitoring Bureau (for short 'NNMB') for the purpose of pensionary benefits and consider his case for grant of retiral benefits in accordance with law and rules. Against the order dated 3.9.2004 of the Tribunal in OA No.191/2003, the Director General of ICMR, New Delhi and the Director of the RMRC, Jabalpur filed the present W.P. No.13334/2004. The Division Bench, after hearing learned counsel for the parties, held in para 12 of the order dated 20.5.2006 that the stand taken by the writ petitioners, namely the Director General of ICMR, New Delhi and the Director of RMRC, Jabalpur that the respondent No.1 resigned from the post of Asstt. Research Officer from NNMB without applying to

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the authorities and therefore the period of service of the respondent No.1 in NNMB cannot be counted under Rule 26 of the Central Civil Services (Pension) Rules towards the service is absolutely misconceived and has to be rejected as the respondent No.1 had applied through the proper channel for resignation as has been held by the Tribunal.

5. From the aforesaid narration of facts, it will be clear that the questions whether the period treated as dies-non would ipso facto mean that there would be continuity of service and whether the period would not be counted towards the pension and whether principles of natural justice were to be followed before an order is passed for treating certain period as dies-non, if at all, arose in the earlier writ petition i.e. W.P. No.9832/2004, but by order dated 12.10.2004, the Division Bench had disposed of the said writ petition upholding the order of penalty passed by the disciplinary authority including the order for treating the period of unauthorized absence of the respondent No.1 for the period from absence of the respondent No.1 from 21.12.1993 to 31.7.2000 as dies-non and further clarifying it that the usage of the term 'dies-non' would not amount to discontinuance of the service of the respondent No.1.

6. The aforesaid narration of facts would further show that in the present W.P. No.13334/2004 the questions whether the period of unauthorised absence of respondent No.1 from 21.12.1993 to 31.7.2000 directed to be treated as dies-non would count for the purpose of only continuity of service or also for pension or whether principles of natural justice had to be followed before order to treat a particular period as dies-non did not arise for decision. The only question that arose for decision in the present W.P. No.13334/2004 was whether the Tribunal was right in directing in its order dated 3.9.2004 in OA No.191/2003 to count the services of the respondent No.1 rendered by him in NNMB for the purpose of pensionary and retiral benefits and this sole question has been decided by the Division Bench in the order dated 20.5.2006 in favour of the respondent No.1 and against the petitioners when the Division Bench did not interfere with the order of the Tribunal passed in the OA.

7. Since the question referred to us did not arise for decision in the present W.P. No.13334/2004 and if at all it arose in W.P.(S) No.9832/2004 which stood disposed of by Division Bench by order dated 12.10.2004, this is not a case which should have been referred to a larger Bench for decision and accordingly we decline to answer the question.

8. As we have seen, the Division Bench in its order dated 20.5.2006 in the present writ petition has upheld the impugned order of the Tribunal and hence, we dismiss the writ petition.

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha, &
Mr. Justice A.M. Sapre*

9 October, 2007

SMT. SHASHIBAI and five others.

....Applicants*

Vs.

SMT. REVABAI AGRAWAL and four others.

....Non-applicants

Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, M.P. 2005, Sections 2, 4(2), M.P. Uchcha Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981, Section 2 - Whether application for restoration/revival of Letters Patent Appeal against Judgment and Decree passed in exercise of appellate jurisdiction under Section 96 of Civil Procedure Code is maintainable - First Appeal filed by appellants dismissed by Learned Single Judge - Letters Patent Appeal dismissed because of Adhiniyam, 1981 - Held - Section 2 of Adhiniyam, 2005 provides for appeal from an order passed in exercise of jurisdiction under Article 226 of Constitution of India - In absence of any express or implied provision in Adhiniyam 2005 Letters Patent Appeals from judgment and decree passed in exercise of jurisdiction under Section 96 of C.P.C. are not revived - Reference answered accordingly.

On a reading of Section 2 of the 2005 Adhiniyam, we find that the section provides for appeal only from a judgment and order passed by a learned single Judge of this Court in exercise of jurisdiction under Art. 226 of the Constitution to a Division Bench of the High Court and it does not provide for any appeal against any other judgment or decree or order passed by the learned single Judge in exercise of any other jurisdiction of the High Court. There is also no other provision in the 1981 Adhiniyam from which the Court can hold that the 2005 Adhiniyam expressly or implicitly revived appeals under Clause 10 of the Letters Patent from an order, judgment or decree of the learned single Judge to the Division Bench in cases other than those in which the learned single Judge has exercised original jurisdiction under Article 226 of the Constitution.

In the absence of any express or implicit provision in the 2005 Adhiniyam providing for appeal from a judgment, decree or order passed by learned single Judge under Section 96 of the Code of Civil Procedure to a Division Bench, we hold that by virtue of the repeal of the 1981 Adhiniyam under Section 4 of the 2005 Adhiniyam, appeals under Clause 10 of the Letters Patent from a judgment and decree passed by learned single Judge in exercise of appellate jurisdiction under Section 96 of the Code of Civil Procedure are not revived.

(Para 12 and 13)

Case Referred :

The Amalgamated Coalfields Ltd. Calcutta and others Vs. The State of M.P. and another; 1966 MPLJ 842.

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Manoj Chaturvedi, for the applicants.

Manoj Sanghi, for the Non-applicant No.2.

Kumares Pathak, Dy. A.G. for the State.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by A. K. PATNAIK, C. J. :-The facts giving rise to this reference are that a Civil Suit No.1-A/81 filed by the husband and father of respondents 1 (a) and 1 (b) respectively, late Chhotelal Agrawal for certain reliefs was decreed by judgment and decree dated 22.2.1991 passed by the learned Additional District Judge, Harda Camp Sohagpur. The appellants filed First Appeal No.86 of 1991 and a learned single Judge of this Court by judgment and decree dated 7.2.1996 dismissed the appeal. Aggrieved, the applicants filed Letters Patent Appeal No.62 of 1997 under Clause 10 of the Letters Patent. By order dated 12.9.2005, the Division Bench dismissed the Letters Patent Appeal because by Section 2 of the M.P. Uchcha Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981 (for short '**the 1981 Adhiniyam**'), Clause 10 of the Letters Patent had been abolished with effect from 1st July 1981. Thereafter, the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for short '**the 2005 Adhiniyam**') was enacted by the Legislature of the State of Madhya Pradesh. Subsection (2) of Section 1 of the 2005 Adhiniyam provides that the 2005 Adhiniyam shall be deemed to have come into force on the 1st day of July, 1981. Sub-section (1) of Section 2 of the 2005 Adhiniyam provides that 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. In the proviso to sub-section (1) of Section 2 of the 2005 Adhiniyam, it is stated that no 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. Sub-section (1) of Section 4 of the 2005 Adhiniyam repeals the 1981 Adhiniyam and sub-section (2) of Section 4 of the 2005 Adhiniyam states that notwithstanding such repeal, anything done or any action taken under or in pursuance of the said Act and which has attained finality shall not be reopened in any court of law.

2. The applicants filed M.C.C. contending that with the repeal of the 1981 Adhiniyam which abolished the appeals under Clause 10 of the Letters Patent, the right of the applicants to file an appeal under Clause 10 of the Letters Patent was revived and accordingly prayed that Letters Patent Appeal No.62 of 1997 be restored to file and be heard on merits. The respondent No.2, on the other hand, contended that by the 2005 Adhiniyam, appeals under Clause 10 of the Letters Patent were not revived but only appeals against the orders passed by a learned single Judge of this Court under Art. 226 of the Constitution were revived because in Section 2 of the 2005 Adhiniyam, only appeals to the Division Bench of the High Court from judgments and orders of learned single Judge made in exercise of original jurisdiction under Art. 226 of the Constitution was provided for with effect from 1st July 1981 and the 2005 Adhiniyam

did not provide for any appeal against any order, judgment or decree passed by the learned single Judge in exercise of any other jurisdiction to the Division Bench.

3. By order dated 10.10.2006, the Division Bench referred this matter to the Full Bench. Since the question referred to the Full Bench has not been appropriately worded, we re-formulate the question as follows:

"Whether an application for restoration/revival would be maintainable in respect of an appeal under Clause 10 of the Letters Patent against a judgment and decree passed by learned single Judge in exercise of appellate jurisdiction under Section 96 of the code of Civil Procedure on the basis of the 2005 Adhiniyam?"

4. We have heard Mr. Manoj Chaturvedi, learned counsel for the applicants, Mr. Manoj Sanghi, learned counsel for respondent No.2 and Mr. Kumaresh Pathak, learned Deputy Advocate General for the State.

5. We find that Sections 1 and 2 of the 1981 Adhiniyam by which appeal under Clause 10 of the Letters Patent was abolished were to the following effect:

"1. **Short title and commencement-** (1) This Act may be called the Madhya Pradesh Uchha Nayaylaya (Letters Patent Appeals Samapti) Adhiniyam, 1981.

(2) It shall come into force at once.

2. **Abolition of appeal from judgment or order of one Judge of the High Court made in exercise of original or appellate jurisdiction -** (1) No appeal, arising from a suit or proceeding which includes a writ petition under article 226 and/or article 227 of the Constitution of India, instituted or commenced whether prior or subsequent to the commencement of this Act, shall lie to the High Court from a judgment, order or decree of one Judge of the High Court made in exercise of original jurisdiction or in exercise of appellate jurisdiction in respect of a judgment, order or decree made by a court subject to the superintendence of the High Court, notwithstanding anything to the contrary contained in clause 10 of the Letters Patent of His Majesty dated the 2nd day of January 1936 constituting High Court of Judicature at Nagpur, or any other law.

(2) Notwithstanding anything contained in sub-section (1), all appeals pending before the High Court on the date immediately preceding the date of commencement of this Act shall continue to lie and be heard and disposed of as hereto before, as if this Act had not been enacted."

6. The language of sub-section (2) of Section 1 of 1981 Adhiniyam, quoted above, made it clear that the 1981 Adhiniyam came into force at once i.e. from 1st July 1981 and Section 2 of the 1981 Adhiniyam provided that no appeal arising from a suit or proceeding including a writ petition under Article 226 and/or Article 227 Constitution of India, was to lie to the High Court from a judgment, order or decree of one Judge of

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the High Court made in exercise of original jurisdiction or in exercise of appellate jurisdiction in respect of judgment, order or decree made by a court subject to the superintendence of the High Court, notwithstanding anything to the contrary contained in Clause 10 of the Letters Patent or any other law. Sub-section (2) of Section 2, however, stated that notwithstanding such abolition of appeals under Clause 10 of the Letters Patent, all appeals pending before the High Court on the date immediately preceding the date of commencement of the 1981 Adhiniyam was to continue to lie and be heard and disposed of as if the 1981 Adhiniyam had not been enacted. The legal effect of the 1981 Adhiniyam thus was that with effect from 1st July 1981, all appeals under Clause 10 of the Letters Patent were abolished except appeals which were pending before the High Court on the date immediately preceding the date of the commencement of the 1981 Adhiniyam on 1st July, 1981.

7. Sections 1, 2 and 4 of the 2005 Adhiniyam, which are relevant for deciding the reference are extracted herein below:

"1.(1) This Act may be called the Madhya Pradesh Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005.

(2) It shall be deemed to have come into force on the 1st day of July, 1981."

"2. (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 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."

"4. (1) The Madhya Pradesh Uchcha Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981 (No.29 of 1981) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under or in pursuance of the said Act and which has attained finality shall not be reopened in any court of law."

8. It will be clear from sub-section (2) of Section 1 of the 2005 Adhiniyam that the 2005 Adhiniyam was to come into force with retrospective effect from first day of

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July, 1981 i.e. with effect from the date from which the appeals under Clause 10 of the Letters Patent were abolished by the 1981 Adhiniyam. It will be further clear from Section 2 of the 2005 Adhiniyam that under the 2005 Adhiniyam, appeal was provided for only from a judgment and order passed by a learned single Judge in exercise of original jurisdiction under Article 226 of the Constitution of India to a Division Bench comprising of two judges of the High Court and no appeal was provided for from the judgment and order passed by a learned single Judge of this Court in exercise of any other jurisdiction of the High Court. It will also be clear from Section 4 of the 2005 Adhiniyam that sub-section (1) of Section 4 repealed the 1981 Adhiniyam. The question which has to be answered in this reference is whether by the repeal of the 1981 Adhiniyam by Section 4 (1) of 2005 Adhiniyam, appeals under Clause 10 of the Letters Patent against judgment and decree passed by the learned single Judge in exercise of its jurisdiction under Section 96 of the Code of Civil Procedure would now be revived even though the 2005 Adhiniyam does not provide for any such revival.

9. The answer to this question lies in Section 12 of the M.P. General Clauses Act, 1957, which is quoted herein below:

"12. Revival of repealed enactment- In any Madhya Pradesh Act, it shall be necessary for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose."

A reading of Section 12 of the M.P. General Clauses Act, 1957, quoted above, would show that the Legislature must expressly state that the repealed Act is either wholly or partially revived. Section 12 of the M.P. General Clauses Act, 1957 was interpreted by P.V. Dixit, C.J. of this Court in *The Amalgamated Coalfields Ltd. Calcutta and others vs. The State of M.P. and another*, 1966 M.P.L.J. 842 in the following language:

"The only manner in which a repealed enactment can be revived is by enacting a fresh statute or by enacting a statute expressly saying that the Act is herewith revived. In this connection it would be pertinent to refer to section 12 of the Madhya Pradesh General Clauses Act, 1957, which lays down that in any Madhya Pradesh Act, it shall be necessary for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.

According to Dixit, C.J., therefore, the only manner in which a repealed enactment can be revived is by the statute expressly saying that the repealed Act is revived.

10. Section 12 of the M.P. General Clauses Act contains almost the same language as Section 11 (1) of the Interpretation Act, 1889 of England, which is quoted herein below:

"Repeal of repealing Acts, no revivor"

11. (1) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals a repealing enactment, it shall not be construed as reviving

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any enactment previously repealed, unless words are added reviving that enactment."

Referring to the change of law brought about by Section 11 (1) of the Interpretation Act, 1889 with effect from 1850, Maxwell on 'The Interpretation of Statutes (Twelfth Edition) says:

"The common law on the point was altered in 1850, by a provision now to be found in Section 11 (1) of the Interpretation Act 1889 : where an Act passed after 1850 "repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment ".

Similarly in Craies on 'Statute Law' (Seventh Edition), it is stated:

"But the present rule, now embodied in section 11(1) of the Interpretation Act 1889 is that where an Act passed after the year 1850 repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment."

From the aforesaid authorities, it is clear that where an Act is passed repealing a repealing enactment, it shall not be considered as reviving any enactment previously repealed unless words are added reviving that enactment.

11. The Supreme Court also discussed in *India Tobacco Co. Ltd. vs. The Commercial Tax Officer, Bhavanipore and others*, AIR 1975 S.C. 155, the general rule of construction in relation to repeal of a repealing Act and observed that the repeal of a repealing Act does not revive anything repealed thereby unless a different intention in the repealing statute expressly or implicitly appears. The relevant portion of the judgment from para 15 at page 158 as reported in the AIR is quoted herein below:

"The general rule of construction is that the repeal of a repealing Act does not revive anything repealed thereby. But the operation of this rule is not absolute. It is subject to the appearance of a "different intention" in the repealing statute. Again, such intention may be explicit or implicit."

12. On a reading of Section 2 of the 2005 Adhiniyam, we find that the section provides for appeal only from a judgment and order passed by a learned single Judge of this Court in exercise of jurisdiction under Art. 226 of the Constitution to a Division Bench of the High Court and it does not provide for any appeal against any other judgment or decree or order passed by the learned single Judge in exercise of any other jurisdiction of the High Court. There is also no other provision in the 1981 Adhiniyam from which the Court can hold that the 2005 Adhiniyam expressly or implicitly revived appeals under Clause 10 of the Letters Patent from an order, judgment or decree of the learned single Judge to the Division Bench in cases other than those in which the learned single Judge has exercised original jurisdiction under Article 226 of the Constitution.

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13. In the absence of any express or implicit provision in the 2005 Adhiniyam providing for appeal from a judgment, decree or order passed by learned single Judge under Section 96 of the Code of Civil Procedure to a Division Bench, we hold that by virtue of the repeal of the 1981 Adhiniyam under Section 4 of the 2005 Adhiniyam, appeals under Clause 10 of the Letters Patent from a judgment and decree passed by learned single Judge in exercise of appellate jurisdiction under Section 96 of the Code of Civil Procedure are not revived.

Since we have answered the reference, the application will now be placed before the appropriate Bench for disposal in accordance with law.

I.L.R. [2007] M.P., 1302

FULL BENCH

**Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S. S. Jha and
 Mr. Justice A. M. Sapre**

11 October, 2007

BHAV SINGH

...Appellant*

v.

SMT. SAVIRANI & ors.

...Respondents

Motor Vehicles Act (LIX of 1988), Sections 145 (g), 147(1), Motor Vehicles Rules, 1994, Rule 97(vii)–Liability of Insurer–Whether insurer liable to indemnify for death of deceased as a passenger was a third party–Deceased working as labour for owner of tractor-trolley–Deceased died in accident while travelling in tractor-trolley–Claims Tribunal awarded compensation but exonerated Insurance Company–Held–Third Party would mean party other than Contracting Parties to Insurance policy–However Insurer not liable for any bodily injury or death of third party unless liability is fastened on insurer under provisions of Section 147 of Act or under terms and conditions of Insurance Policy–Rule 97 of Rules of 1994 has been made by State Government to give effect to provisions of Chapter V of Act–Rule 97 has no bearing in interpreting provisions of Chapter XI–Decision of Division Bench in case of *National Insurance Co. Ltd. v. Sarvanlal and others* relying on Rule 97 of Rules of 1994 holding insurer liable for death or bodily injury by passenger does not lay down correct law–Reference answered accordingly.

We find on a perusal of the decision of the Full Bench in *Jugal Kishore (supra)* and particularly paragraphs 17 and 18 of the judgment that the Full Bench has taken a view that the expression 'third party' would mean a party other than the contracting parties to the insurance policy and would include everyone, be it a person traveling in another vehicle, one walking on the road or a passenger in the vehicle itself which is the subject matter of the insurance policy. In a Full Bench judgment delivered by us in *Smt. Sunita Lokhande and others v. The New India Assurance Company Limited*

*M. A. No. 687 of 1999. (J)

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and others ; I.L.R. (2007) M.P. 1145, we have quoted paragraph 17 of the judgment of the Full Bench in *Jugal Kishore (supra)* to hold that the insured who is a party to the insurance is not a third party for the purpose of Chapter XI of the Act, particularly Section 147 thereof. Thus, any person other than the insurer and the insured who are parties to the insurance policy is a 'third party'. The insurer, however, would not be liable for any bodily injury or death of a third party in an accident unless the liability is fastened on the insurer under the provisions of Section 147 of the Act or under the terms and conditions of the policy of insurance. Hence, the mere fact that a passenger is a third party would not fasten liability on the insurer unless such liability arises under Section 147 of the Act or under the terms and conditions of the insurance policy.

Regarding the Division Bench judgment in *Sarvanlal and others (supra)*, we find that the Division Bench has relied on not only the judgment of the Full Bench in *Jugal Kishore (supra)* but also clause (vii) of Rule 97 of the Motor Vehicles Rules, 1994 (for short 'the Rules of 1994') made by the State of M.P. So far as the judgment of the Full Bench in *Jugal Kishore (supra)* is concerned, we have already clarified the position of law. Regarding clause (7) of Rule 97 of the Rules of 1994, we find that the Rules of 1994 have been made by the State of M.P. under Section 96 of the Act and in particular sub-section (2) (xxxi) which provides that without prejudice to the generality of the foregoing power, rules under Section 96 may be made with respect to the carriage of persons other than the driver in goods carriages. Section 96 is placed in Chapter-V of the Act which relates to 'Control of Transport Vehicles'. Sub-section (1) of Section 96 of the Act states that the State Government may make rules for the purpose of carrying into effect the provisions of Chapter-V. Hence, Rule 97 of the Rules of 1994 has been made by the State Government to give effect to the provisions of Chapter-V of the Act, which, as we have seen, relates to 'control of transport vehicles'. These rules obviously cannot have a bearing in interpreting the provisions of Chapter-XI of the Act including Sections 145 and 147 of the Act. As we have indicated above, the liability of the insurer to indemnify the insured in respect of death or bodily injury suffered by a passenger or an employee would be covered by the provisions of Section 147 of the Act or the terms and conditions of the insurance policy. Thus, the decision of the Division Bench in *Sarwan Lal (supra)* in so far as it relies on Rule 97 of the Rules of 1994 to hold the insurer liable for death or bodily injury suffered by the passenger does not lay down the correct law. (Para 5 & 12)

Cases Referred :

Jugal Kishore and another v. Ramlesh Devi and others 2003 (4) MPLJ 546. *Smt. Sunita Lokhande and others v. The New India Assurance Company Limited and others* I.L.R. (2007) M.P. 1145. *Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co.* 1977 ACJ 343 (SC). *National Insurance Company Limited v. Prembai Patel* AIR 2005 SC 2337. *National Insurance Co. Ltd. v. Sarvanlal and others* 2004(4) MPHT 404 (Does not lay correct law so far it holds Insurer liable).

B. K. Rawat, for the appellant.

Ms Nirmala Raikwar, for the respondents no. 1 to 4.

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*S. K. Rao, with Ajit Agarwal, for the respondent no. 6.
Sanjay Agrawal, Amicus Curiae.*

*Cur.adv.vult.***ORDER**

The Order of the Court was delivered by A.K. PATNAIK, C. J: -The relevant facts leading to this reference are that Hariram was a labour working for the owner of the tractor-trolley bearing registration No.M.P.15/T-1184 and while traveling in the tractor-trolley met with an accident and died. His legal heirs filed M.A.C.T. Case No.29 of 1998 and by award dated 6.3.1999, the First Additional Motor Accident Claims Tribunal, Sagar awarded a sum of Rs.2,84,332/- with interest as stated therein against the owner of the vehicle but absolved the insurer of the tractor-trolley, the New India Assurance Company Limited. Aggrieved by the award of the Tribunal, the appellant who is the owner of the tractor-trolley has filed the present appeal.

2. When the appeal was heard by the Division Bench, a Full Bench decision of this Court in *Jugal Kishore and another v. Ramlesh Devi and others* 2003 (4) MPLJ 54, was cited by learned counsel for the appellant before the Division Bench to contend that a policy of insurance satisfying the requirements of Section 147 of the Motor Vehicles Act, 1988 (for short 'the Act') would cover liability of the insurer to any passenger of the tractor-trolley who may be a 'third party' within the meaning of the expression as used in Section 145 (a) of the Act. Learned counsel for the appellant also cited before the Division Bench a decision of a Division Bench of this Court in *National Insurance Co. Ltd. v. Sarvanlal and others*; 2004 (4) MPHT 404 (DB), in which the Division Bench after citing paragraphs 17 and 18 of the judgment of the Full Bench of this Court in *Jugal Kishore (supra)* held that the insurer is liable to indemnify for the death of the deceased as a passenger was a third party within the meaning of Section 145 (g) of the Act. The Division Bench, in the present appeal, passed an order dated 16.2.2007 saying that the law laid down in case of *Jugal Kishore (supra)* specially in paragraphs 17 and 18 thereof and the law laid down in the case of *Sarvanlal (supra)*, which states that the expression 'third party' would cover a passenger, requires re-consideration by an appropriate larger Bench.

3. We have heard Mr. B.K. Rawat, learned counsel for the appellant, Ms. Nirmala Raikwar, learned counsel for respondents 1 to 4, Mr. S.K. Rao, learned Senior Counsel for the respondent No.6 and Mr. Sanjay Agrawal, Advocate as Amicus Curiae.

4. Sub-section (1) of Section 147 of the Act which states that in order to comply with the requirements of Chapter XI, the policy of insurance must cover the liabilities as indicated in sub-section (1), is quoted herein below:

"147. Requirements of policies and limits of liability.

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer; or

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(b) insurer the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. - For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

5. We find on a perusal of the decision of the Full Bench in *Jugal Kishore (supra)* and particularly paragraphs 17 and 18 of the judgment that the Full Bench has taken a view that the expression 'third party' would mean a party other than the contracting parties to the insurance policy and would include everyone, be it a person traveling in another vehicle, one walking on the road or a passenger in the vehicle itself which is the subject matter of the insurance policy. In a Full Bench judgment delivered by us in *Smt. Sunita Lokhande and others v. The New India Assurance Company Limited and others*; I.L.R. (2007) M.P. 1145, we have quoted paragraph 17 of the judgment of the Full Bench in *Jugal Kishore (supra)* to hold that the insured who is a party to the insurance is not a third party for the purpose of Chapter XI of the Act, particularly Section 147 thereof. Thus, any person other than the insurer and the insured who are parties to the insurance policy is a 'third party'. The insurer, however, would not be

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liable for any bodily injury or death of a third party in an accident unless the liability is fastened on the insurer under the provisions of Section 147 of the Act or under the terms and conditions of the policy of insurance. Hence, the mere fact that a passenger is a third party would not fasten liability on the insurer unless such liability arises under Section 147 of the Act or under the terms and conditions of the insurance policy.

6. This will be clear from the judgment of the Supreme Court in *Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co.*; 1977 ACJ 343 (SC) in which the provisions of Section 95(a) and 95 (b) (i) of the Motor Vehicles Act, 1939 were considered and it was held by the Supreme Court that the plea that the words 'third party' are wide enough to cover all persons except the insured and the insurer is negatived as the insurance cover is not available to the passengers as would be clear from the provisions of Section 95 of the Motor Vehicles Act, 1939. Paragraphs 21 and 22 of the judgment of the Supreme Court in *Pushpabai Purshottam Udeshi (supra)* are quoted herein below:

"21. Section 95 (a) and 95 (b) (i) of the Motor Vehicles Act adopted the provisions of the English Road Traffic Act, 1960 and excluded the liability of the insurance company regarding the risk to the passengers. Section 95 provides that a policy of insurance must be a policy which insures the persons against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. The plea that the words "third party" are wide enough to cover all persons except the person and the insurer is negatived as the insurance cover is not available to the passengers is made clear by the proviso to sub-section which provides that a policy shall not be required:

'(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by a reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises.'

22. Therefore, it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As under Section 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured the plea of the counsel for the insurance company will have to be accepted and the insurance company held not liable under the requirements of the Motor Vehicles Act."

7. We are thus of the opinion that the observations of the Full Bench in *Jugal Kishore (supra)* with regard to the meaning of 'third party' in Chapter-XI of the Act has to be understood in the manner in which we have explained above.

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8. Similarly, an employee is a third party inasmuch as he is not a party to the insurance policy. But merely because an employee is a third party, the insurance company would not be liable to compensate in case such employee suffers bodily injury or dies in an accident in which the motor vehicle is involved unless Section 147 of the Act fixes such liability on the insured or unless the terms and conditions of the contract of insurance fixes liability on the insurer. Section 147 (1) (b) of the Act provides that in order to comply with the requirements of Chapter XI of the Act, a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against the liabilities mentioned in clauses (i) and (ii) thereunder. The Proviso to sub-section (1) of Section 147 of the Act, however, states that a policy shall not be required to cover liability other than the liability arising under the Workmen's Compensation Act, 1923 in respect of the death of, or bodily injury to any of the three categories of employees mentioned in sub-clauses (a), (b) and (c) of clause (i) of the proviso to sub-section (1) of Section 147 of the Act. Hence, even if an employee is a passenger or a person traveling in a motor vehicle which is insured as per the requirements of sub-section (1) of Section 147 of the Act, the insurer will not be liable to cover any liability in respect of death or bodily injury of such employee unless such employee falls in one of the categories mentioned in sub-clauses (a), (b) and (c) of clause (i) of the Proviso to sub-section (1) of Section 147 of the Act and further in cases where such employees fall under categories mentioned in sub-clauses (a), (b) and (c) of clause (i) of the Proviso to sub-section (1) of Section 147 of the Act, the insurer is liable only for the liability under the Workmen's Compensation Act, 1923.

9. This position of law has been clarified by Supreme Court in *National Insurance Company Limited v. Prembai Patel* ; AIR 2005 S.C. 2337. The relevant portion of the judgment of the Supreme Court in *Prembai Patel* (*supra*) from paragraph 12 of the judgment as reported in the AIR is extracted below:

"Clause (b) of sub-section (1) of Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of, or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) and (ii) of clause (b) are comprehensive in the sense that they cover both 'any person' or 'passenger'. An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words 'any person' occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-section (1) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising

under the Workmen's Act if the employee is such as described in sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act."

10. Sub-section (5) of Section 147 of the Act, however, provides that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under Section 147 of the Act shall be liable to indemnify a person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or classes of persons. Thus, if the policy of insurance covers any liability in addition to the liability under Section 147 (1) of the Act, the insurer will be liable to indemnify the insured in case of any liability not because of the provisions of sub-section (1) of Section 147 but because of the terms and conditions of contract of insurance between the insurer and the insured. Therefore, if the contract of insurance provides for a liability to a passenger or to an employee other than the liabilities provided under sub-section (1) of Section 147 of the Act, the insurer would be liable to indemnify the insured against such liability.

11. This position of law has been stated by us in our judgment in *Smt. Sunita Lokhande and others vs. The New India Assurance Company Limited and others* (*supra*). Paragraph 12 of our judgment in *Smt. Sunita Lokhande and others* (*supra*) is quoted herein below:

"12. This is not to say that the owner of the vehicle would not be entitled to any loss suffered in an accident from the insurer. All that we have held is that a policy only satisfying the requirements of Section 147 of the Act does not cover such loss suffered by the owner of the vehicle. But sub-section (5) of Section 147 of the Act makes it clear that a policy of insurance may contain terms and conditions under which the owner can claim loss suffered by him in the accident from the insurer notwithstanding anything contained in any law for the time being."

12. Regarding the Division Bench judgment in *Sarvanlal and others* (*supra*), we find that the Division Bench has relied on not only the judgment of the Full Bench in *Jugal Kishore* (*supra*) but also clause (vii) of Rule 97 of the Motor Vehicles Rules, 1994 (for short 'the Rules of 1994') made by the State of M.P. So far as the judgment of the Full Bench in *Jugal Kishore* (*supra*) is concerned, we have already clarified the position of law. Regarding clause (7) of Rule 97 of the Rules of 1994, we find that the Rules of 1994 have been made by the State of M.P. under Section 96 of the Act and in particular sub-section (2) (xxxii) which provides that without prejudice to the generality of the foregoing power, rules under Section 96 may be made with respect to the carriage of persons other than the driver in goods carriages. Section 96 is placed in Chapter-V of the Act which relates to 'Control of Transport Vehicles'. Sub-section (1) of Section 96 of the Act states that the State Government may make rules for the purpose of carrying into effect the provisions of Chapter-V. Hence, Rule 97 of the

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Rules of 1994 has been made by the State Government to give effect to the provisions of Chapter-V of the Act, which, as we have seen, relates to 'control of transport vehicles'. These rules obviously cannot have a bearing in interpreting the provisions of Chapter-XI of the Act including Sections 145 and 147 of the Act. As we have indicated above, the liability of the insurer to indemnify the insured in respect of death or bodily injury suffered by a passenger or an employee would be covered by the provisions of Section 147 of the Act or the terms and conditions of the insurance policy. Thus, the decision of the Division Bench in *Sarwan Lal (supra)* in so far as it relies on Rule 97 of the Rules of 1994 to hold the insurer liable for death or bodily injury suffered by the passenger does not lay down the correct law.

Since we have answered the reference, the appeal will now be listed before the appropriate Division Bench for hearing and disposal in accordance with law.

I.L.R. [2007] M.P., 1309

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.S. Jha and

Mr. Justice A.M. Sapre

11 October, 2007

SHRI SHANKARANARAYANA CONSTRUCTION COMPANY ---Applicant*
Vs.

STATE OF M.P. and ors.

---- Non-applicants

Madhyastham Adhikaran Adhiniyam, M. P. (XXIX of 1983)-Section 7, Arbitration and Conciliation Act, 1996, Section 11, Constitution of India, Article 254-Inconsistency between Laws made by Parliament and by Legislatures of States-Whether the provisions of 1983 Adhiniyam have been saved by 1996 Act or 1983 Adhiniyam stand impliedly repealed by 1996 Act-Petitioner entered into contract with respondents for construction of Central Spillway of Rajeev Sagar Tank. Conditions of contract provides that any claim valued at Rs. 50,000/- or more will be considered by Superintending Engineer-Petitioner made claim of Rs. 21.81crores which was rejected by S.E.-Petitioner filed application under Section 11(6) of 1996 Act for appointment of arbitrator instead of referring dispute to Tribunal-Objection raised by respondents that application under Section 11(6) is not maintainable-Held-State Legislature was competent to make law in respect of arbitration in Entry 13 of Concurrent List though Arbitration Act, 1940 made by Central Legislature was already in same filed-Parliament competent to make 1996 Act in same field-Provisions of 1983 Adhiniyam have been expressly saved-Provision of 1983 Adhiniyam are not repugnant to the provisions of 1996 Act and are not void and donot stand impliedly repealed by 1996 Act. Application under Section 11(6) of 1996 Act not maintainable.

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In our considered opinion, therefore, the State Legislature was competent to make a law in respect of 'arbitration' in Entry 13 of the Concurrent List, even though the Arbitration Act, 1940 made by the Central Legislature was already in the same field because the 1983 Adhiniyam had been reserved for consideration and had received the assent of the President, as provided in clause (2) of Art. 254 of the Constitution. Under the proviso to clause (2) of Art. 254 of the Constitution, Parliament was competent to make the 1996 Act in the same field, but while making the 1996 Act, has expressly saved the provisions of the 1983 Adhiniyam in sub-sections (4) and (5) of Section 2 of the 1996 Act, both in respect of statutory arbitrations and arbitrations pursuant to arbitration agreements in respect of disputes arising out of works contracts between the State Government or a State Government Undertaking and the contractor from the provisions of Part-I of the 1996 Act which are inconsistent with the provisions of the 1983 Adhiniyam. Hence, the provisions of the 1983 Adhiniyam are not repugnant to the provisions of the 1996 Act and are not void and do not stand impliedly repealed by the 1996 Act. (Para 24)

Cases Referred :

M/s Bhanu Kumar Jain & Associates vs. State of M.P. and two others (W.P.No.3138 of 1997) delivered on 21.11.1997; *M/s Spedra Engineering Corporation, Engineers and Contractors vs. State of M.P.*, AIR 1988 S.C. 111; *Sundaram Finance Limited vs. NEPC India Limited*, (1999) 2 S.C.C. 479; *Zaverbhai Amaldas vs. the State of Bombay*, 1955 SCR 799; *T. Barai vs. Henry Ah Hoe & another*, AIR 1983 S.C. 150; *Stock Exchange, Mumbai vs. Vinay Bubna and others*, AIR 1999 Bombay 266; *Punjab State Electricity Board, Mahilpur vs. Guru Nanak Cold Storage & Ice Factory, Mahilpur and another*, (1996) 5 S.C.C. 411; *Owners and Parties Interested in the Vessel M.V. 'Baltic Confidence' and another vs. State Trading Corporation of India Limited and another*, (2001) 7 S.C.C. 473; *Bhaiji vs. Sub-Divisional Officer, Thandla and others*, (2003) 1 S.C.C. 692; *Manohar Lal vs. The State of Punjab*, AIR 1961 S.C. 418, *Societe De Traction et D'Electricite Societe Anonyme vs. Kamani Engineering Company Ltd.*, AIR 1964 S.C. 558.

S.S. Naganand with *V.R. Rao*, for the applicant.

V.K. Shukla, Dy.A.G.: for the Non-applicant.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :- The petitioner entered into a works contract with the respondents for construction of a central spillway of Rajeev Sagar Tank Project in Guna District of Madhya Pradesh on 19.2.1999. Clause 4.3.29.2 of the Conditions of Contract provides that any claim valued at Rs.50,000/- or more will be considered by the Superintending Engineer (for short 'the S.E.') of the Circle and any party dissatisfied with the final decision of the S.E. may refer the dispute to the Tribunal constituted under The Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (for short 'the 1983 Adhiniyam'). The petitioner made a claim of Rs.21.81 crores against the State of Madhya Pradesh

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in its letter dated 7.1.2002. The S.E. rejected the claim and this was communicated to the petitioner by the Executive Engineer by letter dated 6.6.2002. Instead of referring the dispute to the Tribunal constituted under the 1983 Adhiniyam, the petitioner filed the M.C.C. under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act') contending that the 1983 Adhiniyam being repugnant to the provisions of the Act of 1996 is void by operation of Art. 254 of the Constitution and making a prayer to the Chief Justice of the High Court under Section 11 (6) of the Act of 1996 to appoint an arbitral tribunal comprising of three members to decide the disputes between the petitioner and the respondents arising under the works contract. The petitioner also filed the Writ Petition under Article 226 of the Constitution making a prayer to the Court to declare that the provisions of the 1983 Adhiniyam were impliedly repealed by the 1996 Act and to declare the provisions of the 1983 Adhiniyam to the extent irreconcilable with the provisions of the 1996 Act as void and unenforceable and to further declare that the parties to the works contract are governed by the provisions of the 1996 Act.

2. The respondents filed an Interlocutory Application (I.A.No.609 of 2003) contending that the High Court had no jurisdiction to entertain a dispute arising under the works contract because under the provisions of the 1983 Adhiniyam, the dispute has to be dispute has to be referred to the Arbitration Tribunal constituted thereunder and hence the application under Section 11 (6) of the 1996 Act was not maintainable before the High Court. The M.C.C. was heard by a Division Bench of the High Court at Gwalior. The counsel for the petitioner contended before the Division Bench that the 1996 Act made by Parliament will prevail over the 1983 Adhiniyam made by the State Legislature by virtue of the provisions of Article 254 of the Constitution. The respondents, on the other hand, relied upon the unreported judgment in *M/s Bhanu Kumar Jain & Associates vs. State of M.P. and two others* (W.P.No.3138 of 1997) delivered on 21.11.1997 at Jabalpur in which a Division Bench of this Court has held that the 1983 Adhiniyam was saved by the provisions of sub-section (4) of Section 2 of the 1996 Act and, therefore, the 1983 Adhiniyam survives even after the coming into force of the 1996 Act.

3. The Division Bench, in its order dated 19.12.2003, took note of the provisions of Art. 254 of the Constitution as well as the decision of this Court in *M/s Spedra Engineering Corporation, Engineers and Contractors vs. State of M.P.*, AIR 1988 M.P. 111, in which it was held that the 1983 Adhiniyam being a later special Act would prevail over the Arbitration Act 1940, as provided in Art. 254 (2) of the Constitution. The Division Bench however was of the prima-facie view that the 1996 Act being a later Act made by Parliament would prevail over the 1983 Adhiniyam made by the State Legislature to the extent of repugnancy as provided in Article 254 of the Constitution. Accordingly, the Division Bench held that the judgment delivered in the case of *Bhanu Kumar Jain & Associates* (supra) required reconsideration by a larger Bench vis-à-vis a matter where there is an arbitration agreement between the parties. This is how this matter has been placed before this Bench.

4. Mr. S.S. Naganand, learned senior counsel appearing for the petitioner, submitted

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that the 1996 Act has consolidated and amended the law relating to domestic arbitration and this will be clear from para 8 of the judgment of the Supreme Court in *Sundaram Finance Limited vs. NEPC India Limited*, (1999) 2 S.C.C. 479 in which the Statement of Objects and Reasons appended to the Bill which finally became the 1996 Act have been quoted. He argued that the 1996 Act therefore covered every matter relating to arbitration including arbitration between a State Government and a contractor arising out of a works contract and the view taken by the Division Bench of this Court in *M/s Bhanu Kumar Jain & Associates* (supra) that the arbitration between the State Government and a contractor arising out of a works contract has been excluded from the provisions of 1996 Act is not correct.

5. Mr. Naganand further submitted that the provisions of 1996 Act and the 1983 Adhiniyam have to be interpreted in the light of Article 254 of the Constitution. He referred to Clause (1) of Art. 254 of the Constitution which provides that if any provision of law made by the Legislature of a State is repugnant to any provision of law made by Parliament, which Parliament is competent to enact with respect to one of the matters enumerated in the Concurrent List, then the law made by Parliament, whether passed before or after the law made by the Legislature of a State, shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void. He submitted that Clause (2) of Art. 254 of the Constitution, however, makes an exception that if a law made by the Legislature of a State with respect to any of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament on the same matter, then the law so made by the Legislature of a State shall prevail in that State if it has been reserved for the consideration and receives the assent of the President. He submitted that in accordance with clause (2) of Art. 254 of the Constitution, the 1983 Adhiniyam which contains provisions repugnant to the provisions of the Arbitration Act 1940 was reserved for consideration and received the assent of the President and it is for this reason that this Court in *M/s Spendra Engineering Corporation Engineers and Contractors* (supra) held that the 1983 Adhiniyam will prevail over the Arbitration Act, 1940 in the State of M.P. in view of Art. 254 (2) of the Constitution in so far as there is repugnancy between the two Acts. He referred to the Proviso to Clause (2) of Art. 254 of the Constitution which states that nothing in clause (2) of Art. 254 of the Constitution shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding, amending, varying or repealing the law so made by the Legislature of a State to show that after the 1983 Adhiniyam was made by the State, it was competent for Parliament to make a law relating to arbitration including arbitration arising out of the works contract between the State of M.P. and the contractor so as to amend, vary or repeal the 1983 Adhiniyam. He submitted that Parliament has thus made the 1996 Act covering the entire field of domestic arbitration and therefore the 1983 Adhiniyam in the same field of arbitration is repugnant to the 1996 Act and void and stands impliedly repealed and the 1996 Act will prevail over the 1983 Adhiniyam.

6. Mr. Naganand relied on the decision in *Zaverbhai Amaldas vs. the State of*

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Bombay, 1955 SCR 799, in which the Supreme Court has held that Section 2 of the Bombay Act No. XXXVI of 1947 cannot prevail as against Section 7 of the Essential Supplies (Temporary Powers) Act No. XXIV of 1946 as amended by Act No. LII of 1950 made by the Parliament because of the provisions of Art. 254 (1) of the Constitution. He cited also the decision in *T. Barai vs. Henry Ah Hoe & another*, AIR 1983 S.C. 150, in which the Supreme Court similarly held that after the Parliament enacted the Central Amendment Act in 1976, amending the provisions of Prevention of Food Adulteration Act, 1954, the State amendment made in the Prevention of Food Adulteration Act, 1954 by the State Legislature of West Bengal by the West Bengal Amendment Act of 1973 with respect to the same matter, stood impliedly repealed under Art. 254 (1) of the Constitution.

7. Mr. Naganand next submitted that the Division Bench in the case of *M/s Bhanu Kumar Jain & Associates* (supra) has taken a view that sub-section (4) of Section 2 of the 1996 Act saves other enactments which are inconsistent with the provisions of the 1996 Act and that such other enactments will include the 1983 Adhiniyam and therefore, the 1983 Adhiniyam survives even after the 1996 Act came into force. He submitted that this view taken by the Division Bench in *M/s Bhanu Kumar Jain and Associates* (supra) is not correct because sub-section (4) of Section 2 of the 1996 Act is a provision which relates to statutory arbitrations and does not relate to arbitrations pursuant to an arbitration agreement. He submitted that sub-section (4) of Section 2 of the 1996 Act is *pari materia* with Section 46 of the Arbitration Act, 1940, and it will be clear from the marginal title of Section 46 of the Arbitration Act, 1940 that the provisions relate to statutory arbitrations and not to arbitration pursuant to an arbitration agreement. He cited the decision of the Bombay High Court in *Stock Exchange, Mumbai vs. Vinay Bubna and others*, AIR 1999 Bombay 266 in support of his contention that the provisions of Section 46 of the Arbitration Act, 1940 and sub-section (4) of Section 2 of the 1996 Act relate to statutory arbitrations and not arbitration pursuant to arbitration agreement. He submitted that the 1983 Adhiniyam does not provide for statutory arbitration but arbitration of disputes pursuant to an arbitration agreement arising out of a works contract between the State of M.P. or its undertakings and the contractor and hence the provisions of the 1983 Adhiniyam were not saved by sub-section (4) of Section 2 of the 1996 Act. He submitted that clause 4.3.29.2 of the conditions of contract between the petitioner and the State of M.P. contains an arbitration agreement providing that a party who is dissatisfied with the final decision of the S.E. may refer the dispute to the Arbitration Tribunal constituted under the 1983 Adhiniyam and, therefore, the arbitration sought for by the petitioner is an arbitration pursuant to an arbitration agreement to which the provisions of the 1996 Act apply.

8. In reply, Mr. V.K. Shukla, learned Deputy Advocate General appearing for the respondents submitted that this Court has already held in para 12 of the judgment in *M/s Spedra Engineering Corporation, Engineers and Contractors vs. State of M.P.*, as reported in the AIR (supra) that the 1983 Adhiniyam is a special enactment providing for statutory arbitration arising out of disputes concerning works contract and, therefore, the provisions of the 1983 Adhiniyam which are inconsistent with Part-

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I of the 1996 Act, will prevail, as provided in sub-section (4) of Section 2 of the 1996 Act. He submitted that the language of Clause 4.3.29.2 of the conditions of contract between the petitioner and the State of M.P. would show that it provides for arbitration by a Tribunal constituted under the 1983 Adhinyam for statutory arbitration and not for arbitration pursuant to an arbitration agreement. He argued that the contention of Mr. Naganand that this clause in the conditions of contract provides for an arbitration agreement and that the provisions of the 1996 Act will therefore apply to the arbitration agreement between the petitioner and the State of M.P. is thus misconceived.

9. Mr Shukla cited the decision in *Punjab State Electricity Board, Mahilpur vs. Guru Nanak Cold Storage & Ice Factory, Mahilpur and another*, (1996) 5 S.C.C. 411 in which the Supreme Court has held that the provisions of Arbitration Act, 1940 will not apply to statutory arbitration under Section 52 of the Electricity Act, 1910 or under Section 76 (2) of the Electricity Supply Act, 1948. He also relied on the decision in *Owners and Parties Interested in the Vessel M.V. 'Baltic Confidence' and another vs. State Trading Corporation of India Limited and another*, (2001) 7 S.C.C. 473 in which the Supreme Court has held that attempts should be made to give meaning and effect to the incorporation clause by which the parties have incorporated the arbitration clause and submitted that by clause 4.3.29.2 of the conditions of contract, the parties have intended to incorporate the 1983 Adhinyam for arbitration of disputes between the parties. He submitted that the contention of Mr. Naganand that the arbitration of the dispute between the petitioner and the respondents is to be governed by the provisions of the 1996 Act is therefore not correct.

10. Mr. Shukla finally submitted that the 1996 Act is a general law relating to arbitration in India whereas the 1983 Adhinyam is a special law relating to arbitration of disputes between the State of M.P. or its undertaking and the contractors arising out of works contracts and the authorities discussed in the judgment of the Division Bench in *Bhanu Kumar Jain and Associates* (supra) are clear that a special law prevails over the general law in respect of matters covered by the special law.

11. We find on a reading of the Statement of Objects and Reasons appended to the Bill which finally became the 1996 Act as well as the long title of the 1996 Act that the purpose of the 1996 Act was to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The Statement of Objects appended to the Bill indicate the main purposes of the Bill but cannot control the express provisions of the Act. In *Bhaiji vs. Sub-Divisional Officer, Thandla and others*, (2003) 1 S.C.C. 692, R.C. Lahoti, J, as he then was, relying on 'Principles of Statutory Interpretation' by Justice G.P.Singh, Eighth Edition 2001, pp.206-09 observed:

" Reference to the Statement of Objects and Reasons is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy. The weight of judicial authority leans in favour of the view that the Statement of Objects and Reasons cannot

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be utilized for the purpose of restricting and controlling the plain meaning of the language employed by the legislature in drafting a statute and excluding from its operation such transactions which it plainly covers. (See Principles of Statutory Interpretation by Justice G.P. Singh, 8th Edn., 2001, pp.206-09)."

Similarly, the long title of an Act indicates the main purposes of the Act, but cannot control the express operative provisions of the Act. In *Manohar Lal vs. The State of Punjab*, AIR 1961 S.C. 418, N. Rajagopala Ayyangar, J, speaking for the Constitution Bench, observed:

"..... The long title of the Act extracted earlier and on which learned Counsel placed considerable reliance as a guide for the determination of the scope of the Act and the policy underlying the legislation, no doubt, indicates the main purposes of the enactment but cannot, obviously, control the express operative provisions of the Act....."

12. Hence we have to look at the language used in the provisions in the 1996 Act to find whether the provisions in the 1996 Act apply to arbitration or disputes arising out of works contract between the State of M.P. or its undertaking and the contractor. The 1996 Act has three parts: Part-I contains provisions relating to arbitration, Part-II contains provisions relating to conciliation and Part-III makes provisions for enforcement of certain foreign awards. Sub-sections (2), (3), (4) and (5) of Section 2 in Part-I of the 1996 Act are clubbed together under the heading "Scope" and broadly indicate the scope of arbitration under Part-I of the 1996 Act and are quoted herein below:

"Scope

- (2) This Part shall apply where the place of arbitration is in India.
- (3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration
- (4) This Part except sub-section (1) of section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.
- (5) Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."

Sub-section (2) of Section 2 states that Part-I of the 1996 Act applies to any arbitration which takes place in India. Sub-section (3) of Section 2 makes it clear that Part-I of

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the 1996 Act does not apply to any law under which disputes are not submitted to arbitration.

13. Sub-section (4) of Section 2 of the 1996 Act is relevant as it has been held by the Division Bench of this Court in *M/s Bhanu Kumar Jain & Associates* (supra) that this sub-section saves the 1983 Adhiniyam even after the 1996 Act came into force. Sub-section (4) of Section 2 provides that the provisions of Part-I of the 1996 Act except sub-section (1) of Section 40 and Sections 41 and 43 shall apply to every "arbitration under any other enactment for the time being in force" as if the arbitration were pursuant to an arbitration agreement and "as if that other enactment were an arbitration agreement". The phrases "arbitration under any other enactment for the time being in force" and "as if that other enactment were an arbitration agreement" in sub-section (4) of Section 2 of the 1996 Act clearly show that this sub-section relates to statutory arbitration under any other enactment for the time being in force and not to arbitration pursuant to arbitration agreement. This sub-section, however, states that the provisions of Part-I of the 1996 Act shall apply to the statutory arbitrations under other enactments for the time being in force with the rider that if there is inconsistency between the provisions of Part-I of the 1996 Act and the provisions of the other enactments or rules made thereunder providing for statutory arbitration, the provisions of the other enactments or rules providing for statutory arbitration will prevail over the provisions of Part-I of the 1996 Act.

14. We may now examine whether the 1983 Adhiniyam is one such other enactment for the time being in force providing for statutory arbitration. That the 1983 Adhiniyam provides for statutory arbitration will be clear from a perusal of the different provisions of the 1983 Adhiniyam. Section 3 of the 1983 Adhiniyam provides that the State Government shall by notification constitute an Arbitration Tribunal for resolving all such disputes and differences pertaining to works contract or arising out of or connected with execution, discharge or satisfaction of any such works contract. Thus, the jurisdiction of the Arbitration Tribunal was to decide all disputes and differences pertaining to works contract or arising out of or in connection with execution, discharge, or satisfaction of any such works contract. Sub-section (1) of Section 7 of the Adhiniyam states that either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Arbitration Tribunal. This provision in the 1983 Adhiniyam makes it clear that a reference to the Arbitration Tribunal can be made by a party under the 1983 Adhiniyam even in the absence of an arbitration agreement. In *M/s Spedra Engineering Corporation, Bhopal vs. State of M.P.* (supra), the Division Bench while deciding the validity of the 1983 Adhiniyam held that the 1983 Adhiniyam provides for statutory arbitration because in the absence of agreement between the parties, disputes can be referred to the Arbitration Tribunal. Relevant passage from para 12 of the judgment in *M/s Spedra Engineering Corporation, Bhopal vs. State of M.P.* (supra), as reported in the AIR is quoted herein below:

"..... So there can be statutory arbitration even in the absence of agreement between the parties to refer their dispute to an arbitrator.

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Therefore, it cannot be said that the present enactment is an antithesis of arbitration because it provides for arbitration even in the absence of any agreement between the parties to refer their dispute to the arbitrator. It is also not a misnomer to call the tribunal constituted under the Act as an Arbitration Tribunal as it has all the requisites to arbitrate in the dispute between the contractor and the State except that there is no agreement to refer the dispute to the Tribunal for arbitration that is by the statute."

15. Similarly, in *M/s Bhanu Kumar Jain & Associates vs. State of M.P. and others* (supra), the Division Bench has held that the 1983 Adhiniyam provides for statutory arbitration of disputes arising out of works contract between a private party and the State of value of rupees fifty thousand or more. Relevant portion of para 9 of the judgment of the Division Bench in *M/s Bhanu Kumar Jain & Associates vs. State of M.P. and others* (supra) is extracted herein below:

".... Therefore, the area of operation of this particular enactment of 1983 is not to govern all the arbitrations in the State but it only confines itself to the arbitrations which are dealing with the State or the works contract of Public Undertakings as may be notified by the State. As such this is a particular enactment dealing with limited subject and it is not a general arbitration Act applicable to all arbitration proceedings in the State. It is true that procedure which has been prescribed for resolving disputes has to be by constitution of arbitration Tribunal and all the works contracts in the State will necessarily be governed by this enactment wherever the valuation is rupees fifty thousand or more as defined in clause (d) of Section 2 of the Act of 1983. This is a statutory arbitration which shall be made applicable to all the works contracts arising between private parties and the State and valuation thereof is rupees fifty thousand or more. A detailed procedure with regard to constitution of arbitration Tribunal has been given and it has been provided that no person shall be appointed as Chairman of the Tribunal, unless he is or has been a Judge of a High Court and no person shall be qualified for appointment as a member of the Tribunal unless he is or has been a District Judge of not less than seven years standing, or he is or has been a Revenue Commissioner or has held a post equivalent to the rank of Revenue Commissioner for a total period of not less than five years, or he is or has been Chief Engineer in the service of the State Government in Public Works, Irrigation or Public Health Engineering Department, or a Chief Engineer in the service of the Madhya Pradesh Electricity Board, or a Senior Deputy Accountant General of the office of the Accountant General, Madhya Pradesh for a period of not less than five years. Tenure of five years has been fixed. This is a particular statutory enactment for disposal of certain arbitration agreements arising between the State and private contractors

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for supply of goods or material and all other matters connected therewith where the valuation is rupees fifty thousand or more."

16. We are of the considered opinion that the view taken in the two Division Bench decisions of this Court in *M/s Spedra Engineering Corporation and M/s Bhanu Kumar Jain and Associates* (supra) that the 1983 Adhiniyam provides for statutory arbitration is correct in law because it provides for arbitration of disputes by the Arbitration Tribunal even without an arbitration agreement. Accordingly, the provisions of Part-I of the 1996 Act will also apply to arbitration under the 1983 Adhiniyam as if the arbitration was pursuant to an arbitration agreement and as if the provisions of the 1983 Adhiniyam were an arbitration agreement, but if there is any conflict between the provisions of Part-I of the 1996 Act and the provisions of the 1983 Adhiniyam, then the provisions of the 1983 Adhiniyam will prevail as provided in sub-section (4) of Section 2 of the 1996 Act.

17. We now come to sub-section (5) of Section 2 of the 1996 Act. The opening words of sub-section (5) of Section 2 of the 1996 Act say that Part-I shall apply to all arbitrations and to all proceedings relating thereto subject to the provisions of sub-section (4). As we have seen, sub-section (4) of Section 2 of the 1996 Act states that in case of inconsistency between the provisions of Part-I of the 1996 Act and the provisions of other enactments providing for statutory arbitration, the provisions of the other enactments providing for statutory arbitrations shall prevail over the provisions of Part-I of the 1996 Act. Sub-section (5) of Section 2 of the 1996 Act further states that the provisions of Part-I of 1996 Act will apply to all arbitrations and to all proceedings relating thereto, "save in so far as is otherwise provided by any law for the time being in force". "Any law for the time being in force" in sub-section (5) of Section 2 of the 1996 Act obviously would not mean enactments providing for statutory arbitrations as such enactments providing for statutory arbitrations are covered by sub-section (4) of Section 2 of the 1996 Act. The expression "any law for the time being in force" will mean any law in force not providing for statutory arbitrations but other arbitrations including all arbitrations pursuant to arbitration agreement or consensual arbitration. The language of sub-section (5) of Section 2 of the 1996 Act is identical to the language of Section 47 of the Arbitration Act, 1940 which provided that the provisions of the Arbitration Act 1940 would be applicable to all arbitrations and to all proceedings thereunder but subject to the provisions of Section 46 and save in so far as is otherwise provided by any other law for the time being in force. In *Societe De Traction et D'Electricite Societe Anonyme vs. Kamani Engineering Company Ltd.*, AIR 1964 S.C. 558, the Supreme Court had the occasion to deal with the identical expression in Section 47 of the Arbitration Act, 1940 and their Lordships held that by the use of the words "save in so far as is otherwise provided by any law for the time being in force" in Section 47 of the Arbitration Act, 1940, the Legislature has clearly made provisions of the Arbitration (Protocol and Convention) Act, 1937 applicable to consensual arbitrations under the Arbitration Act, 1940. Para 19 of the judgment of the Supreme Court in *Societe De Traction et D'Electricite Societe Anonyme vs. Kamani Engineering Company Ltd.* (supra) as reported in the AIR is quoted herein below:

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"19. That however is not decisive of the question which falls to be determined before us. Section 47 of the Arbitration Act, 1940, is as much a part of the Indian Arbitration Act as any other provision and that section makes the provisions of the Arbitration Act applicable to all arbitrations and to all proceedings thereunder but subject to the provisions of S.46 and save in so far as is otherwise provided by any law for the time being in force. We are not concerned in the present case with a statutory arbitration. But by the use of the words 'save in so far as is otherwise provided by any law for the time being in force', the Legislature has clearly made the provisions of the Arbitration (Protocol and Convention) Act, 1937, applicable to consensual arbitrations under the Arbitration Act of 1940 when the conditions prescribed for the application of that Act are attracted, even if the scheme of arbitration recognized thereby is inconsistent with Ss.3 to 38 of the Arbitration Act, 1940. The Arbitration (Protocol and Convention) Act 6 of 1937 was enacted for giving effect to the protocol on arbitration clauses set forth in the First Schedule and of the conventions on the execution of foreign arbitral awards set forth in the Second Schedule and for enabling the conventions to become operative in India."

It is thus clear that in sub-section (5) of Section 2 of the 1996 Act, the provisions of any other law for the time being in force will include a law in force applicable to arbitration pursuant to an arbitration agreement or consensual arbitration and such law has been saved from the applicability of Part-I of the 1996 Act to the extent such law in force has provisions which are inconsistent with the provisions of Part-I of the 1996 Act.

18. The question which arises for decision in this case is whether the 1983 Adhiniyam can be held to be a law for the time being in force relating to arbitration pursuant to an arbitration agreement and is thus saved by sub-section (5) of Section 2 of the 1996 Act from the inconsistent provisions of the 1996 Act. As we have seen, sub-section (1) of Section 7 of the 1983 Adhiniyam provides that either party to a works contract shall irrespective of the fact whether the agreement contains arbitration clause or not refer in writing the dispute to the Arbitration Tribunal. The words 'works contract' have been defined under Section 2 (1) (i) of the 1983 Adhiniyam to mean an agreement in writing for execution of any of the works mentioned therein entered into by the State Government or by an official of the State Government or Public Undertakings or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the works mentioned therein. Thus, if a works contract, as defined in Section 2 (1) (i) of the 1983 Adhiniyam contains an arbitration clause, either party to the works contract will have to refer the dispute to the Arbitration Tribunal as constituted under Section 3 of the 1983 Adhiniyam and cannot refer it to any other arbitrator for arbitration. The 1983 Adhiniyam is, therefore, a law for the time being in force relating to arbitration pursuant to an arbitration agreement between the State Government or its Undertaking

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and the contractor and is saved under sub-section (5) of Section 2 of the 1996 Act from the provisions of Part-I of the 1996 Act which are inconsistent with the provisions of the 1983 Adhiniyam.

19. According to Mr. Naganand, however, such a construction of sub-section (5) of Section 2 of the 1996 Act so as to save the 1983 Adhiniyam from the inconsistent provisions of the 1996 Act will be contrary to Article 254 of the Constitution. Article 254 of the Constitution is quoted herein below:

"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States -

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

20. The language of Art. 254 of the Constitution would show that the article is attracted only where Parliament and the Legislature of a State legislate with respect to any matter in the Concurrent List in respect of which both Parliament and the Legislature of a State have legislative powers. The language of clause (1) of Art. 254 provides that where both Parliament and the Legislature of a State make law with respect to the matter enumerated in the Concurrent List, any provision of a law made by the Legislature of a State, if repugnant to any provision of a law made by Parliament, shall, to the extent of repugnancy, be void and the law made by Parliament shall prevail. Thus, there must be repugnancy between the provision of a law made by the Legislature of a State and the provision of a law made by Parliament, in respect of any particular matter and if there is such repugnancy, the provision of a law made by the Legislature of a State will be void to the extent of such repugnancy and the provision of the law made by Parliament shall prevail. In such cases, the Supreme Court has held that there

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may not be any express repeal by a later law made by Parliament on the same subject matter as the earlier law made by the State Legislature but there is implied repeal of the law made by the State Legislature because the later law made by Parliament and the law made by the State Legislature on the same subject matter cannot stand together. This will be clear from the following reasoning adopted by the Supreme Court in *Zaverbhai Amaldas vs. The State of Bombay* (supra) cited by Mr. Naganand:

" It is true, as already pointed out, that on a question under Article 254 (1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254 (2) whether the further legislation by Parliament is in respect of the same matter as that of the State law. We must accordingly hold that section 2 of Bombay Act No. XXXVI of 1947 cannot prevail as against section 7 of the Essential Supplies (Temporary Powers) Act No. XXIV of 1946 as amended by Act No. LII of 1950."

(para 55 of 1955 SCR 799 p. 809)

21. Following the reasoning in *Zaverbhai Amaldas vs. The State of Bombay* (supra), the Supreme Court held in *T. Barai vs. Henri Ah Hoe and another* (supra) cited by Mr. Naganand that a State law would be repugnant to the Union law when there is direct conflict between the two laws and such repugnancy may also arise where both the laws operate in the same field and the two cannot possibly stand together. The relevant passage from para 50 of the judgment of the Supreme Court in *T. Barai vs. Henri Ah Hoe and another* (supra) is extracted herein below:

" The proviso to Article 254 (2) empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent. Parliament may repeal or amend the repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together, e.g. where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed. In all such cases, the law made by Parliament shall prevail over the State law under Article 254 (1). That being so, when Parliament stepped in and enacted the Central Amendment Act, it being a later law made by Parliament 'with respect to the same matter', the West Bengal Amendment Act stood impliedly repealed."

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22. Thus, we will have to examine whether in fact there is any repugnancy between the provision of law made by any State law and a provision made in the Union law where the State law and the Union law are in respect of the same matter in the Concurrent List to find out whether by operation of Art. 254 (1) of the Constitution of India, the Union law will prevail over the State law and the State law would be impliedly repealed. In *T. Barai vs. Henri Ah Hoe and another* (supra), the Supreme Court further held that when repeal is by a fresh legislation on the same subject by Parliament, the line of enquiry would be whether the fresh legislation made by Parliament manifests an intention to destroy the rights and liabilities under the law made by a State Legislature and this enquiry has to be done by the Court by looking at the provisions of the new Act. The following passage from paragraph 18 of the judgment of the Supreme Court in *T. Barai vs. Henri Ah Hoe and another* (supra), as reported in the AIR would make this point clear:

"18. But when the repeal is followed by fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of inquiry would be, not whether the new Act expressly keeps alive old rights and liabilities', in the words of Mukherjee, J., 'but whether it manifests an intention to destroy them.' The Court held that it cannot subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention in compatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new Act and the mere absence of a saving clause is not by itself material. The Court therefore held that the provisions of Section 6 of the General Clauses Act will apply to a case of repeal even if there is simultaneous enactment unless a contrary intention can be gathered from the new enactment."

23. Adopting the line of inquiry as indicated by the Supreme Court in *T. Barai vs. Henri Ah Hoe and another* (supra), we find that sub-section (4) of Section 2 of the 1996 Act clearly shows an intention of Parliament to save the provisions in other enactments providing for statutory arbitrations which are inconsistent with the provisions of Part-I of the 1996 Act. Similarly, sub-section (5) of Section 2 of the 1996 Act shows the intention of Parliament to save the provisions of any other law for the time being in force providing for arbitration including arbitration pursuant to an agreement. The provisions of the 1983 Adhiniyam, in so far as they provide for statutory arbitration in respect of a dispute arising out of a works contract between the State Government or its Undertaking and a contractor are therefore saved from the inconsistent provisions of Part-I of the 1996 Act by sub-section (4) of Section 2 of the 1996 Act. Similarly, the provisions of the 1983 Adhiniyam, in so far as they apply to arbitration pursuant to an

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agreement in a works contract between the State Government or a State Government Undertaking and a contractor are saved from the inconsistent provisions of Part-I of the 1996 Act by sub-section (5) of Section 2 of the 1996 Act.

24. In our considered opinion, therefore, the State Legislature was competent to make a law in respect of 'arbitration' in Entry 13 of the Concurrent List, even though the Arbitration Act, 1940 made by the Central Legislature was already in the same field because the 1983 Adhiniyam had been reserved for consideration and had received the assent of the President, as provided in clause (2) of Art. 254 of the Constitution. Under the proviso to clause (2) of Art. 254 of the Constitution, Parliament was competent to make the 1996 Act in the same field, but while making the 1996 Act, has expressly saved the provisions of the 1983 Adhiniyam in sub-sections (4) and (5) of Section 2 of the 1996 Act, both in respect of statutory arbitrations and arbitrations pursuant to arbitration agreements in respect of disputes arising out of works contracts between the State Government or a State Government Undertaking and the contractor from the provisions of Part-I of the 1996 Act which are inconsistent with the provisions of the 1983 Adhiniyam. Hence, the provisions of the 1983 Adhiniyam are not repugnant to the provisions of the 1996 Act and are not void and do not stand impliedly repealed by the 1996 Act.

The application made under Section 11(6) of the 1996 Act is therefore maintainable and the writ petition has no merit. The MCC and the writ petition are accordingly dismissed.

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FULL BENCH

*Before Mr. A.K. Patnaik Chief Justice, Mr. Justice A.M. Sapre and
Mr. Justice S.K. Seth*

17 October, 2007

DEVI SINGH

Vs.

VIKRAM SINGH & ors.

--- Appellant*

--- Respondents

Motor Vehicles Act (LIX of 1988)-Sections 166, 128 and Rule 123-The driver of the motor cycle was carrying two pillion riders in violation of section 128-Motor Cycle met with an accident with a jeep-Pillion riders sustained injuries-Claims petition filed by Pillion riders-Tribunal held negligence on the part of the jeep driver was 80% and 20% on the part of motor cycle driver and accordingly awarded the compensation-Appeal filed by Insurance Company, contention was raised before D.B. that Pillion rider was traveling in violation of section 128 of the Act so compensation should be reduced on account of his contributory negligence-D.B. found conflict between *Manjo Bee's case* and *Smt. Uma Tiwari's Case*, *Kanti Devi Sikarwar's case* and referred the case to the

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Full Bench-F.B. after considering various judgments and text on the law of Torts-Held-"Contributory negligence" is distinct from the "negligence"-Merely two or more persons are traveling as Pillion rider on a motor cycle *ipso facto* can not be termed as "contributory negligence" on the part of the driver of the motor cycle-Further Held-Law laid down in *Manjo Bee's Case* is correct law-Law laid down in *Smt. Uma Tiwari's Case* and *Kanti Devi Sikarwar's case* -Expressly overruled.

Accordingly, our answers to the questions referred to us are :

- (1) Violation of Section 128 of the Act, per se, by a motor cyclist does not raise a presumption of contributory negligence on his part;
- (2) Similarly, violation of Section 128 of the Act per se does not amount to contributory negligence on the part of the pillion riders.
- (3) A pillion rider cannot put up a plea of composite negligence by the driver of the motor cycle, if the driver only violates Section 128 of the Act.

We also hold that the view taken by the Division Bench of this Court in *Manjo Bee and others Vs. Sajjed Khan and others* (supra) is correct in law and the view taken by the Division Bench in *National Insurance Company Ltd. Vs. Smt. Uma Tiwari and others* (supra) and in *Kanti Devi Sikarwar and others Vs. Om Prakash and others* (supra) is not correct in law. (Para 14 and 15)

Cases Referred :

Manjo Bee & Ors. v. sajjed Khan & Ors., 2007 ACJ 737; *Oriental Fire & Genl. Ins. Co. Ltd. v. Sudha Devi & Ors.*, 1991 ACJ 4; *Managing Director, Tamil Nadu State Transport Corporation Ltd. v. Abdul Salam & Ors.*, 2004 ACJ 1827.

Cases Relied :

Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak & ors., AIR 2002 SC 2864; *Jacob Mathew v. State of Punjab & anr.*, AIR 2005 SC 3180.

Cases Over ruled :

Kanti Devi Sikarwar & ors. V. Om Prakash & Ors., 2007 (1) MPWN 88; *National Insurance Company Ltd. V. Smt. Uma Tiwari and Ors.*, 2007 (1) MANISA 204 (M.P.).

G.M.Chaphekar with Manish Sujan Jain and Shahid Sheikh, for the Appellant
H.C. Jindal with M. Jindal, for the Respondent No. 3.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :- The relevant facts leading to this reference are that one Devisingh was a pillion rider on a motor cycle bearing registration No.MP-09-LF-1486

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driven by Meharbansingh. The motor cycle met with an accident with a jeep bearing registration No.MP-09-W-2291 driven by Vikramsingh. As a consequence of the accident, the driver of the motor cycle as well as the two pillion riders on the motor cycle sustained injuries and they filed claim petitions under Section 166 of the Motor Vehicles Act, 1988 (for short 'the Act').

2. The Tribunal awarded a compensation of Rs.1,95,100/- with interest at the rate of 6% per annum from the date of filing of the claim petition in favour of Devisingh after holding that the negligence on the part of the jeep driver was 80% and the negligence on the part of the motor cycle driver was 20%. Aggrieved by the award, the United India Insurance Co. Ltd. filed M.A.No.314/2007 and Devisingh filed M.A.No.670/2007. When the appeals were heard by the Division Bench, a contention was raised on behalf of the United India Insurance Co. that Section 128 of the Act provides that no driver of a two wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and in the present case, the driver of the motor cycle was carrying two pillion riders in violation of Section 128 of the Act and, therefore, the compensation awarded by the Tribunal in favour of Devisingh, who was one of the two pillion riders, should have been reduced on account of his contributory negligence.

3. In its order dated 24.8.2000 passed in the present appeals, the Division Bench found that in *Manjo Bee and others Vs. Sajjad Khan and others* (2007 ACJ 737), a Division Bench of this Court has taken a view that carrying more passengers than one on motor cycle is in violation of Section 128 of the Act but by carrying more persons, one cannot be said to be negligent as a person having more than one pillion rider can also be more careful than a person going alone on a motor cycle and accordingly repelled the plea of contributory negligence on behalf of the driver of the motor-cycle raised in that case. The Division Bench further found that in *National Insurance Company Ltd. Vs. Smt. Uma Tiwari and others* (2007 (I) MANISA 204 (M.P)), another Division Bench of this Court accepted the contention that the deceased who was driving the scooter along with three other persons by violating the provisions of Section 128 of the Act was negligent and had accordingly determined the liability on the owners of the jeep and the scooter in the proportion of 70:30 and another Division Bench of this Court in *Kanti Devi Sikarwar and others Vs. Om Prakash and others* (2007 (I) MPWN 88), has held that Section 128 of the Act bars riding of more than one pillion rider on the motor cycle and in that case the deceased who was driving the motor cycle in violation of the provisions of Section 128 of the Act was guilty of contributory negligence. By the order dated 24.8.2000, the Division Bench accordingly referred the following two questions to a larger Bench.

(1) Whether by violation of Section 128 of the Motor Vehicles Act, 1988 by a motorcyclist, a presumption can arise with regard to his negligence and thereby making it contributory as far as he is concerned?

(2) Whether a pillion rider while being carried in a motor cycle in violation of Section 128 of the Act contributes to the causation of the

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accident simply because of statutory violation, or negligence as a matter of fact should arise and further whether he can put forth the stance that there has been a composite negligence by the offending vehicle as well as by the driver of a two wheeled motor cycle?

4. Mr.G.M.Chaphekar, learned senior advocate, appearing for the appellant relying on the Ratanlal & Dhirajlal, The Law of Torts, 25th Edition 2006 by Justice G.P.Singh submitted that negligence on the part of the plaintiff which can be described as contributory negligence must have a causal connection with the damage suffered by him and hence violation of Section 128 of the Act by itself does not amount to contributory negligence. He submitted that the decision of the Division Bench in Manjo Bee and others Vs. Sajjad Khan and others that violation of Section 128 of the Act by itself does not amount to contributory negligence on the part of the driver of the motor cycle or the pillion riders, therefore, lays down the correct law.

5. Mr.V.P.Khare, learned counsel, appearing for the United India Insurance Co. Ltd., on the other hand, cited the decision in Managing Director, *Tamil Nadu State Transport Corporation Ltd. Vs. Abdul Salam and others* (2004 ACJ 1827), in which a Division Bench of the Madras High Court has held that motor cycle and any other two wheeler is meant only for two persons, the rider and a pillion rider and if more than two persons travel on a motor cycle or any other two wheeler, undoubtedly, such action of the individual would become illegal and unauthorized and the rider of the two wheeler cannot have complete control over the vehicle. He also relied on Ratanlal & Dhirajlal, The Law of Torts by Justice G.P.Singh and submitted that the test to be applied is to find out whether the plaintiff or the deceased had failed to take reasonable care of his own safety which had contributed to the damage. He referred to the judgment of the Supreme Court in *Jacob Mathew Vs. State of Punjab and another* (AIR 2005 SC 3180), wherein one of the meanings of the word "negligence" as stated in Charlesworth & Percy (Tenth Edition, 2001) has been quoted as breach of duty to take care that is imposed by either common or statutory law. According to Mr.Khare, Section 128 of the Act imposes a statutory duty on the driver as well as the pillion rider of a motor cycle and provides that in a motor cycle, in addition to the rider, there can be only one pillion rider and whenever breach of this statutory duty occurs, there is negligence on the part of the driver or the pillion riders.

6. Mr. M.Jindal, learned counsel, appearing for the United India Insurance Co. in a connected Miscellaneous Appeal supported the arguments of Mr. Khare and further submitted that Rule 123 of the Central Motor Vehicles Rules 1923 (for short 'The Rules') will show that the motor cycle is made in such a manner that it can accommodate only the driver and one pillion rider and this is why Section 128 of the Act provides that only a driver and a pillion rider can travel in a motor cycle. He submitted that if a driver or pillion rider violates Section 128 of the Act, he commits a breach of duty to take care of his own safety and is guilty of the negligence when an accident takes place.

7. In Ratanlal & Dhirajlal, the Law of Torts by Justice G.P.Singh, the following propositions of law regarding contributory negligence have been stated :

" It has to be noted that negligence of the plaintiff which can be

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described as contributory negligence must have causal connection with the damage suffered by him."

"The question simply is whether the plaintiff or the deceased (in case of claims arising out of death) had failed to take reasonable care of his own safety which had contributed to the damage."

Thus, there has to be some causal connection with the damage suffered by the claimant to hold that the conduct of the claimant amounted to contributory negligence. Similarly, there has to be some conduct on the part of the claimant showing absence of reasonable care of his own safety which had contributed to the damage.

8. The meaning of "Contributory Negligence" as distinct from the "Negligence" has been very aptly brought out in the judgment of K. G. Balakrishnan, J (as His Lordship then was) in *Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and others* (AIR 2002 SC 2864) in para 8 at page 2866 in the following words:-

"The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression 'contributory negligence' it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an 'author of his own wrong'."

It will be clear from what has been held by Balakrishnan, J., that negligence ordinarily means breach of a legal duty to take care, whereas contributory negligence means the failure by a person to use reasonable care for the safety of either of himself or his property, so that he becomes blameworthy in part as an "author of his own wrong."

9. In a decision of the Supreme Court in *Municipal Corporation of Greater Bombay Vs. Laxman Iyer and another* (2004 ACJ 53), Arijit Pasayat, J., relying on Charlesworth on Negligence, has explained the meaning of 'contributory negligence' thus :

"Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of other's negligence. Whichever party could have avoided the consequence of other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially

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contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. (See Charles-worth on Negligence, 3rd Edn., Para 328.)

Pasayat, J., of the Supreme Court, relying on Pollock on Torts also explained "composite negligence" in the following words :

" Where a person is injured without any negligence on his part but as a result of combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense. It is a case of what has been styled by Pollock as injury by composite negligence. (See Pollock on Torts, 15th Edn., p. 361)."

10. In *Oriental Fire & Genl. Ins. Co. Ltd. Vs. Sudha Devi and others* (1991 ACJ 4) S.B. Sinha, J., as a learned Judge of the Patna High Court was called upon to decide whether violation of Section 85 of the Motor Vehicles Act, 1939, which is para-materia with Section 128 of the Act, amounts to contributory negligence on the part of the driver of a two wheeler and His Lordship held in para-55 at page 11 of the judgment as reported in the ACJ that violation of the provisions of the Motor Vehicles Act may not have anything to do with the theory of contributory negligence unless the vehicle is driven in violation of the traffic regulations.

11. Section 128 of the Act and Rule 123 of the Rules are quoted herein below :

" S.128.-- Safety measures for drivers and pillion riders-

(1) No driver of a two wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the motor cycle behind the driver's seat with appropriate safety measures.

(2) In addition to the safety measures mentioned in sub-section (1), the Central Government may, prescribe other safety measures for the drivers of two wheeled motor cycles and pillion riders thereon."

"R.123. -- Safety devices in motor cycle.-- No motor cycle which has provision for pillion rider, shall be constructed without provision for a permanent hand grip on the side or behind the driver's seat and a foot rest and a protective device covering not less than half of the rear wheel so as to prevent the clothes of the person sitting on the pillion from being entangled in the wheel."

12. A plain reading of Section 128 of the Act quoted above, would show that sub-section (1) casts a duty on the driver of a two wheeled motor cycle not to carry more than one person in addition to himself on the motor cycle. Similarly, Rule 123 of the Rules quoted above mentions the safety devices to be provided while manufacturing a motor cycle. These provisions obviously are safety measures for the drivers and pillion riders and breach of such safety measures may amount to "negligence" but such

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negligence will not amount to "contributory negligence" on the part of the pillion rider or "composite negligence" on the part of the driver of the motor cycle; unless such negligence was partly the immediate cause of the accident or damage suffered by the pillion rider as would be clear from the authorities discussed above.

13. Thus, we are of the considered opinion that if the damage in the accident has not been caused partly on account of violation of Section 128 of the Act by the pillion rider of the motor cycle, the pillion rider is not guilty of contributory negligence. Similarly, if the damage suffered by the pillion rider has not been caused partly on account of violation of Section 128 of the Act by the driver, the pillion rider cannot put up a plea of composite negligence by the driver. In other words, if breach of Section 128 of the Act, does not have a causal connection with the damage caused to the pillion rider, such breach would not amount to contributory negligence on the part of the pillion rider of the motor cycle or composite negligence on the part of the driver of the motor cycle.

14. Accordingly, our answers to the questions referred to us are :

(1) Violation of Section 128 of the Act, per se, by a motor cyclist does not raise a presumption of contributory negligence on his part;

(2) Similarly, violation of Section 128 of the Act per se does not amount to contributory negligence on the part of the pillion riders.

(3) A pillion rider cannot put up a plea of composite negligence by the driver of the motor cycle, if the driver only violates Section 128 of the Act.

15. We also hold that the view taken by the Division Bench of this Court in *Manjo Bee and others Vs. Sajjed Khan and others* (supra) is correct in law and the view taken by the Division Bench in *National Insurance Company Ltd. Vs. Smt. Uma Tiwari and others* (supra) and in *Kanti Devi Sikarwar and others Vs. Om Prakash and others* (supra) is not correct in law.

Since we have answered the questions referred to us, the matter will now be placed before the appropriate Division Bench for hearing.

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WRIT APPEAL

Before Mr. Justice Dipak Misra & Ms. Justice S.R. Waghmare.

1 August, 2007

R. S. CHAUDHARY

vs.

STATE OF M.P. & others

... Appellant*

... Respondents

Constitution of India - Articles 226/227 - Transfer Policy - Transfer Policy formulated by State is not enforceable as employee does not have a right and Courts have limited jurisdiction to interfere in the order of transfer - Court can interfere in case of mandatory statutory rule or

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action is capricious, malicious, cavalier and fanciful - In case of violation of policy proper remedy is to approach authorities by pointing out violation and authorities to deal with same keeping in mind the policy guidelines.

In view of the aforesaid pronouncement of law by the Apex Court in several cases, which we have referred hereinabove, we are of the considered opinion that the transfer policy formulated by the State is not enforceable as the employee does have a right and the Courts have limited jurisdiction to interfere in the order of transfer. The Court can interfere if there is violation of mandatory statutory rule or if the action of the Government is capricious, malicious, cavalier and fanciful. What would constitute these components that would depend on facts of each case as the same can be neither illustratively or exhaustively stated. In fact, that is not warrantable to be stated. We proceed to hold that in case an order of transfer is assailed on the found that there has been violation of the policy, the proper remedy is to approach the authorities by pointing out the violation and it is expected of the authorities to deal with the same keeping in mind the policy guidelines with utmost objectivity. (Para 35)

Cases Referred :

T.N. Bhardwaj Vs. State of M.P.; C.A. No. 6682/2005, *Union of India and others Vs. H.N. Kirtania*; (1983) 3 SCC 447, *B. Varadha Rao Vs. State of Karnataka and others*; AIR 1986 SC 1955, *Mrs. Shilpi Bose and others Vs. State of Bihar and others*; AIR 1991 SC 532, *Rajendra Roy Vs. Union of India and another*; AIR 1993 SC 1236, *Union of India and others Vs. S.L. Abbas*; AIR 1993 SC 2444, *Union of India and another Vs. N.P. Thomas*; 1993 Supp. (1) SCC 704, *Bank of India Vs. Jagjit Singh Mehta*; (1992) 1 SCC 306, *Home Secretary, U.T. of Chandigarh and another Vs. Darshjit Singh Grewal and others*; JT 1993 (4) SC 387, *State of Punjab and others Vs. Joginder Singh Dhatt*; AIR 1993 SC 2486, *State of M.P. and another Vs. S.S. Kourav and others*; (1995) 3 SCC 270, *Union of India and others Vs. D. Mohan and others*; (1995) 3 SCC 115, *National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan*; (2001) 8 SCC 574, *Union of India and others Vs. Mohanlal Likumal Punjabi and others*; (2004) 3 SCC 628, *State of U.P. and others Vs. Gobardhan Lal*; (2004) 11 SCC 402, *Kendriya Vidyalaya Sangathan Vs. Damodar Prasad Pandey and others*; (2004) 12 SCC 299, *State of U.P. and another Vs. Siyaram and another*; (2004) 7 SCC 405, *Major General J.K. Bansal Vs. Union of India and others*; AIR 2005 SC 3341, *Upton India Ltd. Vs. Shammi Bhan and another*; AIR 1989 SC 1681, *Kulwant Kaur Vs. Gurdial Singh Mann (Dead) by L.Rs. and others*; AIR 2001 SC 1273, *Director of Settlements, A.P. and others Vs. M.R. Apparao and another*; (2002) 4 SCC 638, *Jabalpur Bus Operators Association and others Vs. State of M.P. and another*; 2003(1) MPHT 226, *Union of India and another Vs. Raghubir Singh (dead) by L.Rs. Etc.*; AIR 1989 SC 1933, *Chandra Prakash Vs. State of U.P. and another*; 2002 AIR SCW 1573, *N.S. Giri Vs. Corporation of City of Mangalore and others*; (1999) 4 SCC 697, *Union of India and others Vs. Hansoli Devi and others*; 2002 AIR SCW 3755, *Indian Oil Corporation Ltd. Vs. Municipal Corporation and another*; AIR 1995 SC 1480.

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Amalpushp Shrotri, for the appellant.
R.N. Singh, Advocate General with
Deepak Awasthi, Govt. Advocate for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J** :- In this intra-court appeal assailability and pregnability of the interim order dated 3-7-2007 passed by the learned Single Judge in W.P. No.8005/07(s) is called in question.

2. At the very outset we may proceed to state that a Full Bench of this Court in W.A. No.163/2007 [*Arvind Kumar Jain and others vs. State of M.P. and others*] while dealing with the maintainability of an appeal against an interlocutory order has expressed the view in the following terms:-

“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) Deria* (supra) and *Tejpal Singh* (supra) enunciate the law correctly.

(d) The proviso to Section 2(1) of M.P. Uchha 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' Cooperative 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 exercises 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.”

3. In the case at hand, the appellant has invoked the jurisdiction of intra-Court appeal as the learned Single Judge while admitting the writ petition and issuing notice

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on interim relief has not passed an order of interim protection by way of ad interim measure.

4. Be it placed on record, the learned Single Judge while admitting the writ petition has stated thus:

“Heard Shri Amalpushp Shrotri, learned counsel for the petitioner on the question of admission and interim relief.

The petitioner who is a Joint Collector has challenged the order dated 23-6-2007 transferring him from Narsinghpur to Khandwa. It is submitted by the learned counsel for the petitioner that as per the transfer policy notified on 11-5-2007, a person is entitled to remain at the same place of posting for a period of three years subject to contingencies mentioned therein which do not apply in the petitioner's case. It is submitted by the learned counsel that the transfer policy is binding on the State and for this contention, the learned counsel for the petitioner has relied upon an unreported judgment of the Supreme Court rendered in the case of C.A. No.6682/05 dated 8-11-2005. On this ground, it is submitted that the impugned order of transfer deserves to be quashed being contrary to the transfer policy.

Admit.

Issue notice to the respondents on both counts on payment of PF within two weeks, failing which, the petition shall stand dismissed without further reference to the Bench.”

5. Mr. R.N. Singh, learned Advocate General for the State submitted that as the binding nature of the decision rendered by the Apex Court in C.A. No.6682/2005, dated 8-11-2005 is required to be appreciated and there is refusal of stay of the order of transfer he would not raise the issue of maintainability in a case of this nature and the appeal should be adjudicated on merits so that the controversy from many a spectrum can be put to rest. In view of the aforesaid, we refrain ourselves from adverting to the issue of maintainability in detail and revert to deal with the appeal on merits.

6. Questioning the correctness of the order of the learned Single Judge it is submitted by Mr. Amalpushp Shrotri, learned counsel for the appellant that when the learned Single Judge was convinced that grounds did exist for admission of the writ petition and the Apex Court in Civil Appeal No.6682/2005 [*T.N. Bhardwaj vs. State of M.P. & ors.*] has held that the guidelines are binding on the Government, the learned Single Judge should have been well advised to pass an ad-interim writ/order protecting the interest of the appellant and by not passing such an order and, in fact, not dealing with the said aspect tantamounts to refusal of relief which has vital impact on the case, for by the time the writ petition is adjudicated, a stance would be taken by the State Government that the same has rendered infructuous by efflux of time and the lis cannot rise like a phoenix. It is further urged by him that the appellant has been transferred in contravention of the policy and that being the position, the learned Single should have granted stay of the order of transfer as non-granting of stay would compel the appellant

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to join at the transferred place and thereafter the whole issue may be thrown overboard being academic, and further serious prejudice and inconvenience would be caused to the appellant.

7. Mr. R.N. Singh, learned Advocate General for the State, sounding a contra note, submitted that the decision passed in *T.N. Bhardwaj* (supra) is not a precedent as the same has been rendered on the basis of concession given by the counsel for the State and if a decision of the Apex Court is based on concession or flows from concession should not be regarded as a precedent under Article 141 of the Constitution of India. It is further urged by him that when the Apex Court has observed that the guidelines are binding on the Government they must be understood to be applicable to the said case and should not be general application. The learned Advocate General further proposed that the binding effect of guidelines on the Government has to be understood in the backdrop and bedrock of transfer which is not a condition of service but an incident of service. It is further canvassed by him that there cannot be an inflexible facet to the guidelines because certain emergent situations crop up and exigencies arise and the effect and impact of the same cannot be totally marginalised. It is further contended by him that the judgment has to be understood in a proper perspective regard being had to the factual matrix and not to be read in a straitjacket formula by putting it in a singular compartment.

8. To appreciate the rivalised submissions raised at the Bar, we would like to refer to certain citations in the field which relate to transfer. We may state that the learned counsel for the parties have commended to the said decisions for different purposes. Mr. Amalpshp Shrotri, learned counsel for the appellant has referred to some of them to show that they were rendered by two-Judge Bench and the decision in *T. N. Bhardwaj* (supra) has been delivered by a three-Judge Bench and, therefore, the same is a binding precedent on this Court under Article 141 of the Constitution of India. Per contra, Mr. R.N. Singh, learned Advocate General for the State has placed reliance on some decisions to highlight and increment that the conception of binding nature of the judgment has to be perceived in the fundamental anvil of law relating to transfer in the realm of service jurisprudence.

9. In *Union of India and others vs. H.N. Kirtania*, (1983) 3 SCC 447 the Apex Court has expressed the opinion on the following terms:-

“4. After hearing learned counsel for the parties we find that the Tribunal acted in excess of its jurisdiction in issuing impugned direction. The Tribunal recorded positive findings that the transfer order was legal and valid and it was not vitiated by any unfairness, or mala fide, thereupon it should have dismissed the writ petition.”

10. In *B. Varadha Rao v. State of Karnataka and others*, AIR 1986 SC 1955 the Apex Court has held as under:-

“5...If the power is exercised mala fide, then obviously the order of transfer is liable to be struck down. They relied on the observations made by this Court in *E.P. Royappa v. State of Tamil Nadu*, (1974)

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2 SCR 348 : (AIR 1974 SC 555) for the positivistic view that 'equality is antithetic to arbitrariness' and held that the observations equally apply to the policy regarding the transfer of public servants. It was observed :

"It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The Government is the best judge to decide how to distribute and utilise the services of its employees. However this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such transfers, cannot but be held as in fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose than is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actions should be just and fair."

The observation that transfer is also an implied condition of service is just an observation in passing. It certainly cannot be relied upon in support of the contention that an order of transfer *ipso facto* varies to the disadvantage of a Government servant, any of his conditions of service making the impugned order appealable under R. 19(1)(a) of the Rules.

6. One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. It therefore follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the Government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of Class III and Class IV employees stand on a different footing. We trust that the Government will keep these considerations in view while making an order of transfer." (Emphasis supplied)

11. In *Mrs. Shilpi Bose and others vs. State of Bihar and others*, AIR 1991 SC 532 their Lordships have ruled thus:-

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"4. In our opinion, the courts should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department. If the courts continue to interfere with day-to-day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders."

(underlining is ours)

12. In *Rajendra Roy vs. Union of India and another*, AIR 1993 SC 1236 their Lordships of the Apex Court have ruled thus:

"7. ... It is true that the order of transfer often causes a lot of difficulties and dislocation in the family set up of the concerned employees but on that score the order of transfer is not liable to be struck down. Unless such order is passed mala fide or in violation of the rules of service and guidelines for transfer without any proper justification, the Court and the Tribunal should not interfere with the order of transfer. In a transferable post an order of transfer is a normal consequence and personal difficulties are matters for consideration of the department. We are in agreement with the Central Administrative Tribunal that the appellant has not been able to lay any firm foundation to substantiate the case of malice or mala fide against the respondents in passing the impugned order of transfer. It does not appear to us that the appellant has been moved out just to get rid of him and the impugned order of transfer was passed mala fide by seizing an opportunity to transfer Shri Patra to Orissa from Calcutta. It may not be always possible to establish malice in fact in a straight-cut manner. In an appropriate case, it is possible to draw reasonable inference of mala fide action from the pleadings and antecedent facts and circumstances. But for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestions. In this case, we are unable to draw any inference of mala fide action in transferring the appellant from the facts pleaded before the Tribunal."

(Emphasis added)

13. The Apex Court in *Union of India and others vs. S.L. Abbas*, AIR 1993 SC 2444 has expressed the view as under:-

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"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right.

8. xx xx xx

9. Shri Goswami, learned counsel for the respondent relies upon the decision of this Court in *Bank of India v. Jagjit Singh Mehta*, (1992) 1 SCC 306: (1992 AIR SCW 170) rendered by a Bench of which one of us (J. S. Verma, J.) was a member. On a perusal of the judgment, we do not think it supports the respondent in any manner. It is observed therein (para 5 of AIR):-

"There can be no doubt that *ordinarily and as far as practicable* the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of all-India services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an all-India service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of all-India service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places.....No doubt the guideline requires the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim

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such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees." (Emphasis added)

10. The said observations in fact tend to negative the respondent's contentions instead of supporting them. The judgment also does not support the Respondent's contention that if such an order is questioned in a Court or the Tribunal, the authority is obliged to justify the transfer by adducing the reasons therefor. It does not also say that the Court or the Tribunal can quash the order of transfer, if any of the administrative instructions/ guidelines are not followed, much less can it be characterised as mala fide for that reason. To reiterate, the order of transfer can be questioned in a Court or Tribunal only where it is passed mala fide or where it is made in violation of the statutory provisions."

14. In *Union of India and another vs. N.P. Thomas*, 1993 Supp (1) SCC 704 it has been ruled as under:-

"8. In the present case, it cannot be said that the transfer order of the respondent transferring him out of Kerala Circle is violative of any statutory rule or that the transfer order suffers on the ground of mala fides. The submissions of the respondent that some of his juniors are retained by Kerala Circle and that his transfer is against the policy of the Government posting the husband and wife in the same station as far as possible, cannot be countenanced since the respondent holding a transferable post has no vested right to remain in the Kerala Circle itself and cannot claim, as a matter of right, the posting in that circle even on promotion."

(emphasis supplied)

15. In *Bank of India vs. Jagjit Singh Mehta*, (1992)1 SCC 306, a three-Judge Bench of the Apex Court has stated thus:-

"5. There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of All-India Services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place

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of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an All-India Service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of All-India Service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places. In addition, in the present case, the respondent voluntarily gave an undertaking that he was prepared to be posted at any place in India and on that basis got promotion from the clerical cadre to the Officers' grade and thereafter he seeks to be relieved of that necessary incident of All India Service on the ground that his wife has to remain at Chandigarh. No doubt the guidelines require the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees." (Emphasis added)

16. In *Home Secretary, U.T. Of Chandigarh and another vs. Darshjit Singh Grewal and others*, JT 1993 (4) SC 387 it has been held as under:-

"15. It may be relevant to emphasize at this juncture that while the Rules and Regulations referred to above are statutory, the policy guidelines are relatable to the executive power of the Chandigarh Administration. It is axiomatic that having enunciated a policy of general application and having communicated it to all concerned including the Chandigarh Engineering College, the Administration is bound by it. It can, of course, change the policy but until that is done, it is bound to adhere to it."

17. We also think it apposite to refer to the decision rendered in the case of *State of Punjab and others vs. Joginder Singh Dhatt*, AIR 1993 SC 2486 wherein their Lordships in paragraph 3 have expressed the view as under:-

"3. We have heard the learned counsel for the parties. This Court has time and again expressed its disapproval of the Courts below interfering with the order of transfer of public servant from one place to another.

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It is entirely for the employer to decide when, where and at what point of time a public servant is transferred from his present posting. Ordinarily the Courts have no jurisdiction to interfere with the order of transfer. The High Court grossly erred in quashing the order of transfer of the respondent from Hoshiarpur to Sangrur. The High Court was not justified in extending its jurisdiction under Article 226 of the Constitution of India in a matter where, on the face of it, no injustice was caused.” (underlining is by ours)

18. In the case of *State of M.P. and another vs. S.S. Kourav and others*, (1995) 3 SCC 270 in paragraph 4, the Apex Court has expressed the view in the following terms:-

“4. It is contended for the respondent that the respondent had already worked at Jagdalpur from 1982 to 1989 and when he was transferred to Bhopal, there was no justification to retransfer him again to Jagdalpur. We cannot appreciate these grounds. The courts or tribunals are not appellate forums to decide on transfers of officers on administrative grounds. The wheels of administration should be allowed to run smoothly and the courts or tribunals are not expected to interdict the working of the administrative system by transferring the officers to proper places. It is for the administration to take appropriate decision and such decisions shall stand unless they are vitiated either by mala fides or by extraneous consideration without any factual background foundation. In this case we have seen that on the administrative grounds the transfer orders came to be issued. Therefore, we cannot go into the expediency of posting an officer at a particular place.

5. xx xx xx

6. It is further contended that in an unfortunate situation the respondent's wife committed suicide leaving three children and he would suffer extreme hardship if he has to work in the tribal area. This Court cannot go into that question of relative hardship. It would be for the administration to consider the facts of a given case and mitigate the real hardship in the interest of good and efficient administration. If there is any such hardship, it would be open to the respondent to make a representation to the Government and it is for the Government to consider and take appropriate decision in that behalf.” (Emphasis supplied)

19. In *Union of India and others vs. D. Mohan and others*, (1995) 3 SCC 115 the Apex Court has observed as under:-

“(10) It would here be relevant to refer to the Government of India instructions dated 19-9-1986. Paragraph 3 of Annx. 2 attached to the said instructions reads thus:

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the entire Secondary Area will be done by the Telecom District G.M./ District Manager/District Engineer, according to schedule of powers and all the new recruits including departmental candidates will have transfer liability over the whole secondary area. The existing staff of the erstwhile Telephone District AND THE Telegraph Engineering Divisions will also have transfer liability over the entire Secondary Switching Area, but to avoid hardship to the individuals, such liability for those recruited already to the specific units may be confined only to those units as far as possible taking into consideration individual options. (Emphasis supplied)

(11) As stated earlier learned counsel appearing for the appellant had contended that the Junior Telecom Officers belonging to other than Telangana areas were working in Telangana area under difficult conditions and at personal inconveniences and it was for this reason that the Chief General Manager, Telecom, A.P. Circle took decision to rotate the Junior Telecom Officers and other circle cadre officials every two years and post substitutes in their places from other districts with a view to maintain service efficiency and to help the staff who served in difficult areas. Since the respondents were transferred to Telangana area by order dated 26/5/1993 which has been set aside by the tribunal and according to the appellants themselves Telangana area is a difficult area and it appears that it is for this reason that the respondents felt aggrieved by the transfer order. It is for the same reason that para 3 reproduced above has been introduced in Annx. 2 of the government instructions which provides that while transferring the staff of the erstwhile Telephone District who were recruited to the specific units may be confined only to those units as far as possible taking into consideration individual options when a member of the staff of the erstwhile Telephone District is to be transferred to other areas. Thus, while the instruction contained in para 3 of Annx. 2 provides for the transfer liability of the existing staff of the erstwhile Telephone District over the entire Secondary Switching area it also at the same time provides for taking into consideration individual options. That being so, the Chief General Manager Telecom Circle, A.P. before passing the order of transfer, ought to have obtained options from those employees and officers who belonged to the erstwhile Telephone District who were recruited to the specific units and after considering their individual options should have passed the order of transfer, so as to avoid any possible hardship to them. In the present case admittedly no options were taken from the respondents and for this reason alone the transfer order cannot be enforced. But this aspect appears to have escaped the notice of the Tribunal."

20. In *National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagawan*, (2001) 8 SCC 574 their Lordships have held thus:-

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"5..... It is by now well settled and often reiterated by this Court that no government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise of power or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals cannot interfere with such orders as a matter of routine, as though they are the appellate authorities substituting their own decision for that of the management, as against such orders passed in the interest of administrative exigencies of the service concerned....."

21. In *Union of India and others vs. Mohanlal Likumal Punjabi and others*, (2004) 3 SCC 628 the Apex Court has expressed the view as under:-

"9. In *Uptron India Ltd. vs. Shammi Bhan* it was held that a case decided on the basis of wrong concession of a counsel has no precedent value. That apart, the applicability of the statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law would invariably depend upon the scope and meaning of the provisions concerned and has got to be adjudged not on any concession made. Any such concessions would have no acceptability or relevance while determining rights and liabilities incurred or acquired in view of the axiomatic principle, without exception, that there can be no estoppel against statute."

22. In *State of U.P. And others vs. Gobardhan Lal*, (2004) 11 SCC 402 it has been held as under:-

"7. It is too late in the day for any government servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfers of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public

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interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. This Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision.

8. A challenge to an order of transfer should normally be eschewed and should not be countenanced by the courts or tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that courts or tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer."

(Emphasis supplied)

23. In *Kendriya Vidyalaya Sanghathan vs. Damodar Prasad Pandey and others*, (2004) 12 SCC 299 their Lordships of the Apex Court expressed the following view:-

4. Transfer which is an incidence of service is not to be interfered with by the Courts unless it is shown to be clearly arbitrary or visited by mala fide or infraction of any prescribed norms of principles governing the transfer (see *Ambani Kanta Ray v. State of Orissa*, 1995 (Suppl) 4 SCC 169). Unless the order of transfer is visited by mala fide or is made in violation of operative guidelines, the Court cannot interfere with it. (see *Union of India v. S.L. Abbas*, AIR 1993 SC 2444. Who should be transferred and posted where is a matter for the administrative authority to decide. Unless the order of transfer is vitiated by mala fide or is made in violation of operative any guidelines or rules the Courts should not ordinarily interfere with it. In *Union of India and Ors. v. Janardhan Debanath and Anr.* (2004) 4 SCC 245 it was observed as follows:

"No Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to another is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to

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be in violation of statutory provisions prohibiting any such transfer, the Courts or the Tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this Court in *National Hydroelectric Power Corpn. Ltd. v. Shri Bhagwan*, (2001) 8 SCC 574".

24. In *State of U.P. and another vs. Siyaram and another*, (2004) 7 SCC 405 it has been held as under:-

"5. The High Court while exercising jurisdiction under Arts. 226 and 227 of the Constitution of India, 1950 (in short the 'Constitution') had gone into the question as to whether the transfer was in the interest of public service. That would essentially require factual adjudication and invariably depend upon peculiar facts and circumstances of the case concerned. No Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer as shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the Courts or the Tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this Court in *National Hydroelectric Power Corporation Ltd. v. Shri Bhagwan and another* (2001 (8) SCC 574).

6. The above position was recently highlighted in *Union of India and others v. Janardhan Debanath and another* (2004 (4) SCC 243). It has to be noted that the High Court proceeded on the basis as if the transfer was connected with the departmental proceedings. There was not an iota of material to arrive at the conclusion. No mala fides could be attributed as the order was purely on administrative grounds and in public interest.

7. In view of the settled position in law the judgment of the High Court is indefensible and is set aside." (emphasis added)

25. In *Major General J.K. Bansal Vs. Union of India and others*, AIR 2005 SC 3341 a three-Judge Bench of the Apex Court while dealing with a transfer of army

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personnel opined that it would be useful to take notice of law regarding the scope of interference in a writ petition under Article 226 of the Constitution assailing an order of transfer. Their Lordships in paragraph 9 of the decision referred to the decision rendered in *Mrs. Shilpi Bose* (supra) and reproduced the paragraph which has been referred to hereinabove. Their Lordships referred to the decision rendered in *S.L. Abbas* (supra) and quoted the paragraph which has been referred to us hereinbefore. In paragraph 11 of the said decision adverting to the roll of Court while interfering in the matter of transfer, as had been done in the case of *National Hydroelectric Power Corporation Ltd.* (supra) and after referring to the said decision eventually in paragraph 12 their Lordships expressed the view as under:-

"12. It will be noticed that these decisions have been rendered in the case of civilian employees or those who are working in Public Sector Undertakings. The scope of interference by courts in regard to members of armed forces is far more limited and narrow. It is for the higher authorities to decide when and where a member of the armed forces should be posted. The Courts should be extremely slow in interfering with an order of transfer of such category of persons and unless an exceptionally strong case is made out, no interference should be made."

It is worth noting here that their Lordships declined to interfere in the appeal.

26. Presently, we shall proceed to refer to the order passed by the Apex Court in *T.N. Bhardwaj* (supra). It reads as under:-

"The appellant, challenging the order of transfer, has placed strong reliance on the two guidelines, one dated 12th March, 2001 and the other dated 22nd September, 2001, both issued in the name of the Governor of Madhya Pradesh. Reference has also been made to guidelines dated 16th September, 2003. According to the appellant, he has worked in the Working Plan Unit or post equivalent thereto for a period of nine years, namely, from 1983 to 1988 and also from 1994 to 1997. The contention is that the appellant cannot again be posted in the Working Plant Unit having regard to the stipulation in any of the three guidelines. The High Court has not examined the issue whether the order of transfer contravene the guidelines or not and has proceeded only on the basis that the guidelines cannot be enforced, the same being not statutory in nature.

Learned counsel for the respondent very fairly but rightly has conceded that the guidelines would be binding on the Government since there is no statutory rule or statutory instructions contrary thereto. He has also drawn our attention to the averments made in the order of the Chief Conservator of Forests dated 17th May, 2004 rejecting the representation of the appellant and stating that he was never posted in the Unit, as such he is not entitled to the concession as stipulated in

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clause 3(c) and (d) to the policy of the Government dated 16th September, 2003. If what the appellant says is correct about the posting for nine years as afore-noted, this observation in the order rejecting representation may not be correct. We have, however, not gone into this aspect since it seems to have not been highlighted before the High Court. The High Court has not examined this issue.

Under these circumstances, we are of the view that the appropriate course to follow is to set aside the impugned order and request the High Court to decide afresh Writ Petition No.2998 of 2004 proceeding on the basis as above-noted that the guidelines are binding on the Government."

27. At this juncture, we think it condign and seemly to understand the effect and impact of the decision rendered in *T.N. Bhardwaj* (supra). Mr. R.N. Singh, learned Advocate General for the State would submit that the decision has been rendered by the Apex Court on concession and, therefore, is not a binding precedent. He has invited our attention to the decision in *Upton India Ltd. vs. Shammi Bhan and another*, AIR 1989 SC 1681 wherein it has been held as under:-

"23. This was endorsed by this Court by observing that "Learned counsel for the respondent rightly made no attempt to support this part of the High Court's order." This again cannot be treated to be a finding that provision for automatic termination of services can be validly made in the Certified Standing Orders. Even otherwise, a wrong concession on a question of law, made by a counsel, is not binding on his client. Such concession cannot constitute a just ground for a finding precedent. The reliance placed by Mr. Manoj Swarup on this judgment, therefore, is wholly out of place."

28. The learned Advocate General for the State has also commended us to the decision in *Kulwant Kaur vs. Gurdial Singh Mann (dead) by L.Rs. and others*, AIR 2001 SC 1273 wherein it has been held as under:-

"2. The concession thus recorded in Banarsi Das's case as noticed above obviously renders the submissions of Mr. Mehta of some substance. Concession, if made and in the event the Court proceeds on the basis of such a concession, the decision cannot by any stretch be termed to be a binding precedent and as such the previous decision (1998)2 SCC 81 does not and cannot have the sanctity and, solemnity of a binding precedent."

29. Mr. A.P. Shroti, learned counsel for the appellant would submit that this is not an order on concession as the Apex Court at one point of time has held that the counsel for the respondent has rightly conceded and further their Lordships have held that the High Court should decide the matter on the basis that the guidelines are binding on the Government. In *Director of Settlements, A.P. and others vs. M.R. Apparao and another*, (2002) 4 SCC 638 while dealing with the concept of concession and the opinion of the Court their Lordships have held as under:-

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“15. Bearing in mind the host of decisions cited by Mr. Rao and on examining the judgment of this Court dated 6-2-1986 in Civil Appeal No.198 of 1972 we have no doubt in our mind that the conclusion of the Court that the amendments are constitutionally valid and the view expressed by the Andhra Pradesh High Court is erroneous is a conscious decision of the Court itself on application of mind to the provisions of the Act. It is no doubt true that the counsel for respondent Venkatagiri had indicated that the respondent will have no objection to the judgments and orders of the High Court under appeal, being set aside. But that by itself would not tantamount to hold that the judgment is a judgment on concession. Even after recording the stand of the counsel appearing for Venkatagiri when the Court observed “we are also of the view that the two amendments referred to above, are constitutionally valid”, the same is unequivocal determination of the constitutional validity of the amended Act, it cannot be dubbed as a conclusion on concession, nor can it be held to be a conclusion without application of mind, particularly when the very constitutionality of the Amendment Act was the core question before the Court. It is also apparent from the further direction when the Court holds:

“we further make it clear that the period during which interim payments are payable under the abovesaid Act ends with the date of the original determination by the Director under Section 39(1) thereof.”

This conclusion is possible only after application of mind to the provisions of Section 39 as well as other provisions and the amendment that was brought into the statute-book. In the aforesaid premises, our answer to the first question is that the decision of this Court dated 6-2-1986 must be held to be a “law declared” within the ambit of Article 141 of the Constitution and the constitutional validity of the amendment Act, 1971 is not open to be reagitated and that the judgment of the Andhra Pradesh High Court holding the amendment Act to be constitutionally invalid had been set aside by this Court”.

30. In view of the aforesaid, we are disposed to think that the decision rendered in *T.N. Bharadwaj* (supra) is law declared by the Apex Court.

31. Be it placed on record that the decision rendered in *Darshjit Singh Grewal and others* (supra) was delivered on 12-7-1993 and the decision in *S.L. Abbas* (supra) was rendered on 27-4-1993. Thus, the decision in *S.L. Abbas* (supra) was delivered on earlier point of time. In the said case their Lordships had opined that the guidelines do not confer upon a government employee an enforceable right and unless an order of transfer is violative of statutory mandatory or mala fide the Courts should not interfere with it. Their Lordships further observed that while ordering an order of transfer the authority must keep in mind the guidelines issued by the Government.

32. Submission of Mr.Shrotri is that the aforesaid decision being a three-Judge Bench decision is a binding precedent and the law laid down in the earlier cases are two-Judge Bench decisions. Be it placed on record that the learned counsel for the appellant

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had not referred to us to the decision rendered in the case of *Major General J.K. Bansal* (supra). The said decision has been rendered by three Judges on 23.8.2005 which is earlier point of time. In the said case the three-Judge Bench has approved the ratio laid down in the cases of *Mrs. Shilpi Bose* (supra), *S.L. Abbass* (supra) and *National Hydroelectric Power Corporation Ltd.* (supra).

33. A Full Bench of this Court in *Jabalpur Bus Operators Association and others Vs. State of M.P. and another*, 2003 (1) MPHT 226 (FB) has expressed the view as under:-

“In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench, is binding on the High Courts and the Subordinate Courts. Similarly, in presence of Division Bench decisions and Larger Bench decisions, the decisions of Larger Bench are binding on the High Courts and the Subordinate Courts. No decision of Apex Court has been brought to our notice which holds that in case of conflict between the two decisions by equal number of Judges, the later decision is binding in all circumstances, or the High Courts and Subordinate Courts can follow any decision which is found correct and accurate to the case under consideration. High Courts and Subordinate Courts should lack competence to interpret decisions of Apex Court since that would not only defeat what is envisaged under Article 141 of the Constitution of India but also militate hierarchical supremacy of Courts. The common thread which runs through various decisions of Apex Court seems to be great value has to be attached to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decisions of Court, unless the Court can clearly distinguish the decision put up as a precedent or is per incuriam, having been rendered without noticing some earlier precedents with which the Court agrees. Full Bench decision in *Balbir Singh's case* (supra) which holds that if there is conflict of views between the two co-equal Benches of the Apex Court, the High Court has to follow the judgment which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act, in our considered opinion, for reasons recorded in the preceding paragraph of this judgment, does not lay down the correct law as to application of precedent and is, therefore, over-ruled on this point.”

34. To arrive at the said conclusion the Full Bench has placed reliance on the decisions rendered in the cases of *Union of India and another Vs. Raghubir Singh (dead) by L.Rs. Etc.*, AIR 1989 SC 1933, *Chandra Prakash Vs. State of U.P. and another*, 2002 AIR SCW 1573, *N.S. Giri Vs. Corporation of City of Mangalore*

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and others, (1999) 4 SCC 697, *Union of India and others Vs. Hansoli Devi and others*, 2002 AIR SCW 3755, and *Indian Oil Corporation Ltd. Vs. Municipal Corporation and another*, AIR 1995 SC 1480.

35. Fulcrum of the matter is whether the decision in *T.N. Bhardwaj* (supra) govern the field and would be the binding precedent or that of the decision rendered in *J.K. Bansal and others* (supra) would be binding or both can simultaneously be valid. In the case of *J.K. Bansal and others* (supra) a three-Judge Bench of the Apex Court has referred to the decisions in *Mrs. Shilpi Bose* (supra) and *National Hydroelectric Power Corporation Ltd. vs. Bhagwan* (supra). Their Lordships have not only noticed but have quoted exhaustively the ratio laid down in the said decisions. Thus, the said decisions have been approved by the three-Judge Bench. In *T.N. Bhardwaj* (supra) what their Lordships have stated that the guidelines are binding on the Government. The binding nature of the guidelines, in our humble view, has to be understood in the context of *Mrs. Shilpi Bose* (supra), *S.L. Abbas* (supra), *Jagjit Singh Mehta* (supra) and *S.S. Kaurav and others* (supra). To elaborate the instructions or the guidelines do not confer any enforceable right on an employee. He has no vested right to remain at one post or the other. However, while ordering a transfer the authority must keep in mind the guidelines issued by the Government whether an order of transfer is passed in violation of the guidelines or the executive instructions. The action of the State Government should not be mala fide or malicious and should be tested on the anvil and touchstone of acceptable reasonableness. In view of the aforesaid pronouncement of law by the Apex Court in several cases, which we have referred hereinabove, we are of the considered opinion that the transfer policy formulated by the State is not enforceable as the employee does have a right and the Courts have limited jurisdiction to interfere in the order of transfer. The Court can interfere if there is violation of mandatory statutory rule or if the action of the Government is capricious, malicious, cavalier and fanciful. What would constitute these components that would depend on facts of each case as the same can be neither illustratively or exhaustively stated. In fact, that is not warrantable to be stated. We proceed to hold that in case an order of transfer is assailed on the ground that there has been violation of the policy, the proper remedy is to approach the authorities by pointing out the violation and it is expected of the authorities to deal with the same keeping in mind the policy guidelines with utmost objectivity.

36. Now to the present appeal. The learned Single Judge, as is perceivable, has admitted the writ petition. He has not adverted to the interim relief. The appellant has already been relieved. Passing of an interim order would have been mandatory in nature. We are disposed to think that should not have been passed. In the writ appeal, we have protected the appellant by directing that no coercive steps shall be taken for his not joining at the transferred place. Be it placed on record, such an order should not be passed in a routine manner, but as the law was to be explained, an apprehension was expressed by Mr. Amalpushp Shrofi, learned counsel for the appellant that he would be harassed by the authority, the said protective order was passed. In the obtaining factual matrix we would allow the protective order to continue and request

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the learned Single Judge to dwell upon the merits of the writ petition on the basis of exposition and enunciation of law stated hereinabove by explaining the dictum in T.N. Bhardwaj (supra) within a period of one month.

37. The writ appeal is accordingly disposed of. There shall be no order as to costs.

I.L.R.[2007] M.P., 1349

WRITAPPEAL

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

31 August, 2007

SHRI HARI SIDDHI CONSTRUCTION COMPANY

--- Appellant*

Vs.

RAGHUNANDAN and ors.

--- Respondents

Uchha Nyayalaya (Khand Nyaya Peeth Ko appeal) Adhiniyam, Madhya Pradesh 2005-Section 2(1)-Maintainability of appeal-Temporary Injunction granted by Trial Court-Appeal allowed by Appellate Court-Order of Appellate Court challenged by filing petition under Article 227 of Constitution of India-Writ Petition allowed to Learned Single Judge and order of Trial Court granting temporary injunction restored-Held-Writ Petition was not only filed under Article 227 but was treated to be one under Article 227 of Constitution of India-It cannot be treated as a petition under Article 226/227 of Constitution of India-Writ Appeal not maintainable in view of Section 2(1) of Adhiniyam.

Thus, the factual scenaria depicts a different picture. Respondent no. 1 had not only preferred a petition under Article 227, even learned Single Judge proceeded to decide it as such. Order passed by the learned Single Judge shows that he had passed the same under Article 227 and contour of the order so reflects. Therefore, it cannot be treated as a petition under Article 226/227 of the Constitution of India.

In view of the aforesaid premises, we are of the considered opinion that against the order as passed by learned Single Judge in the case at hand, the appeal is not maintainable in view of proviso appended to Section 2(1) of the Adhiniyam.

(Paras 10 and 11)

Cases Referred :

Dr. Jaidev Siddha and Ors. v. Jaiprakash Siddha & Ors., 2007 (3) MPHT 388 (FB); *Smt. Sushila Bai Laxminaryan Mudliyar v. Nihalchand Waghajibhai Shaha & Ors.* (1993) Suppl. 1 SCC 11.

A.K. Jain with Aditya Jain, for the appellant.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **DEEPAK VERMA, J.** :-At the outset, we posed a question to the learned counsel for

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the appellant with regard to the maintainability of the Appeal, against the order dated 25-07-2007, passed by learned Single Judge in W.P. No.4361/2007 filed by respondent no.1 herein under Article 227 of the Constitution of India, in view of Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005 (hereinafter referred to as 'Adhiniyam 2005').

2. Brief facts, bereft of unnecessary details are mentioned herein below:

Respondent no.1 herein admittedly filed writ petition under Article 227 of the Constitution of India, challenging the order dated 08-03-2007 passed by the learned VIth Additional District Judge, Bhopal, in Misc. Civil Appeal No.45/2007, whereby the appeal was allowed and the order passed by the learned IVth Civil Judge Class-I, Bhopal in Civil Suit No.380-A/06, granting temporary injunction in favour of the plaintiff was set aside. The respondents of the said writ petition were noticed. Present appellant was arrayed as respondent no.14 in the said writ petition.

3. After having heard the learned counsel for the parties at length and after perusal of record, learned Single Judge allowed the writ petition, whereby the order passed by the Appellate Court was set aside and the order passed by the trial court granting temporary injunction in favour of the petitioner/plaintiff was restored. Relevant paras 14 and 15 of the said order are reproduced hereinbelow:

"14. Accordingly, the impugned order passed by the appellate Court is set aside and the order passed by the trial Court granting temporary injunction in favour of the petitioner/plaintiff is restored.

15. Having regard to the controversy and the entire facts and circumstances of the case, the trial Court is directed to make endeavour to decide the suit as expeditiously as possible preferably within four months from the date of receipt of copy of this order. The parties shall cooperate for the final disposal of the suit in the aforesaid time limit."

4. On a perusal of the petition, the nature of order passed by the learned Single Judge and its tenor, it is clear that it was not only filed by the respondent no.1 under Article 227 of the Constitution of India but it was treated also as such by the learned Single Judge. The learned Single Judge, as it clearly shows, has treated the petition to be one under Article 227 of the Constitution of India. In the obtaining factual matrix the question that emerges for consideration is whether a writ appeal would be maintainable against such an order, in view of the proviso appended to Section 2(1) of the Adhiniyam, 2005, which creates a bar to entertain an appeal, where learned Single Judge has exercised the powers conferred on him under Article 227 of the Constitution.

5. To understand the crux of the matter, it is necessary and relevant to scrutinise the phraseology employed in Section 2(1) of Adhiniyam 2005, which is as under :

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"2.(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 be against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India."

In view of the proviso appended to Section 2(1) of the Adhiniyam, 2005, it leaves no room for doubt that against an order passed by the learned Single Judge whereby he has exercised the jurisdiction conferred on him under Article 227 only, no writ appeal would be maintainable.

6. Now the question is whether in view of the opinion expressed by the Full Bench this appeal would be saved and would still be maintainable. We have critically examined the opinion expressed by the Full Bench *Dr. Jaidev Siddha and others Vs. Jaiprakash Siddha and others*, 2007(3) M.P.H.T.388(FB). After considering the previous judgments of the Supreme Court touching the issue, Justice Dipak Mishra authoring for himself and on behalf of Hon'ble the Chief Justice, has held as under in para -17:

"17. From the aforesaid enunciation of law it is quite vivid and luminiscent 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, the jurisdictional prospective in the constitutional context are to be perceived...."

Justice K.K. Lahoti concurring with the aforesaid view has given his own reasonings but has summed up at the end of para of 12, which reads as under:

"To sum up, the Divisional 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."

7. It is pertinent to mention here that the appellant herein while filing the return on his behalf who was arrayed as the respondent no.14 in the writ petition, has also admitted in Ground No.B that it was a petition under Article 227 of the Constitution of India. This admission on the part of the appellant would go a long way to show that he also treated it to be a petition under Article 227 only. There is no whisper in the Return that the petition was a composite petition under Article 226/227 of the

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Constitution of India. At this stage, the appellant cannot be permitted to resile from the said admission to put itself in an advantageous position.

8. Learned counsel for the appellant, Shri A.K.Jain submitted that in such a case where the trial court was pleased to grant injunction in favour of respondent no.1-plaintiff, and on an appeal being preferred by this appellant, purportedly under Order 43 Rule 1(r) CPC, the same was allowed and injunction granted by the trial court was vacated, thereafter writ petition was preferred by the respondent no.1/plaintiff and the same having been allowed, appellant would have no remedy available. According to him thus the right of the appellant has been determined finally till the pendency of the suit and, therefore, it would be an order finally adjudicating the rights of appellant with regard to injunction granted in favour of respondent no.1/plaintiff. In this view of the above he submitted that it should be treated as a petition under Article 226 of the Constitution of India or in the alternative a composite petition under Article 226/227 even though it might not have been described as such. To buttress the contention further in this regard, learned counsel for the appellant has placed reliance on the decision rendered in the case of *Smt. Sushila Bai Laxminarayan Mudliyar vs. Nihalchand Waghajibhai Shaha and Others*, (1993) Suppl.I SCC 11.

9. On a deeper scrutiny we do not find any merit and substance in this contention also. The *ratio decidendi* of the aforesaid case does not apply to the facts of this case; much less to the appellant's benefit. The Full Bench in *Dr. Jaidev Siddha* (Supra) has also considered the aforesaid decision and thereafter the opinion was expressed.

10. Thus, the factual scenario depicts a different picture. Respondent no.1 had not only preferred a petition under Article 227, even learned Single Judge proceeded to decide it as such. Order passed by the learned Single Judge shows that he had passed the same under Article 227 and contour of the order so reflects. Therefore, it can not be treated as a petition under Article 226/227 of the Constitution of India.

11. In view of the aforesaid premises, we are of the considered opinion that against the order as passed by learned Single Judge in the case at hand, the appeal is not maintainable in view of proviso appended to Section 2(1) of the Adhiniyam.

12. In the result, the appeal is dismissed in limine as not maintainable.

Appeal dismissed.

I.L.R. [2007] M. P., 1353

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh

31 July, 2007

ISHAQ MOHD.

.....Petitioner*

Vs.

WELFARE COMMISSIONER, BHOPAL GAS VICTIMS, BHOPAL

...Respondent

Constitution of India - Articles 226/227, Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 - Identification of claimant - Claim of the Petitioner for payment of compensation as Bhopal Gas Victim rejected by Deputy Welfare Commissioner on the ground that different name is mentioned in Tata Survey, Ration Card, Affidavit - Petitioner claimed that both the names are that of same person as father's name is the same - Held - Scheme 1985 provides procedure for identification of claimants - Deputy Welfare Commissioner has to verify identity of claimant on the basis of Photograph affixed on documents required to be filed - Deputy Welfare Commissioner cannot reject the claim where he entertains doubt about ideality of claimant but can reject only if he finds that claimant is not genuine - Deputy Welfare Commissioner should have insisted for personal appearance of petitioner for comparing him with photograph affixed on documents - Matter remanded back to decide the matter with regard to identity of claimant in accordance with procedure laid down in Action plan and instructions - Petition disposed off.

From the records of the Deputy Welfare Commissioner produced before us, we find that the Reference Card was produced as Exh.P/1, the Ration Card was produced as Exh.P/2, Tata Survey was produced as Exh.P/3, Pass-book of the Bank Account in which the interim compensation was deposited was produced as Exh.P/4 and an Affidavit was produced as Exh.P/5. We further find that in Exh. P/4 which is the Pass-book of the Bank Account in which the interim compensation is said to have been deposited, the photograph and thumb impression of Mohd. Ishaq is affixed. Hence, the Deputy Welfare Commissioner should have insisted on the personal appearance of the claimant Sheikh Mohd. and compared him with the photograph affixed in Exh.P/4, but this exercise has not been undertaken by the Deputy Welfare Commissioner. Moreover, as we have held, where the Deputy Welfare Commissioner entertains a doubt about the ideality of the claimant, he cannot reject the claim but has to make summary enquiry and will reject the claim only after recording a finding that the claimant is not genuine. This, the Deputy Welfare Commissioner has not done. (Para 7)

Matloob Hussain, for the petitioner.

O. P. Namdeo, for the respondent.

O R D E R

The Order of the Court was delivered by
A. K. PATNAIK, C. J.:—The petitioner filed a claim for compensation as a Bhopal Gas

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Victim describing himself to be Sheikh Mohd. The Deputy Welfare Commissioner while considering the claim of the petitioner found that in the old ration card produced by the petitioner and in the Tata Survey the victim had been described as Ishaq Mohd. Similarly, in the affidavit sworn by the petitioner before the Deputy Welfare Commissioner, the petitioner has been described as Ishaq Mohd. In none of the papers, there was name of Sheikh Mohd. On account of such discrepancies with regard to the name, the Deputy Welfare Commissioner, the Additional Welfare Commissioner and the Welfare Commissioner rejected the claim of the petitioner. Aggrieved, the petitioner has filed this writ petition under Article 226 of the Constitution.

2. Mr. Matloob Hussain, learned counsel for the petitioner submitted that the petitioner was an illiterate person and in some of the documents produced before the Deputy Welfare Commissioner his name has been described as Ishaq Mohd. and in some of the documents his name has been described as Sheikh Mohd. But in all the documents the father's name of both Sheikh Mohd. and Ishaq Mohd. has been described as Mohd. Jumman. He submitted that Sheikh Mohd. and Ishaq Mohd. therefore is one and the same person and the Deputy Welfare Commissioner, Additional Welfare Commissioner and the Welfare Commissioner ought not to have rejected the claim of the petitioner on the ground that there was doubt about the identity of the claimant, when the petitioner had been paid interim compensation.

3. Mr. O.P. Namdeo, learned counsel appearing for the respondent, on the other hand, submitted that since a number of cases of non-genuine claimants were detected earlier, under the Action Plan approved by the Supreme Court and the procedure laid down by the Welfare Commissioner, the Deputy Welfare Commissioner is required to satisfy himself with the identity of the genuine claimant and where the identity of the claimant is in doubt, the Deputy Welfare Commissioner has to reject the claim.

4. On a reading of the action plan as approved by the Supreme Court by order dated 26.10.2004 in I.A. No.46-47 in Civil Appeal No.3187-88 of 1988, we find that the following guidelines have been laid down for identification of the claimant by the Deputy Welfare Commissioner :

“On the stipulated date fixed for personal appearance before the Dy. Commissioner, the claimant will be required to file the aforesaid documents. The Dy. Commissioner will verify the identity of the claimant on the basis of personal observation of photograph affixed on the record and documents filed by the claimants to establish his identity. Generally, the Smart Card issued to the Gas Victims will be considered as presumptive proof of the identity of the claimants and additional safeguard regarding identity of the claimants will be their Bank Account Passbook, which necessarily, now-a-days, contains account holder's duly attested photograph. If identity of the claimant is established beyond doubt, the Dy. Commissioner will issue an Account Payee Cheque to the claimant and receipt on the Voucher will be taken from the claimant at the same time. The photograph

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filed by the claimant will be affixed on the Voucher, which shall be part of the record.

In case of any doubt or dispute as to identity of the claimant, requiring an enquiry into the matter, his case will be adjourned to the days kept for the purpose, as per the convenience of the Dy. Commissioner."

5. We further find that in conformity with the Action Plan as approved, the Welfare Commissioner in exercise of his powers under para 8 of the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 has laid down a procedure for disbursement of compensation and in the said procedure it is provided that the Deputy Welfare Commissioner will require the claimant to produce his Smart Card, Photo Identity Card, Voters' Identity Card, Pass-port, PAN Card, Driving License or any other duly recognized photo identity card having any proof of his identity and if there is any doubt regarding the identity of the claimant, the Deputy Welfare Commissioner will proceed to summarily enquire into the identity of a genuine claimant and after satisfying himself with the identity of genuine claimant the Deputy Welfare Commissioner will proceed to disburse the pro-rata compensation.

6. It is thus clear that as per the Action Plan as approved and the procedure laid down in conformity with the Action Plan, the Deputy Welfare Commissioner will verify the identity of the claimant on the basis of personal observation of the photograph affixed on the record and the documents filed by the claimant to establish the identity. This obviously will be done by comparison of the claimant who is required to appear in person before the Deputy Welfare Commissioner and the photograph affixed in one of the documents such as Smart Card, Voters' Identity Card, Bank Account Pass-book, Passport, PAN Card, Driving License etc. The aforesaid provision in the Action Plan and the procedure laid down further provide that if the identity of the claimant is still in doubt, the Deputy Welfare Commissioner will make a summary inquiry into the matter. Thus, the Deputy Welfare Commissioner cannot reject the claim where he entertains a doubt about the ideality of the claimant, but he can reject the claim only if on enquiry he finds that the claimant is not genuine.

7. From the records of the Deputy Welfare Commissioner produced before us, we find that the Reference Card was produced as Exh.P/1, the Ration Card was produced as Exh.P/2, Tata Survey was produced as Exh.P/3, Pass-book of the Bank Account in which the interim compensation was deposited was produced as Exh.P/4 and an Affidavit was produced as Exh.P/5. We further find that in Exh. P/4 which is the Pass-book of the Bank Account in which the interim compensation is said to have been deposited, the photograph and thumb impression of Mohd. Ishaq is affixed. Hence, the Deputy Welfare Commissioner should have insisted on the personal appearance of the claimant Sheikh Mohd. and compared him with the photograph affixed in Exh.P/4, but this exercise has not been undertaken by the Deputy Welfare Commissioner. Moreover, as we have held, where the Deputy Welfare Commissioner entertains a doubt about the ideality of the claimant, he cannot reject the claim but has to make summary enquiry and

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will reject the claim only after recording a finding that the claimant is not genuine. This, the Deputy Welfare Commissioner has not done.

8. We therefore quash the impugned orders passed by the Deputy Welfare Commissioner, the Additional Welfare Commissioner and the Welfare Commissioner in Claim No.527873/01 and remand the matter back to the Deputy Welfare Commissioner to first decide the matter with regard to identity of the claimant in accordance with the procedure laid down in the Action Plan and in the instructions of Welfare Commissioner as discussed above and thereafter determine the compensation if the claimant is found to be genuine. This exercise will be completed by the Deputy Welfare Commissioner within three months from the date of filing of this order.

9. With the aforesaid direction, the writ petition is disposed of.

Petition is disposed of.

I.L.R. [2007] M. P., 1356

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh

2 August, 2007

SUMIT JAIN

...Petitioner*

v.

STATE OF MADHYA PRADESH and others

...Respondents

Medical and Dental Undergraduate Entrance Examination Rules, M. P. 2006—Rule 5, 6, 9, 14—Freedom Fighter—Whether students who had applied and selected in quota of freedom fighter can be given admission in seats meant for open unreserved category as they had secured enough marks—Petitioner appeared in Pre-Medical Entrance Test and was ranked 4th in merit list of Freedom Fighter—Sought admission on the ground that as three candidates placed above him had secured enough marks therefore, they should have been given admission in seats meant for open unreserved category—Held—Reservations in favour of S.C./S.T./O.B.C. is made as special provision for advancement of S.C./S.T./O.B.C.—If candidate belonging to this category is able to compete with other candidates belonging to unreserved category and secure admission on his merit, such candidate does not require benefit of special provision for advancement of S.C./S.T./O.B.C.—If candidate belonging to S.C./S.T./O.B.C. is not able to compete with candidates belonging to unreserved categories and cannot secure admission on the basis of merit, he requires protection of special provision—Children or Grand Children of freedom fighter do not belong to S.C./S.T./O.B.C.—They do not belong to class who are socially or educationally backward—Reservation to them is by way of recognition of contribution made by Freedom Fighters—Candidates belonging to Freedom Fighter

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Class cannot claim benefit of Article 15.4—Challenge to Rule 9.14 on the ground of discrimination misconceived—Petition dismissed.

The children or the grand-children of freedom fighters do not belong to Scheduled Castes, Scheduled Tribes or other Social and Educational Backward Classes of citizens for whom special provisions can be made under Article 15.4 of the Constitution. They do not belong to a class of citizens, who are socially or educationally backward. Reservation in the Rules for the children or grand-children of freedom fighters have been made in the matter of admission to MBBS course as a recognition of the contribution made by the freedom fighters to the nation with a view to ensure that a minimum number of seats are kept for the children and grand-children of freedom fighters. The candidates belonging to the freedom fighters class, cannot claim the benefit of Article 15.4 of the Constitution and also cannot be equated with Scheduled Castes, Scheduled Tribes or other Social and Educational Backward Classes of citizens who have been given special provision under Article 15.4. of the Constitution. It is for this reason that in Rule 9.14 of the Rules no provision has been made that a candidate belonging to freedom fighter class, whose name also appears in the merit/waiting list of unreserved category beside the merit/waiting list of his/her own class shall have an option during counselling to select a seat either from his own class or from unreserved class. The challenge to Rule 9.14 of the Rules on the ground of discrimination is, thus, misconceived. (Para 6)

Cases Referred :

Ritesh R. Sah v. Y.L. Yamul and others (1996) 3 SCC 253, *Yoganand Vishwasrao Patil and others v. State of Maharashtra and others* (2005) 12 SCC 311.

Aditya Sanghi, for the Petitioner

Kumaresh Pathak, Dy. Adv. General for the Respondents no. 1 and 2.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :—The petitioner appeared in Pre-Medical Entrance Test in the year 2006 in the seats meant for freedom fighter class and he was ranked 4th in the list of Freedom Fighter class. Respondent nos. 4, 5 and 6 also appeared in Pre-Medical Entrance Test in the year 2006 in the seats meant for freedom fighter class but they were ranked above the petitioner in the list of Freedom Fighter Class.

2. The petitioner's case in the writ petition is that respondent nos. 4, 5 and 6 had secured enough marks in the Pre-Medical Entrance Test in the year 2006 to secure admission in the seats for open unreserved category but the authorities, instead of giving admission to the respondent nos. 4, 5 and 6 in the seats for open unreserved category, gave them admission into three seats reserved for freedom fighters although they opted admission in the seats meant for open unreserved category. The petitioner filed a Writ Petition No.11474/2006 before this Court contending inter alia that had respondent nos. 4, 5 and 6 been admitted to the seats meant for open unreserved category on the basis of their merit, the petitioner would have got admission in one of

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the seats meant for the freedom fighter class. A learned Single Judge of this Court in his order dated 28.9.2006 held that under Rule 5.6 of the Madhya Pradesh Medical and Dental Undergraduate Entrance Examination Rules, 2006 (hereinafter referred to as "the Rules"), a candidate had the option either to apply for freedom fighter class or to apply for open unreserved category and as respondent nos. 4, 5 and 6 had applied for admission in the freedom fighter class, they could be considered for admission only in the seats meant for freedom fighter class and not for the seats meant for open unreserved category. It was held by the learned Single Judge that Rule 9.14 of the said Rules provides that a candidate, belonging to SC/ST/OBC category, whose name also appears in the merit or waiting list of unreserved category besides the merit/waiting list of his/her own reserved category, had the option during counselling to select the seat either from reserved category or from unreserved category, but similar provision has not been made in the Rules in the case of students belonging to freedom fighter class. The learned Single Judge also held in the order dated 28.9.2006 in Writ Petition No.11474/2006 that so long as the Rules are not challenged by the petitioner, admissions will have to be given to the different candidates according to the Rules by the authorities and in the absence of clear provision in the Rules similar to Rule 9.14 for candidates belonging to freedom fighter category, the contention of the petitioner that respondent nos. 4, 5 and 6 should have been given admission in the seats meant for open unreserved category and not in the seats meant for freedom fighter class, cannot be considered. In view of the aforesaid observations of the learned Single Judge in the order dated 28.9.2006 in Writ Petition No.11474/2006, the petitioner has filed the present writ petition challenging Rule 9.14 of the Rules as *ultra vires* Articles 14 and 19 (i)(g) of the Constitution of India.

3. Mr. Aditya Sanghi, learned counsel for the petitioner, submitted that in *Ritesh R. Sah Vs. Dr. Y.L. Yamul and others* (1996) 3 SCC 253 the Supreme Court has taken a view that a student, belonging to the reserved category, who is entitled to be admitted on the basis of merit cannot be treated as admitted against the seats reserved for the reserved category but he should be treated as a candidate admitted in the seats meant for unreserved category. He argued that in view of the said law laid down by the Supreme Court in *Ritesh R. Sah Vs. Dr. Y.L. Yamul and others* (supra) Rule 9.14 of the Rules, which does not provide that students, who belong to freedom fighter class, who on the basis of their merits are entitled to get admission into seats for the unreserved category should be treated as admitted into the seats meant for unreserved category is discriminatory and violative of Article 14 of the Constitution. Mr. Sanghi also cited the decision of Supreme Court in *Yoganand Vishwasrao Patil and others Vs. State of Maharashtra and others* (2005) 12 SCC 311 in which the Supreme Court following the decision of *Ritesh R. Sah Vs. Dr. Y.L. Yamul and others* (supra) has held that a student, who is entitled to be admitted on the basis of merit, though belonging to reserved category, cannot be considered to be admitted in reserved category and issued appropriate directions that the admissions in the Post Graduate Medical courses be made accordingly.

4. Mr. Kumaresh Pathak, learned Deputy Advocate General, appearing for the

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respondents on the other hand, relying on the return filed on behalf of respondent nos. 1 and 2 submitted that the writ petition was barred by the principle of constructive *res-judicata* inasmuch as the petitioner was not willing to challenge the vires of Rule 9.14 in the earlier Writ Petition No. 11474/2006 and this would be clear from the order dated 28.9.2006 of the learned Single Judge in the said case. He submitted that the petitioner could have challenged the validity of the Rules in the earlier writ petition and as he has failed to challenge the validity of the Rules, he cannot now be allowed to assail the validity of the Rules in the present case. On the merits, Mr. Pathak submitted that Rule 5.6 of the Rules provides that a candidate can apply for admission in freedom fighter class or can apply in the open class of his/her category. He submitted that Rule 5.6 thus gives an option to a candidate to apply either for freedom fighter class or for the open class of his/ her category and once a candidate exercises an option for freedom fighter class in his application, he cannot thereafter seek admission in the open class of his/her category. He further submitted that the provision of Rule 9.14 is not discriminatory inasmuch as the said benefit under Rule 9.14 is given to SC/ST/OBC category of candidates only who form a separate class and who cannot be equated with freedom fighters class and, therefore, Rule 9.14 is not violative of Article 14 of the Constitution of India.

5. We have perused the decisions of the Supreme Court in *Ritesh R. Sah Vs. Dr. Y.L. Yamul and others* and *Yoganand Vishwasrao Patil and others Vs. State of Maharashtra and others* (supra) cited by Mr. Sanghi and we find that the aforesaid decisions of the Supreme Court relate to reservation in favour of Scheduled Castes, Scheduled Tribes and other Social and Educational Backward classes of citizens, as provided under Article 15.4 of the Constitution of India. Reservation in favour of Scheduled Castes, Scheduled Tribes and other Social and Educational Backward Classes of citizens is made as a special provision for advancement of Scheduled Castes, Scheduled Tribes and other Social and Educational Backward Classes. Hence where a candidate belonging any of the backward classes is able to compete with other candidates belonging to the unreserved category or general category and secure admission on the basis of his/her merit, such a candidate does not require the benefit of the special provision for advancement of Scheduled Castes, Scheduled Tribes and other Social and Educational Backward Classes under Article 15.4 of the Constitution of India. Such a candidate must be treated as a candidate belonging to the unreserved/ general category and cannot be treated as admitted to a seat reserved for Scheduled Castes, Scheduled Tribes or any other Social and Educational Backward Classes. On the other hand, if a candidate belonging to Scheduled Castes, Scheduled Tribes or any other Social and Educational Backward Classes is not able to compete with candidates belonging to the unreserved or general category and cannot secure admission on the basis of his merit, he requires the protection of the special provision made under Article 15.4 of the Constitution of India for his advancement. This appears to be the basis of the provision in Rule 9.14 of the Rules, which is quoted herein below: -

“A candidate belonging to ST/SC/OBC category, whose name also appears in the merit/waiting list of unreserved category beside the

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merit/waiting list of his/her own reserved category shall have an option during counselling to select the seat either from reserved category or un-reserved category."

6. The children or the grand-children of freedom fighters do not belong to Scheduled Castes, Scheduled Tribes or other Social and Educational Backward Classes of citizens for whom special provisions can be made under Article 15.4 of the Constitution. They do not belong to a class of citizens, who are socially or educationally backward. Reservation in the Rules for the children or grand-children of freedom fighters have been made in the matter of admission to MBBS course as a recognition of the contribution made by the freedom fighters to the nation with a view to ensure that a minimum number of seats are kept for the children and grand-children of freedom fighters. The candidates belonging to the freedom fighters class, cannot claim the benefit of Article 15.4 of the Constitution and also cannot be equated with Scheduled Castes, Scheduled Tribes or other Social and Educational Backward Classes of citizens who have been given special provision under Article 15.4. of the Constitution. It is for this reason that in Rule 9.14 of the Rules no provision has been made that a candidate belonging to freedom fighter class, whose name also appears in the merit/waiting list of unreserved category beside the merit/waiting list of his/her own class shall have an option during counselling to select a seat either from his own class or from unreserved class. The challenge to Rule 9.14 of the Rules on the ground of discrimination is, thus, misconceived.

7. Mr. Sanghi has not been able to cite any authority for the proposition that the fundamental right of a citizen under Article 19 (i) (g) of the Constitution will include the right to be admitted in the MBBS course. He has also not been able to show how Rule 9.14 of the Rules is ultra vires to Article 19(i)(g) of the Constitution of India.

8. For the aforesaid reasons, we do not find any merit in this writ petition and we accordingly dismiss the same. Since we have decided this matter on merits, it is not necessary for us to go into the question whether the present writ petition is barred by the principle of constructive *res-judicata*.

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WRIT PETITION

Before Mr. Justice Abhay M. Naik

9 August, 2007

MAHENDRA GOYANKA

Vs.

STATE OF M.P. and ors.

...Petitioner*

...Respondents

Money Lenders Act, M.P. (XIII of 1934)-Sections 2(ix), 11-B-Registration of Money Lenders-Petitioner granted licence for money lending for a period of 2 years by Tahsildar, Kotma-License extended lastly on 29-3-06 for a period from 30-10-2004 to 29-10-2006 by S.D.M.-Renewal of licence from 30-10-2004 to 29-10-2006 declared void having been

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issued in respect of Scheduled notified area of Kotma-Held-Money Lenders Act stood amended by M.P. Money Lenders (Amendment) Act, 2000-As per amended definition Nagar Panchayat was registering authority for Kotma- S.D.M. had no authority or jurisdiction to grant renewal/extension of licence- Kotma of Shahdol District declared as Scheduled area by notification dated 20-2-2003- Kotma was earlier in Shahdol District but after formation of District Anuppur Kotma became part of it-No separate notification required as it is not the case of petitioner that Kotma falling in earlier Shahdol District is different from Kotma presently falling in District Anuppur-Petition dismissed.

Kotma is a place of Municipal Council and, accordingly, Nagar Panchayat was the registering authority for the purposes of M.P. Money Lenders Act at the relevant time. Earlier, an application for registration as money-lender was required to be made to the Tahsildar. After the aforesaid Amendment Act, the word "Tahsildar" has been substituted by "Registering Authority" in Section 11-A of the Act. The word "Registering Authority" also finds place in various provisions substituted by virtue of the Amendment Act at all the relevant places. Thus, learned Sub Divisional Magistrate Kotma, had absolutely no power or jurisdiction to grant renewal/extension to the money-lenders' licence vide order dated 29.3.2006 contained on the back side of Annx.p/2 and, accordingly, the order of renewal/extension is found to be without jurisdiction.

At the time of issuance of the said Notification, Kotma was part of Shahdol district and, accordingly, it was specified as a scheduled area. After formation of district Anuppur, Kotma has been made part of it. It is not a case of the petitioner that Kotma falling earlier in district Shahdol, is different from Kotma presently falling in district Anuppur. In this view of the matter, no separate Notification is required and the Notification dated 20.2.2003 would serve the purpose for the purposes of Section 11-B of the M.P. Money Lenders Act. (Paras 8 & 11)

Arvind Chouksey, for the petitioner
Vinod Mehta, for the respondents

ORDER

Cur.adv.vult.

ABHAY M. NAIK, J. :—Short facts giving rise to the present writ petition are that the petitioner's father was a money-lender of Shahdol district for more than 30 years. After his death, petitioner continued with the business of money lending. He obtained licence for money-lending by getting himself registered under the provisions M.P. Money Lenders Act, 1934. Licence was issued in favour of the petitioner on 17.3.1998 for a period of two years by Tahsildar, Tahsil Kotma, District Shahdol as revealed in Annx.P/2. It was extended from time to time, lastly on 29.3.2006 for a period from 30.10.2004 to 29.10.2006 as revealed on the back side of Annx.P/2. Last extension/renewal was granted by the Sub Divisional Officer, District Anuppur. It is pertinent to mention here that on formation of District Anuppur, Tahsil Kotma was made a part of it.

2. Sub Divisional Officer Kotma, issued a notice dated 20.11.2006 (Annx.P/3) to the petitioner requiring him to provide certain informations and documents with respect to his act of money-lending. On behalf of the petitioner, time was sought vide application

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dated 23.11.2006 on the ground that he was out of station and stay until his arrival was sought of the proceedings under the provisions of M.P. Money Lenders Act. Learned Sub Divisional Officer, Kotma, refused to grant time and passed the impugned order on 23.11.2006 holding that the licence renewed from 30.10.2004 to 29.10.2006 is void on account of having been issued in respect of scheduled notified area of Kotma Tahsil. Accordingly, licence renewed for the aforesaid period has been cancelled.

3. Case of the petitioner is that the licence was renewed duly for the period from 30.10.2004 to 29.10.2006 and the Collector Anuppur, has acted in a malafide manner due to political influence of his rivals. It is further stated in the petition that a sum of Rs.5 lacs was demanded from the petitioner as gratification and on account of denial on his part, the Collector is bent upon to initiate proceedings against the petitioner under the provisions of the M.P. Rajya Suraksha Adhiniyam, for extermment. A letter issued by the Sub Divisional Officer addressed to the Sub Divisional Magistrate, District Anuppur is placed on record as Annx.P/6, wherein, it has been mentioned that for maintaining law and order, it is necessary to exterm petitioner's brother, namely, Manish Kumar under the provisions of the said Act. This apart, Sub Divisional Magistrate, Kotma, has started a drive against money-lenders as revealed in Annx.P/8 & P/9. It is further submitted that the petitioner has already advanced money to various persons during the validity period of licence which may be recovered by him as of right. On the facts and grounds averred in the writ petition, following reliefs have been sought :-

"7(i) This Hon'ble Court may kindly be pleased to quash the impugned order dated 23.11.2006 (Annx.P/5).

(ii) This Hon'ble Court may kindly be pleased to direct the respondents No. 2 & 3 have got no jurisdiction to issue 10 points Mool Mantras and restrain the petitioner from legally recovering the loan amount of about Rs.35 lacs disbursed during validity of licence."

4. Shri Arvind Chouksey, learned counsel for the petitioner strenuously argued that the impugned order dated 23.11.2006 having been passed by the Sub Divisional Officer Kotma, is without jurisdiction and the same is liable to be quashed. He further contended that the petitioner's licence of money-lending was renewed for a period from 30.10.2004 to 29.10.2006 and the transactions of money-lending performed during this period are not illegal and the petitioner has a right to recover the amount advanced during the aforesaid validity period. It is further contended that declaration of scheduled area with respect to Kotma forming part of District Anuppur, has not been made at all and no such Gazette Notification has been issued. In the absence of such a declaration, licence of money-lending renewed in favour of the petitioner for the aforesaid period is valid and cannot be treated as without jurisdiction.

5. Shri Vinod Mehta, learned Govt. Advocate, submitted that the disputed renewal for the period from 30.10.2004 to 29.10.2006 was made by the Sub Divisional Officer, Kotma, District Anuppur, who had no authority in view of the amended provisions of the M.P. Money Lenders Act, 1934. Moreover, Kotma having been declared as scheduled area under Clause-I of Article 244 of the Constitution of India, no licence of

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money-lending (registration certificate) could be granted for carrying on the business of money-lending in the said area.

6. After hearing the learned counsel for the parties, this Court is of the considered opinion that the petition is totally devoid of force and is liable to dismissal for the reasons contained in the succeeding paragraphs.

7. M.P. Money Lenders Act, 1934, stood amended by the M.P. Money Lenders (Amendment) Act, 2000 (Act No.13 of 2001). This Amendment Act received the assent of the President of India on 14th April, 2001 and was published in the M.P. Gazette (Extraordinary) dated 20th April, 2001. Thus, the M.P. Money Lenders Act, 1934 stood amended and came into force with amendments with effect from 20.4.2001. Under Section 11-B of the Act, every person who carries on or intends to carry on the business of money-lending shall get himself registered by an application made to the Registering Authority. "Registering Authority" has been defined in Section 2(ix) of the Act which reads as follows :-

"(ix) "Registering Authority" means in rural area, Zila Panchayat or Janpad Panchayat or Gram Panchayat constituted under the Madhya Pradesh Panchayat Raj Adhiniyam, 1993 (1 of 1994) for their respective Panchayat Areas and in Urban areas, Municipal Corporation constituted under the Madhya Pradesh Municipal Corporation Act, 1956 (No.23 of 1956) or Municipal Council or Nagar Panchayat constituted under the Madhya Pradesh Municipalities Act, 1961 (No.37 of 1961) as the case may be, for their respective areas."

8. Kotma is a place of Municipal Council and, accordingly, Nagar Panchayat was the registering authority for the purposes of M.P. Money Lenders Act at the relevant time. Earlier, an application for registration as money-lender was required to be made to the Tahsildar. After the aforesaid Amendment Act, the word "Tahsildar" has been substituted by "Registering Authority" in Section 11-A of the Act. The word "Registering Authority" also finds place in various provisions substituted by virtue of the Amendment Act at all the relevant places. Thus, learned Sub Divisional Magistrate Kotma, had absolutely no power or jurisdiction to grant renewal/extension to the money-lenders' licence vide order dated 29.3.2006 contained on the back side of Annx.P/2 and, accordingly, the order of renewal/extension is found to be without jurisdiction.

9. Admittedly, the petitioner was engaged in the business of money-lending in Tahsil Kotma. Section 11-B of the Money Lenders Act, is as follows :-

"11-B : Registration of money-lenders and registration certificate.-(1) Every person who carries on or intends to carry on the business of money lending shall get himself registered by an application made to the Registering Authority of that area in which he carries on or intends to carry on such business and, on such registration the Registering Authority shall grant a registration certificate to him in such form as may be prescribed :

Provided that no person being a firm or partner of a firm of money-

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lenders shall be so registered except upon production before the Registering Authority of a certified copy of an entry showing such person as the firm or partner, as the case may be, made in the Register of Firms under Section 59 of the Indian Partnership Act, 1932 (No.9 of 1932).

Provided further that no registration certificate shall be granted to carry on the business of money lending in the Scheduled areas referred to in clause (1) of Article 244 of the Constitution.

(2) The application made under sub-section (1) shall be in writing and shall specify the area in which the applicant carries on or intends to carry on the business of money-lending and such other particulars as may be prescribed."

10. Second proviso as stated hereinabove, clearly and absolutely prohibits the Registering Authority from issuing registration certificate to carry on the business of money lending in the scheduled areas referred to in Clause-I of Article 244 of the Constitution of India. This Article is reproduced below for the convenience :-

"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, Tripura and Mizoram].

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in [the State of Assam], [Meghalaya, Tripura and Mizoram].

Accordingly, it was within the competence to exclude application of the provision of grant of registration certificate/ money lenders licence in scheduled areas.

11. In the Gazette of India (Extraordinary) Part-II Sub-section (1) of Section 3, dated 20.2.2003, certain scheduled areas are specified including those situated in the State of Madhya Pradesh. Entry at Serial No.13 is as follows :-

" Pushparajgarh, Anuppur, Jathri, Kotma, Joitpur, Sohagpur and Jaisinghnagar Tahsil in Shahdol District."

At the time of issuance of the said Notification, Kotma was part of Shahdol district and, accordingly, it was specified as a scheduled area. After formation of district Anuppur, Kotma has been made part of it. It is not a case of the petitioner that Kotma falling earlier in district Shahdol, is different from Kotma presently falling in district Anuppur. In this view of the matter, no separate Notification is required and the Notification dated 20.2.2003 would serve the purpose for the purposes of Section 11-B of the M.P. Money Lenders Act.

12. It may further be seen that violation of the provisions of the said Act is made punishable with fine in general and violation of the provision of sub-section (1) of

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Section 11-F in any scheduled area has been made an offence which is punishable with imprisonment which may extend to two years, or with fine which may extend to Rs.10,000/- or both. It is held that the Notification dated 20.2.2003 would also be applicable for the purposes of other provisions of the M.P. Money Lenders Act, 1934 including sub-section (3) of Section 11-F of the Act.

13. So far as the recovery of money advanced by the petitioner during the period of disputed licence is concerned, it is observed that the petitioner has no right to recover the money by muscle power. It is stated by the learned counsel for the petitioner that certain suits for recovery have been instituted by the petitioner. Obviously, they will be required to be dealt with in accordance with law, keeping in mind the aforesaid observations.

14. In the result, the petition is totally misconceived and is, therefore, hereby dismissed, for want of substance.

No order as to costs.

Petition dismissed.

I.L.R.[2007] M.P., 1365

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh

9 August, 2007

MANOJ MODI

Vs.

STATE OF M.P. and others

....Petitioner*

...Respondents

Common Entrance Examination, D-MAT, 2006-Admission-Petitioner was offered admission on the basis of his performance in entrance examination-College demanded bank guarantee for Rs. 10 lacs-Held-If Institution feels that student may leave the course in midstream then it may require that student to give a bond/bank guarantee that the balance fee for the whole course would be received by Institution-No assessment by Institution that whether petitioner would leave the course midstream-Demand of bank guarantee without assessment contrary to judgment of Supreme Court-Demand made by institution quashed.

The provision in the brochure is in accord with the judgment of the Supreme Court in *Islamic Academy of Education and another Vs. State of Karnataka and others* (supra) but the demand by the respondent no.4/College from the petitioner to furnish the bank guarantee at the time of admission without an assessment whether the petitioner would leave the course midstream is contrary to the judgment of the Supreme Court in *Islamic Academy of Education and another Vs. State of Karnataka and others* (supra) and the brochure published by the Association of Private Dental & Medical Colleges of Madhya Pradesh, respondent no.3. (Para 7)

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Case Referred :

Islamic Academy of Education and another v. State of Karnataka and others (2003)6 SCC 607.

Aditya Sanghi, for the Petitioner.

Satish Sharma, for the Respondents Nos. 3 and 4.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by A. K. PATNAIK, C. J. :- The petitioner appeared in the common entrance examination, D-MAT 2006, conducted by the Association of Private Dental & Medical Colleges of Madhya Pradesh, respondent no.3, and on the basis of his performance in the said entrance examination he was offered admission in the R.D.Gardi Medical College, Ujjain. The petitioner has alleged in the writ petition that when he went to respondent no.4/ College for admission, he was asked to furnish a bank guarantee for Rs.10 lac within a period of 24 hours or latest by 26th September, 2006. Aggrieved by the aforesaid demand by respondent no.4/College for bank guarantee, the petitioner has filed this writ petition under Article 226 of the Constitution of India.

2. On 28.9.2006, the Court after hearing the learned counsel for the petitioner, issued notice to respondent nos.3 and 4 and directed as an interim measure that they will give admission to the petitioner in respondent no.4/College by 30.9.2006 without insisting upon a bank guarantee, if he was entitled to such admission on the basis of his merit and that such admission would be subject to result of the writ petition. Pursuant to the order dated 28.9.2006 of this Court, the petitioner has been given admission in respondent no.4/ College.

3. Hence, the only question that remains to be decided in this writ petition is whether the respondent no.4/College could insist for a bank guarantee from the petitioner at the time of his admission.

4. In *Islamic Academy of Education and another Vs. State of Karnataka and others* (2003) 6 SCC 697 a Constitution Bench of the Supreme Court considered the question whether a bank guarantee could be insisted upon by an institution from a student and Para 8 of the Judgment at Page 722 of the Supreme Court Cases, the Supreme Court held that if an institution feels that any particular student may leave the course in midstream then it may require that student to give a bond/bank guarantee that the balance fees for the whole course would be received by the institution even if the student left the course in midstream.

5. Mr.Aditya Sanghi, learned counsel for the petitioner submitted that in the present case, bank guarantee was insisted upon from the petitioner by respondent no.4/College without any assessment that the petitioner may leave the course, to which he has been admitted, in midstream and, therefore, the demand of bank guarantee by respondent no.4/ College from the petitioner was not in accordance with the judgment of Supreme Court in *Islamic Academy of Education and another Vs. State of Karnataka and others* (supra).

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6. Mr. Satish Sharma, appearing for respondent nos. 3 and 4, submitted that in the brochure published by the Association of Private Dental & Medical Colleges of Madhya Pradesh for admissions in the year 2006, it is mentioned that the College will have the authority to ask a candidate to deposit the bank guarantee if a college feels that certain candidate may leave the course in midstream.

7. The provision in the brochure is in accord with the judgment of the Supreme Court in Islamic Academy of Education and another Vs. State of Karnataka and others (supra) but the demand by the respondent no.4/College from the petitioner to furnish the bank guarantee at the time of admission without an assessment whether the petitioner would leave the course midstream is contrary to the judgment of the Supreme Court in Islamic Academy of Education and another Vs. State of Karnataka and others (supra) and the brochure published by the Association of Private Dental & Medical Colleges of Madhya Pradesh, respondent no.3.

8. For the aforesaid reasons, we allow this writ petition and quash the demand made by the respondent no.4/College from the petitioner to furnish a bank guarantee.

Certified copy as per rules.

Petition allowed.

I.L.R. [2007] M. P., 1367

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh

10 August, 2007

MITTHULAL JAIN and Four others

...Petitioners*

Vs.

STATE OF M.P. and others

...Respondents

A. Constitution of India - Articles 226/227 - Public Interest Litigation - *Locus Standi* - Petitioners claiming themselves to be members of political parties filed petition challenging alienation of property belonging to Gaushala which is claimed to be a Public Trust - Respondents claimed Gaushala to be a Society - On the complaint of Petitioner no.1 enquiry by Registrar, Firms and Societies already pending - However petitioner instead of participating in enquiry filed Writ Petition - Respondents challenged the *locus standi* of petitioners to file writ petition - Held - Public Interest Litigation cannot be maintained unless Petitioners satisfy that rights and liabilities of class, community or locality to which he belongs have been affected one way or other - Nothing in petition that any of their right or liability is affected by any act or omission of office bearers or committee of Gaushala - Petitioners have no *locus standi* - Petition dismissed.

In the present case, the petitioners have not been able to show how they are interested in the Gaushala. They have not stated in the writ petition that any of their rights have

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been affected by any of the acts of the office bearers or the Committee of the Gaushala. They have also not been able to show that their liabilities are in any way affected by any of the acts of the office bearers or the Committee of the Gaushala. Therefore, assuming that the Gaushala is a public trust to which the Act applies, as contended by the petitioners, in the absence of any pleadings and materials before the court to show that the rights or liabilities of the petitioners as a class or community are affected by the acts of the respondents 8 and 9 or that the petitioners are in any way interested in the Gaushala, we cannot entertain this writ petition as a PIL at the instance of the petitioners for issuing directions for enquiry into the affairs of the Gaushala or into the alienation of the properties of the Gaushala. (Para 26)

B. Constitution of India - Articles 226/227 - Public Interest Litigation - Writ Petition in respect of transaction or affairs of Public Trust cannot be maintained unless it is shown by Petitioner that the legal rights or liabilities of a class or community is affected by some act or omission in respect of Trust.

It is thus clear beyond doubt that unless a member of the public satisfies the court that the rights and liabilities of the class, community or locality to which he belongs have been affected one way or the other, a public interest litigation cannot be maintained at the instance of the member of the public. (Para 22)

Likewise, a writ petition under Article 226 of the Constitution in respect of the affairs or transaction of a public trust cannot be maintained as a PIL unless it is shown by the petitioner that his legal right or liability as a member of a class or community is affected by some act or omission in respect of the Trust. (Para 24)

C. Constitution of India - Articles 226/227 - Public Interest Litigation - Evasion of Income Tax and Stamp Duty - PIL complaining evasion of Income Tax or Stamp Duty is maintainable because any loss to public exchequer affects rights of members of public - No material has been placed by petitioners to substantiate the submission except saying that land worth crores of rupees has been sold - However authorities under Income Tax Act and Stamps Act to take action if they find that there has been evasion of Income Tax and Stamp duty.

In case of gross evasion of income tax and stamp duty, a member of the public may maintain a public interest litigation because any loss to the public exchequer affects the rights of the members of the public who have substantial interest in the public exchequer. Mr. Lalwani orally submitted that there is gross evasion of income-tax and stamp duty in the transaction of sale made by the respondent No.8 in favour of the respondent No.11, but no foundation has been laid in the writ petition filed by the petitioners and no materials have been filed before the Court by the petitioners to substantiate this submission except saying that land worth crores of rupees has been sold by the respondent No.8 in favour of the respondent No.11 at a low price. We are not inclined to entertain this PIL to examine the question of evasion of income-tax and stamp duty at the instance of the petitioners whose antecedents are not above board

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and whose bonafides are in doubt only on the bald allegation that there has been evasion of income tax and stamp duty. It will be however open for the authorities under the Income Tax Act and the Stamps Act to take action in this regard if they find that there has been such evasion of income tax and stamp duty. (Para 30)

Cases Referred :

The Municipality of Taloda Vs. Charity Commissioner, Bombay and others; AIR 1968 SC 418, *S.P. Gupta and others Vs. President of India and others;* AIR 1982 SC 149, *Chenchu Rami Reddy and another Vs. The Government of Andhra Pradesh and others;* AIR 1986 SC 1158, *R. Venugopala Naidu Vs. Venkatarayulu Naidu Charities;* AIR 1990 SC 444, *Bangalore Medical Trust Vs. B.S. Muddappa;* AIR 1991 SC 1902, *Mehsana District Central Cooperative Bank Limited Vs. State of Gujarat;* AIR 2004 SC 1576, *Vishwanath Chaturvedi (3) Vs. Union of India and others;* (2007) 4 SCC 380, *Ramsharan Autyanuprasi Vs. Union of India and others;* 1989 Supp. (1) SCC 251, *Guruvayoor Devaswom Managing Committee and another Vs. C.K. Rajan and others;* (2003) 7 SC 546, *Bombay Dyeing & Mfg. Co. Ltd.(3) Vs. Bombay Environmental Action Group and others;* (2006) 3 SCC 434, *Dattaraj Nathuji Thaware Vs. State of Maharashtra and others;* (2005) 1 SCC 590, *Janta Dal Vs. H.S. Chowdhary;* (1992) 4 SCC 305.

Ashok Lalwani, for the petitioners.

Vivek Awasthi, Govt. Adv. for the respondents 1 to 7.

Radhe Lal Gupta, for the respondent No.8.

Alok Aradhe, with *Sankalp Kochar,* for the respondent No.9.

Kishore Shrivastava, with *Piyush Dharmadhikari,* for the respondent No.11.

K.K. Trivedi, for the respondent No.12.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by A. K. PATNAIK, C. J. :- This writ petition has been filed by five petitioners as a Public Interest Litigation praying for directions to the respondents 1 to 4 to make enquiry into the affairs of Shri Gaushala, Katni (for short 'the Gaushala') and in particular into the alienation of the properties of the Gaushala and for directions to cancel the sale-deeds and lease-deeds executed on behalf of the Gaushala in favour of the transferees.

2. The petitioner No.1 has described himself as the President of Shiva Sena, District Body, Katni and Gau Rakshak Samiti, Katni; the petitioner No.2 has described himself as the State General Secretary, Janata Dal; the petitioner No.3 has described himself as the President of Loktantrik Samajwadi Party; the petitioner No.4 has described himself as the President, Shrimjivi Kamgar Union; and the petitioner No.5 has described himself as the Ex-District President, National Students' Union of India. The petitioners have stated in the writ petition that the Gaushala was founded in the year 1925 for the protection of cows, bulls, calves etc. and for the Gaushala, some landed property was purchased and some landed property was donated and the Gaushala was registered as a Public Trust in the year 1938.

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3. The petitioners have alleged that some greedy persons have taken over the Gaushala and are alienating the immovable properties of the Gaushala worth crores of rupees for selfish and personal ends and are defeating the pious objects of the Gaushala. The petitioners have stated that the Registrar, Public Trusts, Katni initiated proceedings against the Committee of Gaushala and the Secretary of the Gaushala, respondents No. 8 & 9 to prevent them from alienating the property but the respondent No. 8 claimed that the Gaushala is not a Public Trust but is a Society registered under the M.P. Societies Registrikaran Adhiniyam, 1973 (for short 'the Adhiniyam') and assailed the proceedings initiated by the Registrar of Public Trusts, Katni before this Court in W.P.Nos.2364 of 2002 and 1675 of 2004 and on 5.4.2005, a learned single Judge of this Court disposed of the writ petitions with the observation that it is open to the writ petitioners to raise all contentions and produce all materials before the Registrar, Public Trusts, Katni in support of their stand that the Gaushala is not a Public Trust but a Society registered under the Adhiniyam. The petitioners have contended in the writ petition that the status of the Gaushala is not yet clear and yet the respondent No.8 has obtained permission from the Registrar of Societies under the Adhiniyam to sell a big partial of land measuring 12.190 hectares of the Gaushala located within the Katni Municipal Corporation area and valued at crores of rupees. The petitioners have further alleged that the land has been sold to respondent No.11 falsely showing it as agricultural land with a dishonest intention and a sale-deed in respect of the land has been executed and registered in June, 2005 for a very low value. The petitioners have further alleged that the office bearers of the Gaushala are going to alienate the entire land of the Gaushala as soon as possible and end the existence of the Gaushala by distributing the sale proceeds of the land amounting to crores of rupees amongst themselves and they are going to disappear with all the money. The petitioners have also stated that despite representations made by them to the authorities, no steps have been taken to prohibit such alienation and instead the Registrar of Firms and Societies is himself taking interest in the alienation of properties and is not making any enquiry into the dubious state of affairs of the Gaushala.

4. Some preliminary objections have been raised by the respondents to the maintainability of the writ petition in their respective returns. The State respondents 1 to 7 have stated in their common return that against the alleged unlawful alienation of the properties of Gaushala, the petitioner No.1 filed a complaint before the Chief Secretary, Government of M.P., Bhopal and by order dated 11.7.2005, the State Government directed the Registrar, Firms and Societies to enquire into the matter and submit a report to the State Government. Accordingly, an explanation was sought from the respondent No.8 and the respondent No. 8 submitted an explanation. Thereafter, by memo dated 3.8.2005, the petitioner was directed to appear before the Assistant Registrar, Firms and Societies, Bhopal along with the entire records in regard to the complaint made by him. But the petitioner No.1 did not appear before the Assistant Registrar, Firms and Societies on the date fixed i.e. 23.8.2005 and instead of participating in the enquiry, the petitioners have rushed to this Court by filing the writ petition. The respondents 1 to 7 have stated that since the enquiry has already been instituted by the

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State Government, the writ petition was not tenable and deserves to be dismissed on this short ground alone.

5. The respondent No.8, Committee of the Gaushala, has stated in its return that the petitioner No.1 has not even the remotest concern with the cause of cows and is a habitual offender and there are several criminal cases pending against him in the courts and he has been arrested several times in connection with criminal offences. In the return, the respondent No. 8 has furnished the particulars of 9 criminal cases pending against the petitioner No.1 in which the petitioner No.1 was arrested for different offences under the Indian Penal Code. The respondent No.8 has further stated in its return that the petitioner No.2 is also a hard core criminal and there are several criminal cases pending against him. In the return, the respondent No.8 has furnished the particulars of 8 criminal cases pending against him and has also stated that the petitioner No.3 is similarly facing several criminal cases in some of which he has been convicted and details of 12 criminal cases under different provisions of the Indian Penal Code and the Arms Act have been furnished in the return. The respondent No.8 has contended that none of the petitioners has any social standing and that they are criminals and complaints have been made against them at the instance of the women of the locality with whom they have misbehaved. The respondent No.8 has also contended that the petitioners have nothing to do with the welfare of cows and that they are engaged in black-mailing the office bearers of the Gaushala and that they have filed this writ petition for some personal benefits and have utterly failed to disclose the public interest involved in the writ petition which deserves to be dismissed with exemplary cost.

6. The respondent No.9, the Secretary of the Gaushala, has reiterated that the petitioners have criminal antecedents and have several criminal cases pending against them in various Courts in Katni and that the residents of the locality have filed several complaints against the petitioners and that the petitioners are engaged in extortion of money and have filed this writ petition with a view to pressurise and victimize the office bearers of the Gaushala and there is no element of public interest in the writ petition. The respondent No.9 has further stated that the respondent No.8 Gaushala is a Society registered under the provisions of the Adhiniyam and is governed by the Adhiniyam which is a complete Code in itself and the provisions of the M.P. Public Trusts Act, 1951 (for short 'the Act') do not apply to the facts of the case. The respondent No.9 has further stated that the Registrar of Firms and Societies has granted permission to the respondent No.9 under Section 21 of the Adhiniyam to sell the land in question and against the order of the Registrar, Firms and Societies, an appeal lies under Section 40 of the Adhiniyam to the State Government, but the petitioners have failed to avail the alternative remedy by way of appeal. The respondent No.9 has stated that the immovable properties have been alienated in favour of the respondent No.11 at double the market rate with a view to prevent the property from being encroached and the sale has been made in the interest of the Gaushala with a view to maintain the Gaushala and that the proceeds of the sale shall be utilized for the purpose for which the Gaushala has been established and hence the petition is entirely misconceived and should be dismissed.

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7. The respondent No.11, the purchaser of the property, has also filed a return and has stated that a notice inviting tenders for sale of the land of the Gaushala was published and after coming to learn that the respondent No.8 was a Society registered under the Adhiniyam, the respondent No.11 examined the title of the respondent No.8 Society and submitted tender agreeing to purchase the land for Rs.13.50 lacs per hectare which was accepted by the respondent No. 8. The respondent No.11 has also stated that the market value of the land is Rs.5.50 per hectare as reported by the Registrar, Firms and Societies and hence the respondent No.11 has purchased the land at double the market value as determined by the Registrar. The respondent No.11 has contended that he is a bonafide purchaser for a valuable consideration and there was no underhand dealing but the petitioners have made complaints to several authorities to harass the respondent No.8 and, having failed in their evil designs, the petitioners have approached this Court with ulterior motives and the writ petition is a gross abuse of the process of law.

8. The respondent No.12, which has taken a portion of the land of the Gaushala on lease for religious purpose, has stated that the land in dispute was earlier being used to house the Gaushala but since a decision was taken by the State authorities to move all dairies out of the Municipal Corporation limits the Gaushala was shifted to other land beyond the limits of the Municipal Corporation, Katni where the cows have been kept, and the Gaushala has given the land on lease to respondent No.12 for a religious purpose and is using the money obtained out of the lease for the upkeep of the cows.

9. Considering the preliminary objections raised by the respondents in their respective returns to the maintainability of the writ petition, we passed an order on 26.7.2007 that we will first decide whether the petitioners have locus to file this Public Interest Litigation and whether the High Court could entertain the writ petition as a Public Interest Litigation and in case the Court decides this question in favour of the petitioners, the matter will be listed again for consideration of all pending IAs. Hence, the two preliminary questions, which we have to decide are:

(1) Whether the petitioners have locus-standi to file this writ petition;
and

(2) Whether the High Court should entertain this writ petition as a
Public Interest Litigation.

10. Mr. Ashok Lalwani, learned counsel for the petitioners submitted that the original trustees of the Gaushala are all dead and hence the petitioners, as members of the public, have filed this writ petition to protect the properties of the Gaushala and to ensure that the properties of the Gaushala are used only for the objects for which the Gaushala was established. He submitted that the land of the Gaushala is sought to be sold by the respondent No.8 to respondent No. 11 for a very nominal price and the office bearers of the Gaushala intend to misappropriate the sale-proceeds of the Gaushala. He submitted that the sale of the land of the Gaushala has been effected in favour of the respondent No.11 without holding any public auction and it has been held by Courts that properties of religious and charitable trusts can only be sold by public

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auction and not otherwise. He further submitted that on account of the sale of the land of the Gaushala at a very low price, there has been evasion of stamp duty and income tax and the Court should entertain this writ petition (PIL) at the instance of the petitioners even though they were not trustees of the Gaushala.

11. Mr. Lalwani submitted that in the *Municipality of Taloda vs. Charity Commissioner, Bombay and others*, AIR 1968 S.C. 418, one Dagdu Khushal transferred a property to the Municipality for a particular object as stipulated in the transfer deed and the Supreme Court held that after the transfer of property was accepted by the Municipality for the object mentioned in the transfer deed, it was not open for the Municipality to divert the use of the property for its own purposes. He submitted that in the instant case similarly, several donors had gifted their properties to the Gaushala for the protection and welfare of the cows and the properties of the Gaushala cannot be sold away to a builder by the respondent No. 8.

12. Mr. Lalwani next cited the decision of the Supreme Court in *S.P. Gupta and others vs. President of India and others*, AIR 1982 S.C. 149, particularly paragraph 22 at page 194 of the AIR, wherein the Supreme Court has held that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of any provision of the Constitution or any law and seek enforcement of such public duty and observance of such Constitutional or legal provision. He submitted that since there is a breach of public duty on account of sale of the property of the Gaushala to a builder at a very low price resulting in evasion of stamp duty and income tax, the petitioners have sufficient interest in maintaining the action for judicial redressal in this case.

13. Mr. Lalwani also submitted that in *Chenchu Rami Reddy and another vs. The Government of Andhra Pradesh and others*, AIR 1986 S.C. 1158, the Supreme Court held that the properties of charitable and Hindu religious institutions or endowments must be jealously protected because a large segment of the community has beneficial interest in it and the authorities exercising the powers under the A.P. Charitable and Hindu Religious Institutions and Endowments Act, 1966 must be most alert and vigilant in such matters but also show awareness of the ways of the present day world. He submitted that the Supreme Court further held in the aforesaid case that the authority approving the sale of properties of trusts should be aware that in such matters the trustees, or persons authorized to sell by private negotiations, can in a given case, enter into a secret or invisible underhand deal or understanding with the purchasers at the cost of the concerned institution. He submitted that in the aforesaid decision, the Supreme Court held that sale of the land belonging to the Bugga Math, Tirupati, a religious endowment by private negotiations and not by public auction was illegal. He argued that in the present case since the sale has not been made by public auction but by inviting tenders by notice which was not given wide publicity, the sale was bad.

14. Mr. Lalwani cited the decision of the Supreme Court in *R. Venugopala Naidu vs. Venkatarayulu Naidu Charities*, AIR 1990 S.C. 444 in which the Supreme Court, following its earlier decision in *Chenchu Rami Reddy and another vs. The Government of Andhra Pradesh and others* (supra), held that the sale of properties of religious

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and charitable endowments or institutions by private negotiations should not be permitted unless there are special reasons to justify the same and set aside the orders passed by the subordinate court permitting sale of two properties by private negotiations in favour of private parties and directed that the properties in question should be sold by public auction by giving wide publicity regarding the date, time and place of auction.

15. Mr. Lalwani referred to the observations of R.M. Sahai, J. in *Bangalore Medical Trust vs. B.S. Muddappa*, AIR 1991 S.C. 1902 that the restricted meaning of 'aggrieved person' and narrow outlook of specific injury has yielded in favour of broad and wide construction in wake of public interest litigation and that law has veered round from genuine grievance against order affecting prejudicially to sufficient interest in the matter and public spirited persons having faith in the rule of law are rendering great social and legal service by espousing the cause of public nature and they cannot be ignored or over looked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. He also cited the decision of the Supreme Court in *Mehsana District Central Cooperative Bank Limited vs. State of Gujarat*, AIR 2004 S.C. 1576 wherein a contention was raised that the High Court ought not to have entertained the writ petition in the form of PIL as the petition had been preferred by a person no other than the business rival of the appellants due to clash of interest but the contention was rejected by the Supreme Court holding that where statutory authorities do not perform their statutory obligation, any aggrieved citizen can always bring to the notice of the High Court about the inaction of the statutory authorities and in such an event, it would always be open to the High Court to pass appropriate orders as deemed fit and proper in the facts and circumstances of the case. He finally cited the decision in *Vishwanath Chaturvedi (3) vs. Union of India and others*, (2007) 4 S.C.C. 380, in which the Supreme Court has held that the ultimate test for maintainability of public interest litigation praying for a CBI investigation is whether the allegations have any substance and an enquiry should not be shut out at the threshold because a political opponent raises allegations of commission of an offence.

16. Mr. Ravindra Shrivastava, learned Senior Counsel appearing for the respondent No.11, on the other hand, submitted that even if the High Court has jurisdiction to entertain a PIL, the High Court will not entertain every matter of public interest as a PIL. He submitted that even in the decision in *S.P. Gupta and others vs. President of India and others* (supra) in which the novel concept of public interest litigation was developed, the Supreme Court has clarified in paragraph 24 of the judgment at page 195 of the AIR that if the person or specific class or group of persons who are primarily injured as a result of an act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of the public who complains of a secondary public injury cannot maintain the action because the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want. He submitted that in the instant case since the trustees or members of the Committee of the Gaushala have not come forward complaining about the alleged mis- management of the affairs of the Gaushala or sale of the land of the Gaushala in favour of the

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respondent No.11, the Court should not entertain this PIL at the instance of the petitioners who have no interest in the Gaushala at all.

17. Mr. Shrivastava cited the decision in *Ramsharan Autyanuprasi vs. Union of India and others*, 1989 Supp.(1) S.C.C. 251, in which the Supreme Court having found from the pleadings of the parties that there was no breach of fundamental rights of the petitioners and that the case was one which was more amenable to be proceeded under Sections 37 and 38 of the Rajasthan Public Trust Act, 1959 held that it would be highly improper to consider the litigation to be a public interest litigation as it was a litigation between the members of the erstwhile Raj family to settle their own scores and not for the benefit of the public. He also relied upon the decision of the Supreme Court in *Guruvayoor Devaswom Managing Committee and another vs. C.K. Rajan and others*, (2003) 7 S.C.C. 546 in which the High Court had passed an order on a petition under Article 226 of the Constitution appointing a Commissioner to make a general enquiry and particularly make a study on various aspects highlighted in the complaint alleging serious irregularities, corrupt practices, mal-administration and mismanagement prevailing in the temple and the Supreme Court held that the case did not fall in any of the categories where PIL could be entertained and the functions required to be performed by statutory functionaries could not be rendered redundant by the Court issuing directions upon usurpation of statutory powers. He submitted that the respondent No.11 had purchased the land of the Gaushala at the price which was double the market value of the land and the High Court in exercise of its powers under Article 226 of the Constitution should not interfere with the purchase of the land by the respondent No. 11 who was bonafide purchaser of a land for value. In support of his contention, he cited the Supreme Court decision in *Bombay Dyeing & Mfg. Co. Ltd. (3) vs. Bombay Environmental Action Group and others*, (2006) 3 S.C.C. 434, in which the Supreme Court has observed that *bonafide* purchasers in an auction sale for certain purposes are treated differently and in a case where even the decree is set aside, interest of bonafide purchaser who is a third party is safeguarded.

18. Mr. R.L. Gupta appearing for the respondent No.8 while supporting the contentions of Mr. Ravindra Shrivastava, further submitted that the sale of the land in favour of the respondent No.11 was made for the object of the Gaushala and the sale proceeds have been kept in a fixed deposit to be utilised for the objects of the Gaushala. He further submitted that besides the land which has been sold in favour of the respondent No.11, the Gaushala has various lands outside Katni. He cited the decision of the Supreme Court in *Dattaraj Nathuji Thaware vs. State of Maharashtra and others*, (2005) 1 S.C.C. 590, for the proposition that a public interest litigation can be entertained at the instance of person whose interest or right as a member of a class is affected by the action complained of. He submitted that since the petitioners have no interest whatsoever in the Gaushala, the PIL should not be entertained by the Court at the instance of the petitioners.

19. Mr. Alok Aradhe, learned counsel appearing for the respondent No.9 added that the Gaushala is a Society registered under the Adhiniyam as it would be clear from the certificate of registration, Annexure.R8/5 and Section 36 (1) (b) of the Act

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stipulates that where a public trust is registered under any other Act, the Trust will not be governed by the Act. He also submitted that the objects of the Society permitted sale of the properties the Gaushala and the Registrar of Firms and Societies has granted permission for such sale under section 21 of the Adhiniyam subject to the condition that the sale will be for the object of the Gaushala.

20. Relevant portions of paragraphs 22 and 24 of the judgment of the Supreme Court in *S.P. Gupta and others vs. President of India and others* (supra) on which Mr. Lalwani and Mr. Shrivastava relied upon for their respective contentions are quoted herein below:

"22. We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision."

"24. Before we part with this general discussion in regard to locus standi, there is one point we would like to emphasise and it is that cases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of public who complains of secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want."

It will be clear from the aforesaid extracts from the judgment of the Supreme Court in *S.P. Gupta and others vs. President of India and others* (supra) that any member of the public having 'sufficient interest' can maintain action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision, but where a person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of the public who complains of a secondary public injury, cannot maintain the action because the consequence of such action would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want. Thus, a member of the public must satisfy the court that he has 'sufficient interest' to maintain

an action for judicial redress whether the injury suffered by him is primary or secondary in nature.

21. A member of the public can be said to be having 'sufficient interest' to maintain an action only if his legal rights or liabilities as a member of a class, community or locality are affected by the act or omission in respect of which he has initiated the action, and not otherwise. This will be clear from the definition of 'public interest' in Stroud's Judicial Dictionary, Vol. 4 (4th Edn.) and in Black's Law Dictionary (6th Edn.), quoted in paragraphs 5 and 6 of the judgment of Dr. Arijit Pasayat, J. in *Dattaraj Nathuji Thaware vs. State of Maharashtra and others* (supra) cited by Mr. R.L. Gupta, learned counsel for the respondent No.8. The said definition of 'public interest' as quoted in Stroud's Judicial Dictionary and in Black's Law Dictionary are extracted herein below:

"Public interest - (1) A matter of public or general interest 'does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected'...."

(Stroud's Judicial Dictionary)

"Public Interest - Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything too narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national Government."

(Black's Law Dictionary)

22. In *Dattaraj Nathuji Thaware vs. State of Maharashtra and others* (supra), Dr. Pasayat, J. has also referred to the judgment of the Supreme Court in *Janata Dal vs. H.S. Chowdhary* (1992) 4 S.C.C. 305 to explain the scope of public interest litigation. Paragraph 53 of the judgment of the Supreme Court in *Janata Dal vs. H.S. Chowdhary* (supra) to which reference has been made in the judgment of Dr. Pasayat, J. is quoted herein below:

"53. The expression 'litigation' means a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy. Therefore, lexically the expression 'PIL' means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

It is thus clear beyond doubt that unless a member of the public satisfies the court that the rights and liabilities of the class, community or locality to which he belongs have been affected one way or the other, a public interest litigation cannot be maintained at the instance of the member of the public.

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23. The scope of public interest litigation was again considered at length by S.B. Sinha J. in *Guruvayoor Devaswom Managing Committee and another vs. C.K. Rajan and others* (supra) cited by Mr. Shrivastava, and after summarizing the principles evolved by the Supreme Court in this regard, his Lordship has observed that each case has to be judged on its own merits and different problems may have to be dealt with differently. Thus, the problem of locus-standi in public interest litigations in relation to a public trust has to be dealt with differently from other public interest litigations.

24. In *Ramsharan Autyanuprasi vs. Union of India and others* (supra), the Supreme Court had the occasion to consider a public interest litigation under Art. 32 of the Constitution in relation to the Maharaja Sawai Man Singh II Museum Trust in respect of which a petition had been addressed by a member of the public alleging that there was total disarray caused by the arbitrary and high-handed running of the said Trust. The Supreme Court held that the petition under Article 32 of the Constitution is not maintainable as there was no breach of fundamental rights of the petitioner. Paragraph 12 of the judgment of the Supreme Court at page 256 of the 1989 Suppl. (1) SCC is quoted herein below:

"12. In the aforesaid view of matter we are of the opinion that the petition under Article 32 of the Constitution is not maintainable. On the facts as appearing from the pleadings it cannot be predicated that there is any breach of any fundamental right of the petitioners. We are fortified by this conclusion by the fact that in view of the nature of the allegations made in the present context, it is a case which is more amenable to be proceeded under Sections 37 and 38 of the Rajasthan Public Trust Act, 1959, as amended from time to time. These provisions correspond, more or less, to Sections 91 and 92 of the Code of Civil Procedure."

The petition filed before the Supreme Court in respect of the affairs of a public trust thus could not be entertained as a public interest litigation under Art. 32 of the Constitution because it was not shown that some fundamental right of the petitioner was affected. Likewise, a writ petition under Article 226 of the Constitution in respect of the affairs or transaction of a public trust cannot be maintained as a PIL unless it is shown by the petitioner that his legal right or liability as a member of a class or community is affected by some act or omission in respect of the Trust.

25. In the aforesaid decision in the case of *Ramsharan Autyanuprasi vs. Union of India and others* (supra), the Supreme Court further held that in view of the nature of allegations made in the writ petition, it is a case which is more amenable to be proceeded under Sections 37 and 38 of the Rajasthan Public Trust Act, 1959 as amended from time to time and the said provisions were corresponding to Sections 91 and 92 of the Code of Civil Procedure. Sections 26 and 27 of the Act provide for remedies to a person in relation to a public trust in the State of Madhya Pradesh and are quoted herein under:

"26. Application to Court for directions -

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(1) If the Registrar on the application of any person interested in the public trust or otherwise is satisfied that -

- (a) the original object of the public trust has failed;
- (b) the trust property is not being properly managed or administered; or
- (c) the direction of the court is necessary for the administration of the public trust;

he may, after giving the working trustee an opportunity to be heard direct such trustee to apply to court for directions within the time specified by the Registrar.

(2) If the trustee so directed fails to make an application as required or if there is no trustee of the public trust or if for any other reason, the Registrar considers it expedient to do so, he shall himself make an application to the court.

27. Courts power to hear application -

(1) On receipt of such application the court shall make or cause to be made such inquiry into the case as it deems fit and pass such orders thereon as it may consider appropriate.

(2) While exercising the power under sub-section (1) the court shall, among other powers, have power to make an order for -

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) declaring what portion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (d) providing a scheme of management of the trust property;
- (e) directing how the funds of a public trust whose original object has failed, shall be spent, having due regard to the original intention of the author of the trust or the object for which the trust was created;
- (f) issuing any directions as the nature of the case may require.

(3) Any order passed by the Court under sub-section (2) shall be deemed to be a decree of such court and an appeal shall lie therefrom to the High Court.

(4) No suit relating to a public trust under section 92 of the Code of Civil Procedure, 1908 (V of 1908), shall be entertained by any court on any matter in respect of which an application can be made under section 26."

It will be clear from a reading of Section 26 of the Act that if the Registrar on the application of 'any person interested in the public trust', is satisfied that the original object of the public trust has failed, or the trust property is not being properly managed

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or administered, or a direction of the court is necessary for the administration of the public trust, he may after giving the working trustee an opportunity to be heard direct such trustee to apply to court for directions within the time specified by the Registrar and if the trustee fails to make an application, the Registrar himself can make an application to the Court. It is not without a reason that the legislature has used the expression 'any person interested in the public trust' in Section 26 (1) of the Act. The legislature has intended that it is not any member of the public but a person who is interested in the public trust who can move the Registrar under Section 26 (1) of the Act. Thus, a member of the public cannot move the Registrar under Section 26 of the Act unless he shows that he is interested in the public trust.

26. In the present case, the petitioners have not been able to show how they are interested in the Gaushala. They have not stated in the writ petition that any of their rights have been affected by any of the acts of the office bearers or the Committee of the Gaushala. They have also not been able to show that their liabilities are in any way affected by any of the acts of the office bearers or the Committee of the Gaushala. Therefore, assuming that the Gaushala is a public trust to which the Act applies, as contended by the petitioners, in the absence of any pleadings and materials before the court to show that the rights or liabilities of the petitioners as a class or community are affected by the acts of the respondents 8 and 9 or that the petitioners are in any way interested in the Gaushala, we cannot entertain this writ petition as a PIL at the instance of the petitioners for issuing directions for enquiry into the affairs of the Gaushala or into the alienation of the properties of the Gaushala.

27. Coming now to the authorities cited by Mr. Lalwani, in *The Municipality of Taloda vs. The Charity Commissioner, Bombay and others* (supra), one Sambhusing applied under Section 19 of the Bombay Public Trusts Act, 1950 for a declaration that City Survey Nos. 371 to 379 of Taloda were settled by one Dagadu Khushal in favour of the Municipality in 1883 for the benefit of the Johari Panch and for an order that the property be registered as property of the public trust under the said Act and the Assistant Charity Commissioner held that there was no such institution known as Johari Panch and the property in dispute had not been used for the benefit of that community, but Dagadu Khushal had transferred the property to the Municipality for the benefit of members of the public interested in the Samadhi of Nagabawa. The Assistant Charity Commissioner declared that there was a public trust and City Survey Nos. 371 to 379 of Taloda Municipality were the property of the Trust and that the Municipality held it as trustee of that Trust. This order was confirmed by the Charity Commissioner in appeal. The District Court set aside the order of the Assistant Charity Commissioner on further appeal and held that by the deed of transfer issued by Dagadu Khushal, no trust was created. In an appeal under Section 72 (4) of the Bombay Public Trust Act, the High Court of Bombay reversed the order passed by the District Court and restored the order passed by the Charity Commissioner. The Municipality of Taloda filed a Special Leave Petition before the Supreme Court and while deciding the appeal, the Supreme Court held that after the transfer of property was accepted by the Municipality from Dagadu Khushal who had transferred the same for a specific object, the High

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Court rightly held that it was not open to the Municipality to divert the use of the property for its own purpose and the Municipality held the property as a trust. The facts of the case thus show that this was not a case of writ petition filed by a member of the public either before the High Court or before the Supreme Court in respect of any trust property. The case originated under Section 19 of the Bombay Public Trust Act and went up in appeal under Section 72 (4) of the said Act to the High Court and finally to the Supreme Court and the Supreme Court upheld the order passed by the High Court and the question of locus-standi in a PIL did not arise for decision in the case.

28. In *Chenchu Rami Reddy and another vs. The Government of Andhra Pradesh and others* (supra) cited by Mr. Lalwani, the Government of Andhra Pradesh passed an order permitting Bugga Math, Tirupathi, a religious endowment, to sell certain land belonging to the Math by private negotiations at a price of Rs.62,500 per acre in exercise of its powers under the Proviso to clause (c) of sub-section (1) of Section 74 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966. Chenchu Rami Reddy, who was willing to purchase this land at a price of Rs.2,50,000/- per acre as against the price of Rs.62,500/- per acre for which the land was to be sold as per the order passed by the Government of Andhra Pradesh, challenged the said order before the High Court but the High Court rejected the challenge of Chenchu Rami Reddy. In the appeal filed by Chenchu Rami Reddy, the Supreme Court held that the order passed by the Government of Andhra Pradesh for sale of the property by private negotiation under the proviso to clause (c) of Section 74 (1) of the aforesaid Act was illegal and that the property should have been sold by public auction under main provision of clause (c) of Section 74 (1) of the said Act. It was thus a case where Chenchu Rami Reddy was interested in the property of the religious endowment, which was sought to be sold and therefore, he could maintain a writ petition under Article 226 of the Constitution and after the High Court dismissed the writ petition, he could also move the Supreme Court in appeal. In the instant case, the petitioners have not stated in the writ petition that they were in any way interested in purchasing the land of the Gaushala sold by the respondent No.8 to the respondent No.11 but did not get an opportunity to offer a price higher than the price at which the land has been sold to respondent No. 11.

29. The other decisions cited by learned counsel for the parties to which reference has been made in this order do not relate to public trust and are therefore not relevant for deciding the question whether the petitioners have *locus-standi* to file this present writ petition as a PIL in relation to the Gaushala which according to the petitioners is a public trust.

30. In case of gross evasion of income tax and stamp duty, a member of the public may maintain a public interest litigation because any loss to the public exchequer affects the rights of the members of the public who have substantial interest in the public exchequer. Mr. Lalwani orally submitted that there is gross evasion of income-tax and stamp duty in the transaction of sale made by the respondent No.8 in favour of the respondent No.11, but no foundation has been laid in the writ petition filed by the

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petitioners and no materials have been filed before the Court by the petitioners to substantiate this submission except saying that land worth crores of rupees has been sold by the respondent No.8 in favour of the respondent No.11 at a low price. We are not inclined to entertain this PIL to examine the question of evasion of income-tax and stamp duty at the instance of the petitioners whose antecedents are not above board and whose bonafides are in doubt only on the bald allegation that there has been evasion of income tax and stamp duty. It will be however open for the authorities under the Income Tax Act and the Stamps Act to take action in this regard if they find that there has been such evasion of income tax and stamp duty.

31. We, therefore, hold that the petitioners have no locus-standi to file this writ petition and the High Court should not entertain this writ petition as a PIL. Consequently, the writ petition is dismissed but without any order as to costs.

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WRIT PETITION

Before Mr. Justice K. K. Lahoti

17 September, 2007

RAJKUMAR VERMA and others

....Petitioners*

Vs.

BOARD OF REVENUE and another

....Respondents

A. Land Revenue Code, M.P. (XX of 1959), Section 110, Rules Regarding Record of Rights, Rule 32 - Mutation of Name - Original holder had two wives - After death of original holder dispute arose between sons of first wife and the second wife - Compromise entered into during pendency of Civil Suit and half share of the agricultural land given to second wife - Compromise decree was drawn by Civil Court - Second wife sold her share - Purchaser filed application for mutation of his name on the entire property - Application allowed by Tahsildar - Application for review filed by sons of first wife - Application allowed and the names of sons of first wife restored - Order set aside by Board of Revenue - Held - Property was purchased from second wife and therefore, purchaser had step into the shoes of seller - Seller had only half share in agricultural land - Nothing has been referred in the order about acquisition of title of remaining half land except that purchaser was in possession of land - Mere possession will not give a party to get his name recorded or to get deleted the name of other co-owner - For invoking jurisdiction under Section 110 acquisition of right by some valid deed or order was necessary - Order passed by Board of Revenue set aside - Order passed by Tahsildar restored - Petition allowed.

The aforesaid Rule specifically empowers the Tahsildar to decide the application under Section 110 of the Code on the basis of title and not on the basis of possession.

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For invoking jurisdiction of the Tahsildar under Section 110 of the Code, acquisition of right by some valid deed or order was necessary. In absence of this, merely on the basis of possession, the Tahsildar was having no jurisdiction to delete the names of co-owners Ganga Prasad and Kashi Prasad from the revenue record. Order Annexure P/3 was illegal and without jurisdiction, as the Tahsildar was having no right to direct deletion of names of Kashi Prasad and Ganga Prasad merely on the basis of possession of Pyare Lal. Apart from this, the judgment and decree Annexure P/3 were neither produced nor were brought into the knowledge of Tahsildar at the relevant time by Pyare Lal, who purchased only half of the property from Summi Bai and Govindi Bai. Pyare Lal was bound by the aforesaid judgment and decree and could not have acquired any right on the entire area of land S.N.345 except by process of law.

(Para 8)

B. Land Revenue Code, M.P. (XX of 1959) - Section 51 - Review - Review of order sought on the ground that judgment and decree passed by Civil Court not brought to knowledge of Court - Civil Court is having jurisdiction to decide title of parties - Once the matter is finally decided between parties, they and their successors are bound by aforesaid judgment and decree - It was a valid reason to seek review.

Now the second question remains whether the Tahsildar, Betul erred in entertaining the application filed by Kashi Prasad for reviewing the order dated 30.7.1976. From the perusal of the entire order, it is apparent that the aforesaid order was passed by the Tahsildar on the ground that while passing order dated 30.7.1976, the judgment and decree of Civil Suit No. 37 of 1952 were not taken into consideration. That was a valid reason to seek review of the order dated 30.7.1976. Undoubtedly, the Civil Court is having jurisdiction to decide the title of the parties and once the Civil Court has decided the matter finally between the parties, all the parties and their successor are bound by the aforesaid judgment and decree. In these circumstances, the Tahsildar was right in entertaining the application seeking review of the order. The only flaw in the matter was that the application was filed after 13 years from the date of passing of the order dated 30th July, 1976 and the answer of this is very short and simple that when justice demands or some injustice has been caused to a party and for this purposes, if the power of *suo motu* revision has been exercised, no fault can be found. Apart from this, respondent Sunder Lal who challenged the order Annexure P/7 dated 27.8.1991 upto the Board of Revenue and remained unsuccessful and thereafter had not challenged the order dated 3.9.90 on merits. Now, after decision of merits in review application cannot say that the order dated 3.9.90 is illegal. The Board of Revenue without considering the facts of the case has reversed the orders which is not sustainable under the law

(Para 9)

Bhanu Yadav, for the petitioners

Y. H. Khare, for the respondent no. 2

Cur. adv. vult.

*Rajkumar Verma v. Board of Revenue., 2007***ORDER**

K. K. LAHOTI, J.—This petition is directed under Article 227 of the Constitution of India, assailing order dated 7th July, 2000 passed by the Board of Revenue, M.P. Gwalior in Revision No.280-Char/2000, by which the order dated 9.2.2000 passed by the Additional Commissioner, Bhopal Division, Bhopal in Appeal No.249/Appeal/98-99 was reversed.

2. The facts necessary for the decision of the present case are as under:

(a) One Ramcharan was having two wives. From first wife—Meera Bai, Ramcharan was having two sons— Kashi Prasad and Ganga Prasad. Ram Charan's second wife was Summi Bai. From Summi Bai, daughter Govind Bai was born. After the death of Ram Charan, there was a dispute between Summi Bai and Kashi Prasad, Ganga Prasad. A civil Suit was filed in the Court of Civil Judge Class-I Betul which was registered as Civil Suit No.37-A/ 52 and by a compromise decree between parties, both Summi Bai and Kashi Prasad, Ganga Prasad were found entitled half share of land. In the compromise, it was decided that Summi Bai will be given possession of the joint half share of Malik makuja land at village Tikari, after partition in the execution proceedings, of S.N.345 area 6.63 acre. This land is in dispute in the present case. New number of this land is 819.

(b) After the aforesaid decree, Summi Bai sold her half share of S.N.345 area 6.63 acre in favour of Pyare Lal by a sale deed dated 30th January 1954. Sunder Lal respondent no.2 is the son of Pyare Lal. Pyare Lal filed an application before the Tehsildar, Betul under Section 110 of the M.P. Land Revenue Code, 1959 (hereinafter in short referred to as the Code) for deleting the names of Kashi Prasad and Ganga Prasad from S.N. 819. The Tehsildar vide order dated 30th July, 1976 found that Pyare Lal was in possession of the entire land, he had proved his title, and directed for deletion of names of Kashi Prasad and Ganga Prasad from the record.

© Thereafter, Kashi Prasad and Ganga Prasad filed an application before the Tehsildar for reviewing the order dated 30th July, 1976 (Annexure P/3). The application was filed on the ground that while passing order on 30th July, 1976, the Tehsildar had not considered the judgment and decree passed in Civil Suit No.37-A/1952. The Tehsildar satisfied with the ground, forwarded the matter for seeking permission of review to the S.D.O Betul. The S.D.O by order dated 3.9.1990 granted permission to the Tehsildar for review. Thereafter Sunder respondent no.2 filed an application to the S.D.O seeking review of the order dated 3.9.90 by which permission for review was accorded to the Tehsildar. This matter was contested by the petitioners and by the order dated 27th August, 1991 (Annexure P/7), the S.D.O found

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that order cannot be reviewed and rejected the application. Then respondent Sundar Lal filed a revision before the Additional Collector, Betul and by the order dated 17.10.95 Annex.P/8, the Additional Collector, Betul affirmed the order of the S.D.O. Dated 27th August, 1991 and the revision was dismissed. Thereafter a second revision was preferred by respondent Sundar Lal before the Additional Commissioner, (Bhopal and Hoshangabad Division), Bhopal which was also dismissed vide order dated 2.6.1998 (Annex.P/9). Respondent Sundar Lal preferred a third revision before the Board of Revenue, but vide order dated Annex.P/10 on 4.12.1998, this revision was also dismissed.

d. The Tehsildar, Betul by order dated 15.3.1999(Annex.P/11) decided review application and found that while passing order dated 30th July, 1976, his predecessor had not taken into consideration the judgment and decree passed in Civil Suit No.37-A/52 and the Tehsildar had to see the Rule 32 framed under Section 110 of the Code and mutation could have been made on the basis of the title and not on the basis of the possession. In para 11 of the order, the Tehsildar considered the contention of Kashi Prasad and Ganga Prasad that the order dated 30.7.1976 was passed without effecting service on them, but as the record of previous case was not available, so no definite finding in this regard was recorded by the Tehsildar, though a presumption was drawn in favour of the petitioners. The Tehsildar found that provisions of Rule 32 of the Rules under Section 110 of the Code were not followed. As per the judgment and decree dated 20th April, 1953, petitioners Kashi Prasad and Ganga Prasad were given half share in the land of S.N.345. On these grounds, the Tehsildar reviewed the order and directed that the names of Kashi Prasad and Ganga Prasad be restored. Against the order (Annexure P/11) dated 15.3.99, respondent Sundar Lal preferred an appeal before the S.D.O., who vide the order Annexure p/13 dated 5.7.99 dismissed it. A second appeal was preferred before the Additional Commissioner, Bhopal, but by the order dated 9th Feb.2000 (Annex.P/15) it was dismissed. Thereafter, Sunder Lal preferred a revision before the Board of Revenue which was decided by the order Annexure P/1 dated 7th July 2000 and the Board of Revenue allowed the revision on following grounds:

- (i) The application for suo moto revision was filed after 13 years on 13.6.1989 which was belated,
- (ii) From the perusal of the order dated 30th July, 1976 para 2, it is apparent that the non-applicants (petitioners 1 and 2 herein) were noticed and Kashi Prasad also filed his reply. So the contention of Kashi Prasad and Ganga Prasad that their names were deleted

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without notice or opportunity of hearing was incorrect.

(iii) That, the Tehsildar had not passed the order in accordance with law and the order was based on hypothesis. On the aforesaid ground, the Board of Revenue allowed the revision and order dated 30th July, 1976 (Annexure P/3) was restored.

This order is under challenge in this petition.

3. The learned counsel for petitioner submitted that:

(a) the Board of Revenue committed an error of law in reversing the orders passed by the Tehsildar, S.D.O., Additional Commissioner;

(b) the Tehsildar while passing order (Annex.P/3) had not considered the fact that the rights of the parties were decided long back by judgment and degree (Annex.P/5) on 20th April, 1953 in which Summi Bai was given half share and Kashi Prasad, Ganga Prasad were given half share;

© the order Annexure P/3 dated 30th July, 1976 by which the correction was directed based on possession of respondent no.2 Sunder Lal. While Section 110 of the Code is attracted only when any right is acquired lawfully. In absence of acquisition of any right, the Tehsildar was having no jurisdiction to pass an order under Section 110 of the Code. Rule 32 framed under Section 110 of the Code specifically provides that the Tehsildar shall decide the dispute based on title and not on possession. In this case, no title was acquired by Sunder Lal. So the order Annexure P/3 was without jurisdiction;

(d) the Tehsildar, the Sub Divisional Officer and the Additional Commissioner had rightly decided the matter in accordance with law but the Board of Revenue committed an error of jurisdiction in reversing those orders.

4. The learned counsel appearing for respondent no.2 supported the order and submitted as under:

(i) the application for suo motu revision was filed after 13 years from the date of order passed by the Tehsildar (Annexure P/3) which was apparently beyond a period of limitation under Section 51(1). In Sub-Section (3) of Section 51, a period of 90 days has been provided for review, but the application was not filed within the aforesaid period and the Board of Revenue has rightly set aside the orders on this ground;

(ii) the order Annex.P/3 was an appealable order under Section 44 of the Code, but the petitioners had not challenged the aforesaid order by filing an appeal. So invoking powers of suo motu revision was not permissible to the petitioners. The permission of review granted to the petitioners 1 and 2 was bad in law as was granted after lapse of

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13 years and the Board of Revenue has rightly considered it in the impugned order;

(iii) when the SDO granted permission to the Tehsildar to review the order dated 13th July, 1976 on 3.9.90, the respondent filed an application to review the order dated 3.9.90, but the aforesaid review application was dismissed. This dismissal order was assailed by the respondent before the Additional Collector, Betul which was dismissed by Annexure P/8. This order Annexure P/8 was challenged in revision by the respondent before the Additional Commissioner and the Board of Revenue, but the revisions were dismissed vide the orders Annexure P/9 and P/10. This fact shows that the order dated 3.9.90 granting permission to review was not challenged on merits by the respondent and the Board of Revenue rightly held that grant of such permission after 13 years was not permissible.

Contending aforesaid, it is submitted that this writ petition may be dismissed with cost.

5. To appreciate the rival contentions of the parties, it would be appropriate if the factual position as emerged in the case may be stated.

(i) Ram Charan was having two wives. first Marri Bai and second Smt. Summi Bai. From Marri Bai, there was no issue and from Summi Bai, a daughter was born namely Govindi. After the death of Ram Charan, a dispute arose between Kashi Prasad, Ganga Prasad and Summi Bai, and ultimately Summi Bai filed a suit against Kashi Prasad and Ganga Prasad. This suit was registered as Civil Suit No.37-A/1952 and was finally decided by a compromised decree, dated 20th April, 1953. As per aforesaid judgment and decree in respect of S.No.345 which is in dispute in the present case, it was decided as under:

“The plaintiff will be given possession of the joint half share of Malik mabuja land at Tikari to be partitioned in the execution proceeding of this Court (K.No.345 area 6.63 acres, rent Rs.12/-)”

(ii) The aforesaid fact shows that the plaintiff Summi Bai was to get possession of half share this land from defendants Kashi Prasad and Ganga Prasad. There is no evidence on record showing that the aforesaid land was ever partitioned and was handed over to Mst. Summi Bai. Though it is not in dispute that half of this land was transferred by Summi Bai in favour of Pyare Lal, father of respondent Sunder Lal.

(iii) Pyare Lal filed an application before the Tehsildar for deleting the names of Kashi Prasad and Ganga Prasad from half of the area of Survey No.345 new no. 819. Para 1 of the aforesaid order shows that applicant Pyare Lal was having right on the aforesaid land. On

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the basis of this, names of Kashi Prasad and Ganga Prasad were prayed to be deleted. This application was contested by Kashi Prasad and Ganga Prasad, which appears from the averments stated in para 2 of the order (Annex.P/3) who claimed half share by way of succession in these lands and prayed that the application be rejected.

(iv) The Tehsildar by the same order found that land S.No.345 area 6.63 belongs to Ram Charan and after his death, the land was succeeded by his wife Summi Bai and Marri bai. Marri bai died while Summi Bai and her daughter are alive. In the disputed land, Govindi Bai and Summi Bai sold their share to Pyare Lal on 30.1.1954 for Rs.1,000/- and since then Pyre Lal was in possession of the land. Pyare Lal filed several documents showing possession over the land. In paras 5 and 6 of the order, the Tehsildar found that the land was sold by Ex.P/8 to Pyare Lal and since the date of sale, Pyare Lal was in possession of entire land of 6.63 acres. Neither any evidence in rebuttal of the aforesaid fact was produced nor Ganga Prasad and Kashi Prasad appeared in the witness box. They remained ex parte. On the basis of this, the Tehsildar found that Pyare Lal was in possession of the land. He was cultivating the land. The land was ploughed by Pyare Lal through Banwari Lal. On these facts, the Tehsildar found that Pyare Lal was in possession of the land since 1954 and on the basis of this, he directed deletion of names of Kashi Prasad and Ganga Prasad in revenue papers on the land.

(v) Thereafter, Kashi Prasad filed an application to the Tehsildar for reviewing the order dated 30th July, 1976 on the ground that the order was contrary to the decision of the Court dated 20th April, 1953 and he was entitled for half share in the land. As the order was passed ignoring the judgment of the Civil Court, the order be reviewed.

(vi) The Tehsildar found that the order passed by the Civil Court was not taken into consideration by the Tehsildar while passing order dated 30th July, 1976 and it was a fit case for review and sought permission from the SDO, Betul. On 3.9.1990, the S.D.O. accorded permission to the Tehsildar for reviewing of the order dated 30th July, 76.

(vii) Thereafter Sundar Lal filed an application to the SDO that the order dated 3.9.90 granting permission of review be reviewed and recalled. This application was rejected by the SDO on the ground of maintainability, against which Sundar Lal approached to the Additional Collector, the Additional Commissioner and the Board of Revenue, but vide the orders Annexures P/8, P/9 and P/10 the revisions were dismissed.

(viii) Then the Tehsildar, Betul considered the matter at length in review

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and after hearing both the parties, vide the order dated 15.3.1999 (Annexure P/11) allowed the application on the grounds: (a) that so far as notice in previous case and filing of the reply by Kashi Prasad and Ganga Prasad are concerned, the file of Case No. 1A6 74-75 was not traceable, so nothing can be said about this, but the fact remains that order of Civil Court in Civil Suit No. 37-A/52 was not considered by the then Tehsildar, in which half share was given to Kashi Prasad and Ganga Prasad, (b) that on the basis of the possession, mutation cannot be effected as it was contrary to rule 32 of the Rules framed under Section 110 of the M.P. Land Revenue Code.

(ix) On the basis of these findings, the Tehsildar reviewed and recalled the order dated 30th July, 1976 and directed that names of both the parties be recorded in equal share. Against the order of Tehsildar, respondent Sunder Lal preferred an appeal to the S.D.O. ' second appeal to the Additional Commissioner, but both the authorities affirmed the order of Tehsildar. Thereafter a revision was preferred before the Board of Revenue. Vide the order Annexure P/1, the revision was allowed on the aforesaid grounds as stated hereinabove.

6. To appreciate the contentions of the parties, following questions emerge in this petition (i) Whether the order dated 28.8.1990 passed by the Tehsildar seeking permission of review and order dated 3.9.1990 of the S.D.O granting permission to review were illegal and the Board of Revenue rightly set aside the orders? (ii) Whether Pyarelal, the father of respondent no.2 was entitled to get his name alone recorded in the revenue papers by deleting the names of Kashi Prasad and Ganga Prasad?

7. So far as title in the land is concerned, it is not in dispute that right of parties were determined by Annexure P/5 the judgment and decree dated 20.4.1953, in which it was decreed that in S.N. 345 area 6.63 acres Mst. Summi will get joint half share and Kashi Prasad, Ganga Prasad will get a joint half share. So the right and title in the aforesaid land were decided by Annex.P/5 long back. Summi Bai was not entitled to alienate more than half share of the land in favour of Pyare Lal as she was bound by the decree Annex. P.5. Similarly, the sale deed, if any, alienating more than half share in S.N. 345 was contrary to the judgment and decree (Annex.P/5). The Tehsildar in para 3 of the order while considering the case found that Govindi Bai and Summi Bai sold their share to Pyare Lal Patel, and half share was purchased by Pyare Lal from Summi Bai and Govindi Bai. This fact has been mentioned in para 3 of the order Annex.P/5. The judgment and decree passed in Civil Suit were not considered by Tehsildar in order Annexure P/3 and there is nothing on record ascertaining the fact that the order of the Civil Court was before the Tehsildar or not while he passed order Annex.P/3. Pyare Lal purchased the property from Govindi Bai and Summi Bai and he had stepped into the shoes of Summi Bai and Govindi Bai. He was bound by the judgment and decree Annexure P/5 and it was his duty to bring this fact into the notice of Tehsildar while filing the application for deleting names of co-owners. Apart from this, when the Tehsildar was well aware that Pyare Lal purchased half share of

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S.N.345 then he had got title only for half land. Nothing has been referred in the order about acquisition of title of remaining half land, except to the fact that he was in possession of the land. Mere possession on the land will not give a party to get his name recorded or to get deleted name of other co-owner. The provision of Section 110 of the M.P. Land Revenue Code is specific and gives a right to a party to mutate his name on acquisition of title. It was necessary for Pyare Lal to file some document of title or judgment and decree of the competent Court to show that he had acquired right by some valid documents or by an order of Competent Court. In absence of this, the provisions of Section 110 of the Code could not have been invoked. Apart from this, on 10th June, 1965, the State Govt. had framed Rules known as 'Rule regarding Record of Rights'. Rule 32 of this Rule is that the Tahsildar is having right to decide the dispute summarily on the basis of title and not on the basis of possession. Rule 32 reads as under:

"32. Disputes shall be decided summarily by the Tahsildar on the basis of title and not possession. Any transfer by a person whose name is not recorded in the Khasra shall not be admitted in mutation by the Tahsildar. The order shall contain the names of the parties and witnesses and a brief summary of the evidence produced by either side together with the Tahsildar findings thereon."

8. The aforesaid Rule specifically empowers the Tahsildar to decide the application under Section 110 of the Code on the basis of title and not on the basis of possession. For invoking jurisdiction of the Tahsildar under Section 110 of the Code, acquisition of right by some valid deed or order was necessary. In absence of this, merely on the basis of possession, the Tahsildar was having no jurisdiction to delete the names of co-owners Ganga Prasad and Kashi Prasad from the revenue record. Order Annexure P/3 was illegal and without jurisdiction, as the Tahsildar was having no right to direct deletion of names of Kashi Prasad and Ganga Prasad merely on the basis of possession of Pyare Lal. Apart from this, the judgment and decree Annexure P/3 were neither produced nor were brought into the knowledge of Tahsildar at the relevant time by Pyare Lal, who purchased only half of the property from Summi Bai and Govindi Bai. Pyare Lal was bound by the aforesaid judgment and decree and could not have acquired any right on the entire area of land S.N.345 except by process of law.

9. Now the second question remains whether the Tahsildar, Betul erred in entertaining the application filed by Kashi Prasad for reviewing the order dated 30.7.1976. From the perusal of the entire order, it is apparent that the aforesaid order was passed by the Tahsildar on the ground that while passing order dated 30.7.1976, the judgment and decree of Civil Suit No. 37 of 1952 were not taken into consideration. That was a valid reason to seek review of the order dated 30.7.1976. Undoubtedly, the Civil Court is having jurisdiction to decide the title of the parties and once the Civil Court has decided the matter finally between the parties, all the parties and their successor are bound by the aforesaid judgment and decree. In these circumstances, the Tahsildar was right in entertaining the application seeking review of the order. The only flaw in the matter was that the application was filed after 13 years from the date

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of passing of the order dated 30th July, 1976 and the answer of this is very short and simple that when justice demands or some injustice has been caused to a party and for this purposes, if the power of suo motu revision has been exercised, no fault can be found. Apart from this, respondent Sunder Lal who challenged the order Annexure P/7 dated 27.8.1991 upto the Board of Revenue and remained unsuccessful and thereafter had not challenged the order dated 3.9.90 on merits. Now, after decision of merits in review application cannot say that the order dated 3.9.90 is illegal. The Board of Revenue without considering the facts of the case has reversed the orders which is not sustainable under the law.

10. At this juncture, it would be appropriate to refer to one more fact. The Board of Revenue while deciding the matter by Annexure P/1, at page 3 in 2nd part has recorded that Summi Bai sold her half share to Pyare Lal and Kashi Prasad, Ganga Parasad also sold their half share to Pyare Lal and Pyare Lal after purchase of the land remained in possession between 1953 and 1976 on the entire 6.63 acres of land. A specific question was raised during the course of argument to the counsel of respondent no.2 whether there is any such deed in favour of Pyare Lal, but he was unable to produce any documents in this regard. This new fact was placed before the Board of Revenue for the first time for which there was no basis in the matter. From the perusal of the order Annexure P/3, in para 3, the Tehsildar had specifically stated that half share of S.N.345 was purchased by Pyare Lal. In these circumstances, the aforesaid fact stated by the Board of Revenue appears to be erroneous.

11. In view of the aforesaid discussion, the order passed by the Board of Revenue (Annexure P/1) is not sustainable under the law and is accordingly set aside and that of Tahsildar (Annexure P/11) dated 15.3.1999, which was affirmed by the S.D.O. by Annexure P/13 and by the Additional Commissioner by Annexure P/15 is hereby restored. The petitioner shall be entitled for costs of entire litigation from respondent no.2. Counsel's fee Rs.1,000/-

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WRIT PETITION

Before Mr. Justice Deepak Verma & Mr. Justice K. S. Chauhan.

18 September, 2007

NARENDRA CHAUKSEY

...Petitioner*

v.

STATE OF M.P. and others

...Respondents

Constitution of India, Articles 226/227—Public Interest Litigation—Pond/water tank being used by villagers—Pond not allotted or leased out to respondent no. 4—On account of construction being made all around the said pond by respondent no. 4 accessibility to it by villagers has become impossible—Total land surrounding the pond from all directions has been allotted in favour of respondent no. 4 for establishment of factory—Pond recorded in name of State—Respondents contended that

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pond was being used only twice a year on two festive occasions for immersion of pooja for Dolgyaras and not for nistar purposes—Held—Pond has not been transferred to respondent no. 4 and State still continues to be its owner—Respondent no. 4 has been put to an advantageous position as accessibility to the pond has been denied to villagers—There is no delay or *malafide* intention in filing Petition—Respondent no. 4 directed to make arrangements to have the accessibility to the pond for the villagers—In case respondent no. 4 fails to do so, respondents no. 1 and 2 would make adequate arrangements in this regard so that villagers are not denied accessibility to pond for nistar and day to day use throughout year—Petition allowed.

To keep the matter at rest from future litigation or complications, we deem it fit to issue the following directions:-

(i) Respondent no.4 on its own, shall make necessary, proper and adequate arrangements so as to have the accessibility to the pond for the villagers of Mandideep and other surrounding villages, in an easy and convenient method within a period of 2 months from today.

(ii) In case respondent no.4 fails to do so as mentioned hereinabove, then respondent nos.1 & 2 would make adequate arrangements in this regard so that accessibility to the pond in question may not be denied to the villagers of Mandideep and other surrounding villages for their 'nistar' and day to day use throughout the year. The cost incurred by respondent nos.1 & 2 in making this arrangement would be recovered from respondent no.4.

(iii) Should there be non-compliance of the aforesaid directions contained hereinabove, the petitioner shall be at liberty to bring it to the notice of this Court so that the order could be implemented in letter and spirit. In that eventuality, respondents shall be exposing themselves for committing Contempt of Court. (Para 18)

Cases Referred :

Ashok Kumar Pandey v. State of W.B. (2004) 3 SCC 349, *Chairman & MD. Bhopal Ltd. v. S.P. Gururaja and others* (2003) 8 SCC 567, *Printer (Mysore) Ltd. v. M.A. Rasheed and others* (2004) 4 SCC 460.

Vijay Pandey, for the petitioner.

Deepak Awasthy, Govt. Advocate, for the respondent nos. 1 & 2.

None, for the respondent no.3.

N. S. Ruprah, for the respondent no.4.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by DEEPAK VERMA, J :—In this *Pro Bono Publico* proceedings, petitioner is praying that

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the water tank/pond (hereinafter referred to as 'pond') bearing Khasra No.141 admeasuring 1.42 hectares be allowed to be used by the villagers of Obedullaganj and other neighbouring villages of District Raisen.

2. It has been contended by the petitioner that even though this Khasra No.141, having the pond has not been allotted or leased out to respondent no.4, but on account of construction having been made by it all around the said pond, accessibility to it by the villagers has become impossible. It has also been submitted that the villagers of the surrounding villages of Mandideep are facing water problems for their day to day need. Similarly, cattle of the said area require water of the pond for their own need, but are deprived due to its land locking.

3. In the light of these averments being made in the petition, notices were issued to the respondents. Respondent nos.1 & 2 have submitted its reply.

4. According to them, the answering respondents had given on lease about 100 acres of land to respondent no.4 in the year 1974 for establishment of a factory. Pursuant thereto, respondent no.4 has established its factory on the said land, which was leased out in its favour. The disputed pond is situated on the western side of the allotted plot and total land surrounding the said pond from all directions has been allotted in favour of respondent no.4. It has been contended by them that the pond is not being used by public for purposes of Nistar, but they are using the same on two festive occasions in a year i.e. Bhujalia and Dolgyaras Pooja for immersion of Bhujalia or pooja for Dolgyaras. They have also contended that on the aforesaid two occasions respondent no.4 allows villagers and public in general to use it. According to them, the pond bearing Khasra No.141 is still recorded in the name of the State Government and has not been encroached upon by respondent no.4. They have contended that on account of specific situation of the pond which stands land-locked, it cannot be used by general public of the villages.

5. No reply has been filed by respondent no.3 i.e. Municipal Corporation, Mandideep. Respondent no.4 Factory in whose favour the lease deed has been executed by the State, for an area of 100 acres of land only, has submitted as under:-

It has not been disputed by it that Khasra No.141 has been recorded as pond in the name of the State Government, but this pond has never been source of water to the villagers of Mandideep or its surrounding areas for their day to day use or for their cattle. After allotment of the land in its favour, respondent no.4 has constructed its Graphite Electrode Unit thereon. The lease has been executed for a period of 99 years commencing from 27.7.1974.

It has not been disputed that atleast on two occasions in a year i.e. Bhujalia and Dolgyaras this pond is being used by the residents of Mandideep and the neighbouring villagers. During that period main gate of respondent no.4 Factory is kept open so as to allow them to gain access to the said pond. Except for these two occasions in a year, neither the pond is available to any other person nor water is available therein for the alleged purposes throughout the year.

It has been contended by it that, in any case, respondent no.4 is not in an

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unauthorized or illegal possession of the pond. According to it, the petition being devoid of any merit or substance, deserves to be dismissed.

6. Pursuant to this, rejoinder has been filed by petitioner and additional return has also been filed by respondent no.4. The matter had come up for consideration before the Court on 27.1.2006. On the said date, after hearing the counsel for the parties, State Government was directed to clarify and submit further additional reply/return pertaining to validity of leasing of the pond to respondent no.4 and to explain whether permission for such lease could be granted.

7. In the light of this order, affidavit of Mr. Vikas Mishra, S.D.M Goharganj, District Raisen has been filed. In the same it has been mentioned that pond is recorded for 'Nistar Usage' in the Revenue Records and the same could not have been given to a private party on lease, much less to respondent no.4. The disputed pond belongs exclusively to the State and has been recorded as 'Nistar Usage' in the record. Khasra No.141 on which the pond is situated still stands in the name of the State and has not been transferred to respondent no.4, meaning thereby that State continues to be its owner. They have then specifically mentioned that, in any case, the pond does not form part of the leased area of respondent no.4. It is also mentioned that the pond is for 'nistar usage' and it cannot be restricted for use by the Factory only but is to be kept open for its use by villagers. Respondent no.4 is required to make necessary arrangements for usage of the pond by the villagers and necessary action in this regard by Revenue Authorities shall be taken, in accordance with law.

8. After this, additional affidavit was filed. Matter had come up for hearing before the Bench again on 13.8.2007. On the said date, the following order came to be passed:-

"Pursuant to orders passed by this Court on 20.6.2007, an affidavit has been filed by the Collector, Raisen stating therein that Khasra No.141 on which the water tank is located has not been given on lease to the respondent No.4 Company.

If that be so, the respondent No.4 Company cannot prevent the villagers from using the tank and hence we call upon the counsel for respondent No.4 to obtain instructions in what manner the respondent No.4 will allow the villagers to use the tank.

The matter be listed on 29th August, 2007.

The affidavit filed by the Collector, Raisen be placed on record. A copy of the affidavit be furnished to counsel for respondent No.4.

Sd/-

CHIEF JUSTICE

Sd/-

JUDGE"

9. Aforesaid order dated 13.8.2007, would show that even on that date prima facie, the Bench was satisfied that villagers have to be given right to use the pond. Thereafter, the matter came up for hearing today. We have, accordingly, heard learned counsel for the parties at length. Perused the record.

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10. The question that has cropped up for consideration is whether Khasra No.141 on which the said pond admeasuring 1.43 acres is situated, was ever allotted to respondent no.4.

The said question stands answered from Annexure P-2 Khasra Panchshala of the year 2004-05, which shows that the said pond still stands recorded in the name of the State Government. This would go to show that the pond was never allotted or leased out to respondent no.4. It appears, from the location of the pond, it is surrounded on all sides by that land, which has been leased out to respondent no.4, thus pond stands land locked.

Under the circumstances, admittedly, respondent no.4 has been put to at an advantageous situation, whereby on account of allotment of land to it by State Government, the accessibility to the pond has been denied to the villagers. This has happened on account of construction of walls all around the land allotted to respondent no.4.

11. Despite arguing for considerable time, learned counsel for respondent no.4 was not able to show us any document by which it could be made out that Khasra No.141 on which the pond is situated, was ever leased out to it.

This fact has also been denied by respondent nos.1 & 2 in their subsequent affidavit filed in this regard on 9.8.2007. They have also submitted that only land was leased out but, pond as such was never allotted or leased out to respondent no.4.

12. From the averments, as have been made by the respective parties, atleast one thing is clear that the said Khasra No.141 on which the disputed pond is situated, had never been leased out to respondent no.4. May be, because of the location and situation of the land leased out to respondent no.4, it may not be accessible to the villagers now as it is land-locked, but that would not mean that the use thereof can be denied to the villagers.

13. Learned counsel for respondent no.4 has placed reliance on various judgments of the Supreme Court reported in (2004) 3 SCC 349, (Ashok Kumar Pandey Vs. State of W.B), 2003 (8) SCC 567 (Chairman & MD. Bhopal Ltd. Vs. S. P. Gururaja and Others) and (2004) 4 SCC 460 (Printer (Mysore) Ltd. vs. M. a. Rasheed and Others) to contend that on account of long lapse of time, such a Public Interest Litigation cannot be entertained and the facts mentioned in the petition could not be looked into.

14. We are afraid, the ratio decidendi of these cases do not apply to the facts of the present case. There is no question of delay and laches on the part of the petitioner nor it can be said that with malafide intention such a Public Interest Litigation has been brought to the notice of this Court. As has been admitted by all the respondents, respondent no.4 has been allowing the use of the pond atleast on two occasions in a year, as mentioned hereinabove, which is indicative of the fact that it has no exclusive right, title or interest over the pond.

15. Now the question that crops for consideration is whether it can be put to use for 'nistar' purposes of the villagers of Mandideep and surrounding areas throughout the year or not.

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As has been mentioned hereinabove, admittedly, the pond was never leased out in favour of respondent no.4. If that be so, it cannot have any right, title or interest over it. Even otherwise, it is meant for public usage as such the use of the pond by villagers for their Nistar cannot be denied to them. Respondent no.4 has no right to land lock the pond in such a way that it may not be accessible to the villagers.

16. It is a matter of common knowledge that there is great scarcity of water, not only in Urban Towns, but in villages also, where majority of India's population lives. They have lesser resources at their disposal. So, why they should not be allowed to use the natural source of water, which is available in the vicinity. Even if respondent no.4 has spent money on its improvement, would not be material as it has done so knowing it fully well that the pond is not a part of the leased area and has already utilized it for long number of years.

17. In the light of the aforesaid discussion, we are of the considered opinion that in this Pro Bono Publico, necessary directions are required to be issued so as to save the pond from being misused by respondent no.4 only. Thus, the petition deserves to be allowed. It is, accordingly, hereby allowed. We also gave our anxious consideration to the matter from all angles and came to the conclusion that on facts being brought to our notice, if we do not rise to the occasion, then we would be failing in our duty.

18. To keep the matter at rest from future litigation or complications, we deem it fit to issue the following directions:-

(i) Respondent no.4 on its own, shall make necessary, proper and adequate arrangements so as to have the accessibility to the pond for the villagers of Mandideep and other surrounding villages, in an easy and convenient method within a period of 2 months from today.

(ii) In case respondent no.4 fails to do so as mentioned hereinabove, then respondent nos.1 & 2 would make adequate arrangements in this regard so that accessibility to the pond in question may not be denied to the villagers of Mandideep and other surrounding villages for their 'nistar' and day to day use throughout the year. The cost incurred by respondent nos.1 & 2 in making this arrangement would be recovered from respondent no.4.

(iii) Should there be non-compliance of the aforesaid directions contained hereinabove, the petitioner shall be at liberty to bring it to the notice of this Court so that the order could be implemented in letter and spirit. In that eventuality, respondents shall be exposing themselves for committing Contempt of Court.

19. With the aforesaid directions, this petition stands allowed to the extent indicated above, but with no order as to the costs.

Security amount, if deposited by the petitioner, be refunded to him after due verification.