I.L.R. [2007] M. P., 1397

WRIT PETITION

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

21 September, 2007

SMT. UMA DEVI SHARMA ...Petitioner*

v.

STATE OF M.P. and others ...Respondents

A. Motor Vehicles Rules, M.P. 1994–Rule 158–Validity of Rule 158 challenged being unconstitutional–Petitioner purchased second hand bus which was registered in Gujarat with seating capacity 29+1–No Objection Certificate issued by competent authority to enable her to ply the vehicle within State of Madhya Pradesh–Petitioner applied for transfer of her name in Registration Book–Name of Petitioner was recorded however original seating capacity of 29+1 was changed to 38+2–Change was done in view of circular issued by Transport Commissioner–Validity of Rule 158 and circular of Transport Commissioner challenged–Held–Vehicle was physically verified and keeping in view the size and length of vehicle seating capacity was changed from 29+1 to 38+2–This does not make the vehicle unworkable or prone to accident–As change in seating does not make the vehicle unworkable therefore, increase in seating capacity of stage carriage or contract carriage does not deprive the petitioners of their means of their livelihood–Contention of Petitioner that it amounts to deprivation of livelihood without substance.

It is seen from the return filed by respondents that the seating capacity was re-arranged keeping in view the size and length of the vehicle as also the wheel base. Not even one instance has been put forth before us, whereby on account of change in seating capacity either public has been put to inconvenience or on account of it vehicle had met with an accident. The principles of natural justice were also followed inasmuch as the said change was recorded in the registration book by the Registering Authority only after vehicle was inspected in presence of the petitioner. There is no rejoinder in this regard by the petitioner controverting the averment made by respondents in their return. Thus, we are of the considered opinion that seating capacity does not, in any manner, whatsoever, put any hindrance or hurdle in effective plying of the vehicle. Nor the change in capacity is likely to cause accidents. It is also worth mentioning that none of the petitioners has supplied any data, that even though there is no sufficient load to be carried on the routes as per permits, yet they are required to pay more taxes with fewer loads. In the absence of any required data, the stand is unsustainable.

The second facet that is required to be seen is whether the impugned Rule in any way affects the livelihood of the petitioners, thereby attracting violation of Article 21 of the Constitution of India. We have already referred to the Rule in question and have expressed the opinion that seating capacity as has been entered into by the Registering Authority does not make the vehicle unworkable. We fail to understand how by

*W. P. No. 8261/2006 (J)

increasing the seating capacity of the stage carriage or contract carriage, the right of livelihood of the petitioner is *jeopardized.* On the contrary, by increasing the seating capacity, it does not deprive the petitioners of the means of their livelihood. The submission that there would be deprivation of livelihood of the petitioners as contended by the learned counsel for the petitioners, in our considered opinion, is totally without substance. We may further state that by increasing maximum seating capacity, the petitioners are not put to any monetary loss and further there is no deprivation of means of livelihood. (Paras 14 & 16)

B. Constitution of India–Article 39(a)–Directive Principles–No legislation or delegated legislation can be declared invalid solely on ground that Directive Principles of State Policy have not been followed or have been violated.

We would be failing in our duty if we do not note a submission advanced by learned counsel for the petitioners. We have taken note of the said submission as the learned counsel for the petitioners endeavoured and laboured hard to drive home the said point. They referred to Article 39(a) to buttress the stand that adequate means of livelihood is affected. It is settled in law that no legislation or delegated legislation can be declared invalid solely on the ground that Directive Principles of State Policy have not been followed or there has been violation of the same unless the requirement under the said Article which is meant for good governance, establishment of a welfare state, social and economic revolution and such other aspects read in consonance with the fundamental rights are really infringed and further some facet of fundamental rights are played foul with. Discrimination solely on the ground of sex, as regards pay despite similar work is impermissible being irrational but one cannot be oblivious of the fact that it is also a part of the fundamental rights. But once no facet of fundamental right is abridged, the challenge exclusively on the ground of non-following the provisions contained in Chapter IV of the Constitution would make a statutory provision or a rule *ultra vires* is devoid of merit. A piece of legislation may meet the requirement of Directive Principles of State Policy from many aspects and that may sustain the validity of the same, but, the converse is totally unacceptable. We may only add that the submission has been noted only to be dealt with, and rejected. (Para 17)

Case Referred :

State of Mysore & another **v.** *K.G. Jagannath,* AIR 1973 SC 2165.

H.C. Kohli, Ashish Rawat, Subodh Pandey and *Brajesh Dubey,* for the petitioner.

Kumaresh Pathak, Dy. Advocate General, for the respondents.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by DEEPAK VERMA, J :–In this batch of Writ Petitions, common question posed for adjudication is to the constitutional validity of Rule 158 of the M.P. Motor Vehicles Rules, 1994 (hereinafter referred to as 'the Rules'). In addition to the prayer for striking

down the aforesaid Rule being unconstitutional, the petitioners have also challenged the order dated 16.9.2005, issued by the Transport Commissioner, mentioning therein that in Tata Vehicles, the seating capacity in Ordinary and Deluxe stage carriages be fixed in accordance with Rule 158 of the aforesaid Rules, as also under Rule 128 of the Central Motor Vehicle Rules, 1989 (in short 'the Central Rules').

2. Certain material facts, which need to be adverted to, in the aforesaid petitions, are mentioned hereinbelow. For the sake of convenience, we have taken the facts of aforesaid case as the leading petition :

(A) Petitioner herein had purchased a second hand bus bearing Registration No.GJ-19-T-4170 from Rohan Kumar, resident of Surat. The bus was originally registered on 16.8.2004 with ARTO Bardoli, Surat. The make of the bus is entered as Tata with seating capacity 29+1 in the Registration Certificate issued to Rohan Kumar. According to the petitioner the said bus used to ply on the route as per the permit issued in favour of the previous owner, having seating capacity of 29+1. The tax used to be recovered for the aforesaid seating capacity of 29+1 only. After purchasing the said vehicle from its previous owner, the petitioner applied to the competent authority in the State of Gujarat for issuance of 'No Objection Certificate', so as to enable her to ply the vehicle within the State of Madhya Pradesh. Thereafter, the petitioner applied to the respondent No.3 herein, District Tranport Officer, Shajapur for transfer of her name in the Registration Book.

(B) On the strength of the documents filed by the petitioner, respondent No.3 recorded the name of the petitioner on 17.11.2005 and issued a Smart Card in this regard. However, in the certificate issued to the petitioner by respondent No.3, the original seating capacity of 29+1 was changed to 38+2. It is averred by the petitioner that this change of seating capacity was done by the respondent No.3 without her notice and knowledge. It is put forth that the same is contrary to the provisions of the Act and the Rules and hence, it is unconstitutional, illegal and liable to be struck down. The petitioner lodged her complaint with the respondent No.3 with regard to the aforesaid change in the seating capacity. According to the petitioner, she was orally informed that this had become necessary on account of the Circular dated 16.9.2005, issued by the Transport Commissioner, which is also the subject matter of challenge in this petition.

(C) It is further mentioned in the petition that Section 47 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act'), provides for registration of a vehicle, which is carried out after full verification by the Registering Authority. In the present case, the vehicle was duly inspected; verified and only thereafter the original Registering Authority registered its seating capacity as 29+1. The said vehicle has come to the State of Madhya Pradesh with "No Objection Certificate" issued

in that regard. According to the petitioner, section 50 of the Act, contemplates transfer of the vehicle in the name of subsequent purchaser, but no other change in the particulars already existing in the registration book at the time of initial registration, can be made by respondents, more so, *suo motu.*

(D) Reference has also been made with regard to powers conferred on the Authority under section 52 of the Act, but according to the petitioner no suo motu power can be exercised in this regard. According to the petitioner, Act of 1988 has been basically introduced with the object of providing better service, facilities to the travelling public in the fast moving age of competition as the latest model buses are provided by owners with best amenities and comforts and facilities for the travelling public. Infact by providing more comforts to the public generates less profit to the petitioner, but, the only surety is that by doing so petitioner and other such operators are not likely to be ousted from business.

(E) It is further mentioned that prescribing seating capacity on the basis of wheel base is against the convenience and safety of the travelling public. That apart, it is contrary to the object of the Act. It is not only unworkable, but is impracticable too. If the space and dimension mentioned in Rule 158 and 163 of the Rules, are strictly followed, the number of seats mentioned against the wheel base is not possible and the entire concept of Act to provide better facilities to the travelling public stands frustrated.

(F) According to petitioner, the bus is fitted with 29 seats yet the respondents are charging tax for 38 seats, which is illegal, unwarranted and unconstitutional. As set forth, the seating capacity as prescribed under Rule 158 of the Rules, is unworkable. However, the petitioner is required to adhere to it, but the travelling public is likely to be put to great inconvenience, which would increase chances of accident. On account of aforesaid facts and features Rule 158 of the Rules, and the Circular issued by the respondent No.2 are ultra vires the constitution and the statutory provisions, consequently deserve to be quashed and set aside.

3. Respondents have submitted their reply in oppugnation. It has been contended by them that every citizen in this country is entitled to carry on business of transport for hire or reward, however, the same is subject to reasonable restrictions as may be prescribed under law. The Act was passed by the Parliament with the intention to regulate the transport business and to grant license to vehicles. Section 111 of the Act, confers power on the State Government to frame and formulate Rules. Exercising the said power, State Government has framed the Rules as mentioned hereinabove and Rule 158 bestows power on the respondents to fix the maximum seating capacity for the stage carriages or contract carriages. They have referred to Chapter VII, of the

Rules. According to them, Rule 154 stipulates that no person shall use and no person shall cause or allow to be used or to be in any public place, any motor vehicle which does not comply with the rule contained in this Chapter, or with any order made thereunder. According to them, Rule 158 makes provision for minimum and maximum seating space, backrest and gangway to be provided in public service vehicles.

4. As is patent, in accordance with the Rules framed by the State Government, actual physical verification of the bus of the petitioner was carried out and it was found that the floor area/space available in the vehicle is more than the seating arrangements fixed therein. The third respondent measured the seating arrangement and allotted 38+2-seating capacity to the vehicle, which was within the competence of the said respondent. The change of seating capacity was conducted after actual physical verification of the bus in presence of the petitioner. Thus, the petitioner cannot raise any legitimate grievance with regard to change of seating capacity on the ground that the same has been done suo motu or without her knowledge. They have also justified issuance of letter/circular by Transport Commissioner mentioning therein on the ground that the same is absolutely in compliance with the provisions of Rule 154 of the Rules. In this case, manufacturer has given the wheel base as 4200 mm, which is equivalent to 166" (inches). Any vehicle having wheel base of 166" must have the seating arrangement in accordance with measurements specified under sub-rule (1) of Rule 158 of the Rules. Thus, the seating capacity of 38+2 to the petitioner's vehicle has been done strictly in accordance with the said Rules. Under the garb of providing better comforts and facilities to the travelling public, choice cannot be left to the operator to fix seats according to his own discretion. In any case, the bus operators are required to carry on business strictly in accordance with the statutory rules and the restrictions imposed therein. With the intention to evade payment of proper road tax, they cannot reduce the number of seats, more so, under the guise of providing better seating capacity and facilities to the travelling public. They have also contended that it is a matter of common knowledge that if more open space is left in the bus, the operator indulges in carrying travelling passengers keeping them standing, giving a complete go by to their basic comforts, and pay less road tax to the respondents. According to them, the chances of accidents increase as mostly bus operators carry passengers more than the authorised capacity.

5. It is further set forth that the question of loss to the operator is irrelevant in comparison to the loss of revenue to the State, which it suffers on account of showing less capacity in the bus, yet carrying more passengers and paying less tax. By doing so, more consumption of fuel is experienced which can otherwise be avoided and thereby is the national loss. As regards directions issued by the respondent No.3, according to them, it has become necessary to ensure uniformity in the enforcement of the provisions of Rule 158 of the Rules. There is no question of the circular issued by respondent No.2, being violative of Article 21 of the Constitution of India. Provisions contained in Rule 158 of the Rules, and directions given in the Circular are not at variance with the fundamental rights enshrined under Articles 19 and 21 of the Constitution. In the light of the aforesaid, it has been strenuously contended by

respondents that petition is devoid of merit and substance deserves to be dismissed.

6. To appreciate the question of law that has been projected before us, it is necessary to reproduce Rule 158 of the Rules, which reads as under :

"**158. Seating Room -** (1) The minimum and maximum seating space, back rest and gang-way to be provided in public service vehicles, other than motor cabs or maxi-cab deployed as Ordinary or Express services shall be as follows :

	Ordinary		Express--	
	Mini-mum	Maxi-mum	Mini-mum	Maxi-mum
(1)	(2)	(3)	(4)	(5)
I. Distance of Seats back to back -				
(a) When seats are placed across the vehicle and facing in the same direction.	66 cm	70 cm	66 cm	74 cm
(b) When seats are placed across the vehicle but facing each other.	127 cm	130 cm	Not permissible	
(c) When seats are placed along with length of the vehicle and facing each other.	137 cm	140 cm	Not permissible	
II. Size of the seats.	38 cm Sq.	40 cm Sq.	38 cm Sq.	40 cm Sq.
III. Height of the back of the seat above seat level.	40 cm	40 cm	40 cm	60 cm
IV. Type of seat and Seat cushion.	Rubberized coir or Polymanance foam cushion with upholstery of PVC leather cloth.		Foam or Rubber foam cushion of minimum 5 cm thickness with upholstery of leather, the remix or like material.	
V. Gangway.	30 cm	30 cm	30 cm	35 cm.

Provided that in any or all express services or in express service plying as night services, seats of size minimum 40 cms. square instead of 38 cms square placed at a minimum back to back distance of 74 cms, instead of 66 cms. with square of back above seat level minimum 60 cms, instead of 40 cms. shall be provided.

(2) The specifications for Tourist Vehicles as provided under rule 126 of the Central Rules, shall apply to the Deluxe buses.

(3) Notwithstanding anything contained in sub-rule (1) or (2), the seating capacity of a stage carriage of all makes and models, having following wheel base, shall not be less than the minimum capacity indicated against them :-

	Wheel Base	Minimum capacity of seats excluding seats of driver and conductor.
1.	166"	46
2.	205"	50
3.	210"	55.

(4) The restriction imposed by sub-rule (3) in so far as they relate to the stage carriages registered before the coming into force of these rules, shall not be operative for a period of four months from the date of commencement of these rules."

7. In the light of the rival contentions as mentioned hereinabove and the Rule reproduced above, we find that the following questions arise for consideration :

(i) Whether such a procedure is workable;

(ii) Whether it is against the liberty of general public, as provided under the Constitution;

(iii) Whether the Rule 158 of the Rules, runs contrary to Section 52, of the Act; and,

(iv) Vehicle having been registered once by the concerned RTO, after scrutinizing the papers and fixing seating capacity, if other RTO would be justified to change the seating capacity.

8. Shri H.C. Kohli, learned counsel for the petitioners, assisted by Shri Ashish Rawat, Shri Subodh Pandey and Shri Brajesh Dubey, submitted that in these batch matters, following three types of petitions have been filed by the operators:

(a) Where notices with regard to change have been given subsequent to the Circular dated 16.9.2005, issued by the Transport Commissioner, respondent No.2 herein;

(b) Where the concerned RTO's have suo motu changed the seating capacity; and,

(c) Where the vehicles are registered in other States, but after sale

they have been brought to this State, then original seating capacity has been changed.

9. Learned counsel for the respondents contended that in all the aforesaid three types of petitions referred to above, a common return that has been filed by them would meet all the grounds. Shri Kumaresh Pathak, learned Dy. Advocate General appearing for respondents, submitted that neither the Rule nor the Circular violates Articles 14, 19 and 21 of the Constitution of India, nor do they transgress any of the provisions of the Act.

10. Before dealing with the questions posed before us, it is apposite to embark upon some of the relevant provisions of the Act. Section 39 of the Act requires that every motor vehicle to be driven in public place or in any other place is to be duly registered with the concerning Registering Authority, so as to make it road worthy. Section 44 deals with the powers of the Registering Authority to order production of vehicle at the time of registration. Section 48 deals with the powers to grant "No Objection Certificate", if the vehicle is removed from one State where it was originally registered to another State, for the purposes of its plying. Section 50 refers to transfer of ownership of motor vehicle. Section 52 stipulates with regard to alteration in motor vehicle, which puts a barrier on the owner of the motor vehicle to alter the particulars contained in the Certificate of Registration, which may be at variance with those originally specified by the manufacturer. Under section 56, certificate of fitness is to be issued with regard to transport vehicles. It contemplates that vehicle shall not be deemed to be validly registered for the purposes of Section 39 unless it carries a certificate of fitness in such form containing such particulars and information as may be prescribed by the Central Government, issued by the prescribed authority, or by an authorized testing station mentioned in sub-section (2) to the effect that the vehicle complies for the time being with all the requirements of this Act and the Rules framed thereunder.

11. Under section 58 of the Act, the Central Government may, having regard to the number, nature and size of the tyres attached to the wheels of a transport vehicle (other than a motor cab), and its make and model and other relevant considerations, shall make entry in the record of registration and shall also enter in the certificate of registration of the vehicle following particulars namely;

(a) the unladen weight of the vehicle;

(b) the number, nature and size of the tyres attached to each wheel;

(c) the gross vehicle weight of the vehicle and the registered axle weights pertaining to the several axles thereof; and,

(d) if the vehicle is used or adapted to be used for the carriage of passengers solely or in addition to goods, the number of passengers for whom accommodation is provided.

Thereafter, the owner of the vehicle shall have the same particulars exhibited in the prescribed manner on the vehicle. As mentioned hereinabove, these are some of the sections, which are material and necessary to be considered by us for adjudicating the petition.

12. Learned counsel for the petitioners contended that bare reading of the aforesaid provisions of the Act would make the following things clear as crystal :

(i) under section 52, alteration in the vehicle can be only at the instance of the owner and it cannot be at the dictate of the Registering Authority.

(ii) Section 56 contemplates grant of certificate of fitness of transport vehicles, but it also clearly establishes that once a certificate has been issued there cannot be any change in the same either suo motu, or unilaterally.

It has been contended by the learned counsel for the petitioners that no doubt it is true that State Government has been conferred with the powers to make Rules under section 111 of the Act, and Clause (a) thereof stipulates seating arrangements in public service vehicles and the protection of the passengers against weather, but validity of Rule 158 of the Rules, requires scrutiny.

13. Presently to the question No.(i), with regard to workability of the seating capacity. It has been contended that only after actual physical verification of the vehicle, seating capacity was fixed as 29+1. Thus, higher capacity would not be workable as passengers would not be available, and even if passengers are available then seating would be highly congested, which will make it difficult for them to board or alight from the vehicle. According to them, even the gangway would be congested which would not allow two passengers to cross each other to reach their respective seats. The seating capacity by the registering authority was so fixed so as to avoid accidents on road, which could not have been changed unilaterally by other registering authority, where the vehicle was taken for change in the name of registration. In any case, change having been done behind the back of the petitioner violates the principles of natural justice.

14. It is seen from the return filed by respondents that the seating capacity was re-arranged keeping in view the size and length of the vehicle as also the wheel base. Not even one instance has been put forth before us, whereby on account of change in seating capacity either public has been put to inconvenience or on account of it vehicle had met with an accident. The principles of natural justice were also followed inasmuch as the said change was recorded in the registration book by the Registering Authority only after vehicle was inspected in presence of the petitioner. There is no rejoinder in this regard by the petitioner controverting the averment made by respondents in their return. Thus, we are of the considered opinion that seating capacity does not, in any manner, whatsoever, put any hindrance or hurdle in effective plying of the vehicle. Nor the change in capacity is likely to cause accidents. It is also worth mentioning that none of the petitioners has supplied any data, that even though there is no sufficient load to be carried on the routes as per permits, yet they are required to pay more taxes with fewer loads. In the absence of any required data, the stand is unsustainable.

15. Thus, in the considered opinion of this Court, the seating capacity as has been entered into by the Registering Authority does not make the vehicle unworkable or prone to accidents. In view of this, question No.(i) is answered against the petitioner.

16. The second facet that is required to be seen is whether the impugned Rule in any way affects the livelihood of the petitioners, thereby attracting violation of Article 21 of the Constitution of India. We have already referred to the Rule in question and have expressed the opinion that seating capacity as has been entered into by the Registering Authority does not make the vehicle unworkable. We fail to understand how by increasing the seating capacity of the stage carriage or contract carriage, the right of livelihood of the petitioner is jeopardized. On the contrary, by increasing the seating capacity, it does not deprive the petitioners of the means of their livelihood. The submission that there would be deprivation of livelihood of the petitioners as contended by the learned counsel for the petitioners, in our considered opinion, is totally without substance. We may further state that by increasing maximum seating capacity, the petitioners are not put to any monetary loss and further there is no deprivation of means of livelihood.

17. We would be failing in our duty if we do not note a submission advanced by learned counsel for the petitioners. We have taken note of the said submission as the learned counsel for the petitioners endeavoured and laboured hard to drive home the said point. They referred to Article 39(a) to buttress the stand that adequate means of livelihood is affected. It is settled in law that no legislation or delegated legislation can be declared invalid solely on the ground that Directive Principles of State Policy have not been followed or there has been violation of the same unless the requirement under the said Article which is meant for good governance, establishment of a welfare state, social and economic revolution and such other aspects read in consonance with the fundamental rights are really infringed and further some facet of fundamental rights are played foul with. Discrimination solely on the ground of sex, as regards pay despite similar work is impermissible being irrational but one cannot be oblivious of the fact that it is also a part of the fundamental rights. But once no facet of fundamental right is abridged, the challenge exclusively on the ground of non-following the provisions contained in Chapter IV of the Constitution would make a statutory provision or a rule ultra vires is devoid of merit. A piece of legislation may meet the requirement of Directive Principles of State Policy from many aspects and that may sustain the validity of the same, but, the converse is totally unacceptable. We may only add that the submission has been noted only to be dealt with, and rejected.

18. Now, coming to the third question. It is to be seen that section 52 of the Act, deals with alteration in motor vehicle, it reads as under :

> "(1) No owner of a motor vehicle shall so alter the vehicle that the particulars contained in the certificate of registration are at variance with those originally specified by the manufacturer:
>
> xxx xxx xxx xxx
>
> xxx xxx xxx xxx."
>
> Reading of the aforesaid provision further makes it absolutely clear that it deals with the right of the owner of a motor vehicle to alter the vehicle in any manner whatsoever, but the originality of the vehicle as

specified by the manufacturer would not be changed. In our considered opinion, the said provision not being applicable to the facts of the case, cannot render any assistance to the petitioners.

19. Now to the last question; whether after necessary endorsements having been made by the original Registering Authority, in the registration book and other relevant papers, changes can be made by other Registering Authority or not?

20. Section 111 of the Act, confers power on the State Government for framing statutory rules. This power is also to be exercised with regard to seating arrangements in public service vehicles and the protection of passengers against weather. Exercising this power, the State Government has framed the Rules. Rule 158 of the Rules, which deals with 'seating room', has already been reproduced hereinabove. Sub-rule (3) of the said Rule, stipulates that where wheel base is 166", the seating capacity has to be 46. If the wheel base is 205", seating capacity has to be 50; and, if the wheel base is 210", seating capacity has to be 55. Sub-rule (1) thereof provides for minimum and maximum seating space, backrest and gangway in the public service vehicles. All this has been worked out only after actual physical verification of the vehicles, so as to see that the travelling public is not put to any inconvenience and at the same time, by carrying less passengers State is not put to any financial loss.

21. Rules 159 and 160 of the Rules, deal with headroom and with regard to standing passengers to be taken in the said vehicles. In fact Chapter VII of the Rules, deals with construction, equipment and maintenance of motor vehicles. These provisions have been made keeping in view the comfort of the travelling public as also the revenue likely to be generated on account of plying of the stage carriages or contract carriages, within the State.

22. At this juncture, we may profitably refer to the decision reported in *State of Mysore and Another Vs. K.G. Jagannath* (AIR 1973 SC 2165), wherein a similar question had cropped up for consideration before the Apex Court. In the aforesaid matter, the Supreme Court was considering the constitutional validity of Rule 216 of Mysore Motor Vehicle Rules, 1963, which deals with fixing of minimum number of seats to be provided in a bus. After elaborate consideration of the matter, the Apex Court held that the aforesaid Rule is intra vires and is not violative of Article 19(1)(g), of the Constitution. The Apex Court, in paras 9 and 10, expressed the view as under:

> "9. The validity of the Rule at present has to be considered not merely from the point of view of the effect it has on a particular individual like the respondent. It has to be looked at from the point of view of the generality of the motor vehicles operators as well as the public. We have shown above that the vehicles with the minimum capacity available in this country can carry 35 passengers and if, as is alleged by the respondent, the average number of passengers in buses over this route is only 25, the proper thing to do in due course is to reduce the number of vehicles plying on this route. Otherwise, it would mean unnecessary waste of valuable transport space and facility. Buses so

released could be used elsewhere to much greater advantage to the travelling public. There are many areas and many routes crying for transport facilities and they would be better served. We are unable to place any weight on the basis of an argument which affects one or two individuals, where by insisting upon this provision of a minimum seating capacity the larger public interest will be served. If it causes some inconvenience to a few individuals like the respondent they have got to face the situation. It appears from the additional affidavit filed by the petitioner (respondent herein) that he has got four buses running between Dodda-ballapur and Tumkur. If it is found that the average number of passengers is only 25, the proper thing to do would be for him to cut down his buses on this route from four to three. In that case there can be no question of his suffering any losses or his being affected in any way in the matter of his carrying on his business.

10. Though it is not in evidence it may be presumed that the cost of operation of a bus whether it is provided with 30 or 40 seats may not be very much different and there will be the additional facility available to the public if the bus has more seats. Moreover, as traffic grows, as it has a tendency to grow everywhere, the public will be better served. We are unable to accept the contention that the Rule providing for minimum number of seats is, intended to secure more revenue indirectly. The State can do it directly by increasing the rate of tax. It is really a rule intended for the benefit of the travelling public. We see no reason not to accept the statement made on behalf of the State that the passenger traffic on every route in the State has increased by leaps and bounds, that generally it was found that the stage carriage operators were carrying passengers in excess of the seating capacity specified in the Registration Certificate and the permit to the serious inconvenience and discomfort of the travelling public in addition to causing loss of revenue to the State, and it was with a view to eliminate the above evils that the impugned Rule has been framed."

23. In fact, in the light of the aforesaid judgment of the Supreme Court, the issue that has been projected in this batch of petitions has been put to rest, and nothing more is required to be done. The relevant Rule 216(2), of the Mysore Motor Vehicle Rules, has been reproduced in the aforesaid decision of the Supreme Court, which is almost identical to Rule 158 of the Rules of this State. This would go to show that the factual and legal scenario of the two cases being identical, this batch of petitions has no merits and substance. Quite apart from the above, we have also done a threadbare analysis and our considered opinion is that the Rule subserves the collective interest, for the general travelling public are benefitted and the individual motor vehicle operator is not affected as has been urged with vehemence.

24. During the course of hearing, respondents have also filed Inspection Report of vehicle bearing registration No.MP-20-E-6573, having wheel base of 166". The said

inspection was done by Transport Inspector Mr. P.K. Hardenia, on 6.8.2007. Copy of the said Inspection Report together with the chart attached therewith was supplied to the learned counsel for the petitioner.

25. The said Report shows that on actual physical verification of the vehicle, it was found that after leaving the seats earmarked for driver and conductor, it had in all 46 seats. It has also been mentioned that size of the seats, distance between the two, and the size of the gangway were perfectly in consonance with Rule 158 of the Rules. We have critically gone through the said chart. The total width is 235 cms and the length fixed for seating the passengers is 625 cms, apart from a cabin of 85 cms for driver and conductor etc. From the said chart, it is crystal clear that it has 46 seats for passengers with gangway of 50 cms between the two seats. The said seating arrangements is in two rows: two seats and three seats in one row. In the middle, there is a gangway. This Report alongwith the Chart has been severely attacked by learned counsel for the petitioners, on the ground that looking to the width of the vehicle, it is not possible to have as many as 46 seats for the passengers.

26. On a perusal of Rule 158 of the Rules, it is noticeable that it also prescribes the size of the seats, which can be between 38 cms to 40 cms. There is nothing on record to show that the said seating arrangement, which was found actually in the vehicle, was not having the seats of the sizes as prescribed under the Rules. Thus, the aforesaid stand of the petitioners is also without any substance.

27. In the light of the aforesaid discussion, we are of the considered opinion that there is no merit or substance in the writ petitions, and accordingly they are hereby dismissed, but with no order as to costs.

28. Copy of the order be retained in each case.

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APPELLATE CIVIL

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

8 May, 2007

DIRECTOR, REGIONAL MEDICAL RESEARCH CENTRE, JABALPUR ....Appellant*

v.

GOKARAN & ors. ....Respondents

Land Acquisition Act, (I of 1894)–Section 23–Determination of Compensation–Land of respondents acquired in 1984 and possession taken in 1985 after invoking emergency clause–Land Acquisition Officer fixed the compensation at the rate of Rs. 0.97 paisa per sq.ft. and 0.47 paisa was deducted towards development and price of 0.45 paisa per sq.ft. was fixed–Reference Court enhanced the compensation of Rs. 2 per sq.ft. and granted compensation after deducting 33% towards development–Held–Sale deed filed by claimants being for

*F. A. No. 80/2004 (J)

smaller area and basic valuation register cannot form safe basis for determination of valuation–For relying on sale deeds distance from the land acquired to be proved–Test of prudent buyer can be applied–Size of plot sought to be acquired, nearness to road, proximity of developed area, depressed portion requiring filing, shape, level etc are relevant considerations for determining compensation–Sale deeds filed by appellant cannot be relied upon as witness has failed to narrate the distance between the lands sold and acquired–Considering potentiality of land, development in surrounding area, determination of compensation at Rs. 2/- per sq.ft. is not excessive–Deduction of 33% towards development also proper–Appeal dismissed.

From the sale-deeds Ex. P.1 & P.2 dated 5.3.85 and 27.4.84 respectively it is apparent that plot admeasuring 3200 square feet was sold for a sum of Rs. 38,500/- as per sale-deed (Ex. P.1) while as per sale-deed (Ex. P.2) plot admeasuring 1089 square feet along with a Kaccha house 10 x 10 was sold for a sum of Rs. 14,000/-. The value as per the aforesaid sale-deeds came to approximately Rs. 12/- to 15/- per square feet, however, aforesaid sale-deeds being for smaller plot of land could not have formed the basis for determining the valuation of large tract of the land acquired in the instant case.

The Apex Court in *U.P. Jal Nigam, Lucknow v. M/s Kalra Properties (P) Ltd.* AIR 1996 SC 1170, has laid down that basic valuation register cannot form the safe basis for determination of compensation. While determining the valuation of land, the test of prudent buyer has to be applied what price he would have offered in case of purchase of the land while considering the evidence distance from the road, development in the surrounding area are relevant factors. For considering the evidentiary value of the sale-deeds, it significant to be probed into, what was the distance of the area of the land covered under the sale-deeds, area sold. The test of prudent buyer canbe applied as laid down by the Apex Court in *Special Deputy Collector and anr. v. Kurra Sambasiva Rao and Ors.*AIR 1997 SC 2625.

As per amended section 51A of the Land Acquisition Act a certified copy of a document registered under the Registration Act including a copy given under section 57 of the Registration Act, may be accepted as evidence of the transaction recorded in such document but in our opinion at the same time it is necessary to prove what was the distance of the land covered under sale-deed from the land acquired and whether it was similar in other respects.

Time gap between sale transaction situation, genuineness of the transaction are relevant factors while determining the price, compensation for the land acquired. Similarly acquisition of the plot where it is small or large is relevant factor, nearness to road where land is in frontage or only small opening on front, proximity to developed area, depressed portion requiring filing, shape, level etc. are relevant considerations.

In our opinion, considering the potentiality of the land, development in the surrounding area the determination of the valuation at Rs. 2/- per square feet by

reference court could not be said to be excessive in the facts & circumstances of the instant case.

Coming to the submission that some amount was spent in levelling of the land and for construction, as construction was the main purpose for which the contract of Rs. 38 lacs was given and for levelling of the land aforesaid amount was utilized, deduction of 33% towards development is found to be proper considering the prime location of the land, the existing development and considering the nature of the land acquired.

(Paras 6, 7, 10, 12 and 13)

Cases Referred :

U.P. Jal Nigam, Lucknow v. M/s. Kalra Properties (P) Ltd., AIR 1996 SC 1170; *Special Deputy Collector and anr. v. Kurra Sambasiva Rao and Ors.*, AIR 1997 SC 2625; *M/s Printers House Pvt. Ltd. v. Mst. Saiyadan (Deceased) by L.Rs. & ors.*, AIR 1994 SC 1160; *Panna Lal Ghosh & Ors. v. Land Acquisition Collector & Ors.*, AIR 2004 SC 1179; *Triveni Devi v. Land Acquisition Officer*, AIR 1972 SC 1417; *Land Acquisition Officer, Karnataka Housing Board v. P.N. Malappa*, AIR 1997 SC 3661; *Bhagwathula Samanna & Ors. v. Special Tahsildar & Land Acquisition Officer, Visakhapatnam Municipality*, AIR 1992 SC 2298; *Karan Singh v. Union of India* (1998) 11 SCC 170; *Priya Vrat v. Union of India*, AIR 1995 SC 2471; *Hansanli Walichand v. State of Maharashtra*, AIR 1998 SC 700; *Chimanlal Hargoinddas v. Land Acquisition Officer, Poona*, AIR 1988 SC 1652.

Ashutosh Singh, for the appellant.
B.M. Dwivedi for the respondents no. 1 to 6.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :– This appeal has been filed by Director, Regional Medical Research Centre for Tribals at Jabalpur (hereinafter referred to as 'the Research Centre') aggrieved by an award dated 7.11.2003 passed in reference case no. 2/2003 evincing the compensation as the land belonging to respondents no. 1 to 11 was acquired by the State of M.P. for the purpose of establishment of building and offices of Research Centre at Jabalpur.

2. A notification u/s 4 of the Land Acquisition Act (hereinafter referred to as 'the Act') was issued on 25th July, 1984. Emergency clause was invoked. Enquiry was dispensed with and Govt. transferred the land on 30.10.84 to the Research centre. The possession was handed over on 14.2.85. Land Acquisition Officer passed an award on 29.8.86. Valuation of the land was determined at 0.92 paisa per square feet, out of that 0.47 paisa was deducted for development and price of 45 paisa i.e. Rs. 19602/- per acre was determined. Claimant prayed for reference u/s 18 of the Act. The reference was decided by the reference court on 7.5.94. Initially reference application was rejected. A first appeal no. 251/94 *(Gokaran and others v. Collector, Jabalpur)* was preferred, First appeal no. 252/94 *(Smt. Samundari Bai and others v. Collector,*

Jabalpur) was filed. This Court enhanced the compensation to Rs. 57,000/- per acre with 30% solatium. The appeals were decided on 1.12.98. As the Research centre was not heard before enhancement of compensation prayer was made by way of filing MCC no. 1162/02 and MCC no. 1163/02 to recall the orders, they were dismissed as barred by limitation. The appellants filed SLP before the Apex Court. Orders passed by the High Court and reference court were set aside. Case was remanded to the stage of reference u/s 18 of the Act, to give an opportunity to the beneficiary to adduce the evidence as it may desire; thereafter witnesses already examined were cross-examined by the beneficiary. One more witness C.A. Thomas (D.W. 2) was also examined. The reference Court as per impugned award has determined the compensation at Rs. 58,000/- per acre after making deduction of 33% area and corresponding cost towards development. The valuation was determined by reference court at Rs. 2/- per square feet, and Rs. 87,120/- per acre after 33% deduction towards development, value per acre has been worked out at Rs. 58,370/- Figure has been rounded off at Rs. 58,000/-. 30% solatium and the interest @ 9% has been awarded on the additional compensation till it was deposited. Dissatisfied with the award Research centre has come up in this appeal.

3. Shri Ashutosh Singh, learned counsel for appellant, has submitted that reference court has committed error of law while fixing the valuation at Rs. 2/- per square feet. Deduction of 33% towards development was on lower side considering the fact that huge amount was spent for getting the land levelled towards development, at least 50% deduction should have been made. Statement of C.A. Thomas has been illegally discarded by the reference court and also the sale-deeds (Ex. P.D. 6 to D.11), they were of the nearby area. The valuation of the aforesaid sale-deeds ought to have been accepted.

4. Shri B.M. Dwivedi, learned counsel for respondents no. 1 to 6, has controverted the submissions and relied upon the sale-deed (Ex. P.1) by which land was sold @ 12/- per square feet. He has also relied upon sale-deed (Ex.P.2) to claim that value of the land was Rs. 12/- per square feet. He has relied upon the guidelines (Ex. P.3. C) framed by the Collector evincing the average value of the land per square feet fixed by the Collector was Rs. 15/- per square feet. He has further submitted that sale-deeds (Ex. D. 6 to D. 11) were not relevant for the reason that they were of the distant area whereas the area in question was just one km. away from the national highway no. 7 and was adjacent to Shastri Nagar & Medical College, Jabalpur. Even the Land Acquisition Officer had determined the compensation at the rate of per square feet. Land was developed, as such deduction of 33% towards development was proper. Deduction of 33% made was on the higher side in the facts of the instant case.

5. It is not in dispute that land was capable of being used as house site. The land was within the Jabalpur's Municipal corporation area, in the close vicinity development activity had already taken place, medical college had come up long before, Shastri Nagar and Housing colony was also developed just adjacent to the land in question, thus, considering the potential user discarding the purpose for which the acquisition was made, we are in the considered opinion that land was capable of being used as

house site, thus, per square feet valuation was required to be determined in the instant case as rightly done by LAO and reference court.

6. From the sale-deeds Ex. P.1 & P. 2 dated 5.3.85 and 27.4.84 respectively it is apparent that plot admeasuring 3200 square feet was sold for a sum of Rs. 38,500/- as per sale-deed (Ex. P.1) while as per sale-deed (Ex. P.2) plot admeasuring 1089 square feet along with a Kaccha house 10 x 10 was sold for a sum of Rs. 14,000/-. The value as per the aforesaid sale-deeds came to approximately Rs. 12/- to 15/- per square feet, however, aforesaid sale-deeds being for smaller plot of land could not have formed the basis for determining the valuation of large tract of the land acquired in the instant case. S.D. Yogi (A.W. 2) has stated that for Garha ward the rate prescribed by the Collector was Rs. 15/- per square feet, it was not for village Purwa and rate of Rs. 20/- per square feet was for residential plot in Shastri Nagar, though the statement made as per the guidelines framed by the Collector is not of the much evidentiary value but we can take it for the purpose that adjacent land of Shastri Nagar used to be sold at per square feet. The Apex Court in *U.P. Jal Nigam, Lucknow v. M/s Kalra Properties (P) Ltd.*, AIR 1996 SC 1170, has laid down that basic valuation register cannot form the safe basis for determination of compensation. While determining the valuation of land, the test of prudent buyer has to be applied what price he would have offered in case of purchase of the land while considering the evidence distance from the road, development in the surrounding area are relevant factors, for considering the evidentiary value of the sale-deeds, it significant to be probed into, what was the distance of the area of the land covered under the sale-deeds, area sold. The test of prudent buyer can be applied as laid down by the Apex Court in *Special Deputy Collector and another v. Kurra Sambasiva Rao and others*; AIR 1997 SC 2625. Similar opinion was expressed by the Apex Court in *Land Acquisition Officer Eluru v. Jasti Rohani*; 1995 1 ACC 717.

7. As per amended section 51A of the Land Acquisition Act a certified copy of a document registered under the Registration Act including a copy given under section 57 of the Registration Act, may be accepted as evidence of the transaction recorded in such document but in our opinion at the same time it is necessary to prove what was the distance of the land covered under sale-deed from the land acquired and whether it was similar in other respects. A sale-deed relating to closest or nearest piece of land carries more value as laid down in *M/s Printers House Pvt. Ltd. v. Mst. Saiyadan (Deceased) by L.Rs. and others*; AIR 1994 SC 1160 potentiality and nature of the land is required to be seen for determining the compensation as laid down in *Panna Lal Ghosh and others v. Land Acquisition Collector and others*; AIR 2004 SC 1179. It was laid down by the Apex Court in *Triveni Devi v. Land Acquisition Officer*; AIR 1972 SC 1417, that distance from the land acquired is relevant consideration while adjudging evidence furnished by the sale-deed.

8. Relevant date for determining compensation obviously is of issuance of notification under Section 4 of the Act, on that date potential value has to be seen not the subsequent user for which land had been acquired; subsequent user of the land is of no value as laid down in *Land Acquisition Officer, Karnataka Housing Board v. P.N.*

Malappa; AIR 1997 SC 3661. Other factors like the degree of urgency which has led to the acquisition, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired have to be neglected in determining the compensation as per section 24 of the Act and any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put, is also required to be neglected; any improvement made after notification u/ s 4 of the Act is also required to be overlooked cannot from the basis for determining the valuation.

9. How much deduction has to be made for development ? If a land is developed less deduction can be made as laid down in *Bhagwathula Samanna and others v. Special Tahsildar and Land Acquisition Officer, Visakhapatnam Municipality;* AIR 1992 SC 2298. In *Karan Singh v. Union of India*; 1998 11 SCC 170, in case of acquisition of large piece of land 1/3rd deduction was held to be permissible and grant of compensation at Rs. 10/ per square feet was upheld.

10. The situation of the land is relevant criteria if the land is situated near the road it may fetch higher value, higher compensation is permissible as held in *Priya Vrat v. Union of India*; AIR 1995 SC 2471. Distance from the city is also one of the relevant criteria, compensation of Rs. 1/- per square feet was awarded and 50 paise was deducted for development on facts by the Apex Court in *Hansanli Walichand v. State of Maharashtra*; AIR 1998 SC 700. Various aspects for determination of compensation are elaborately dealt with in *Chimanlal Hargoinddas v. Land Acquisition Officer, Poona*; AIR 1988 SC 1652. Time gap between sale transaction, situation, genuineness of the transaction are relevant factors while determining the price, compensation for the land acquired. Similarly acquisition of the plot where it is small or large is relevant factor, nearness to road where land is in frontage or only small opening on front, proximity to developed area, depressed portion requiring filing, shape, level etc. are relevant considerations.

11. In the light of the aforesaid principles and also considering the development in the close vicinity, potentiality of the land to be used as a house site and also the fact that Land Acquisition Officer realizing the aforesaid potentiality of the land had determined the valuation at per square feet, when we come to the statement of C.A. Thomas (D.W. 2), with respect to the sale-deeds (Ex. D. 6 to D. 11) he was not in a position to give the distance of the land covered under the sale-deed, in para-18 of his deposition, the sale-deeds (Ex. D. 7, 8 & 11) were with respect to the land situated at village Sagda whereas disputed land was situated at village Porba. As per sale-deeds (Ex. D. 6, 9 & 12) the land was sold and purchased for the purpose of agriculture, thus, the land appears to be *prima facie* different as compared to the land in question considering its nearness to Shastri Nagar, the distance from the national highway and that medical college had come up in close vicinity. At the same time, the sale-deeds P.1& P.2 evincing the higher value, at the rate of Rs. 12/-to15/- per square feet, could also not form the safe basis for determination of the valuation. The Land Acquisition Officer determined the compensation at 0.92 paise and deducted 47 paise towards development and awarded 0.45 paise per square feet value.

12. In our opinion, considering the potentiality of the land, development in the surrounding area the determination of the valuation at Rs. 2/- per square feet by reference court could not be said to be excessive in the facts & circumstances of the instant case. Surendra Kumar Jain has claimed that valuation was Rs. 12/- per square feet and his land was acquired for the purpose of establishing medical college, medical college was started in the year 1962, Shastri Nagar colony had come up in the year 1985. S.D. Yogi (A.W. 2) has stated that Collector had fixed the rate for Garha ward of Rs. 15/- per square feet and for Shastri Nagar, it was Rs. 20/- but his statement is of not much value for the aforesaid reasons. Gokran Sonkar (A.W. 3) has proved the sale-deed P. 1 & P. 2 and value to be Rs. 12/- per square feet of the land covered under the aforesaid sale-deed but that being for smaller plot could not have formed the basis for determination of valuation at Rs. 12/- per square feet. Nandu Prasad Shrivastava (D.W. 1) has stated that from Nagpur road to Shastri Nagar there is the road, made of Muram, Shastri Nagar was merely 600-700 yards away from the disputed land. He was unable to say whether there was grass over the land and towards northern side land of medical college was adjacent, thereafter medical college was situated; considering the prime location of the land in our opinion valuation of Rs. 2/- per square feet determined by the reference court could not be said to be excessive in any manner.

13. Coming to the submission that some amount was spent in levelling of the land and for construction, as construction was the main purpose for which the contract of Rs. 38 lacs was given and for levelling of the land aforesaid amount was utilized, deduction of 33% towards development is found to be proper considering the prime location of the land, the existing development and considering the nature of the land acquired.

14. Thus, we find appeal to be devoid of merit, same deserves dismissal. Resultantly, appeal is hereby dismissed. Parties to bear their own costs as incurred of this appeal.

Appeal dismissed.

I.L.R. [2007] M. P., 1415
APPELLATE CRIMINAL
Before Mr. Justice S.K. Kulshreshtha & Mr. Justice S.L. Kochar
11 December, 2006

KUMERSINGH & ors. .... Appellants*
v.
STATE OF MADHYA PRADESH .... Respondent

A. Penal Code, Indian (XLV of 1860)–Sections 148, 449/149, 302/149, 325/149–Non mentioning of all the names of assailents in inquest report, medical requisition form, F.I.R.–Effect–As per provision of Section 174 of the Cr.P.C. mentioning of names of assailants, use of weapon, name of eye-witness and details as to how the deceased was assaulted are not germane to the inquest proceeding.

* Criminal Appeal No. 761/2003 (I)

B. Penal Code, Indian (XLV of 1860)–Sections 148, 449/149, 302/149, 325/149–Overall assessment and appreciation of the statements of all the injured witness suggest that appellants formed an unlawful assembly whose common object was to give good beating to the opposite faction–Conviction u/s 449/149, 302/149 of the IPC set aside, instead they are convicted under Section 325/149–Appeal allowed in part.

We do not find any legal force in the argument of the learned counsel for the appellants that in view of the non-mentioning of all the names in inquest report, medical requisition form. FIR (Ex. P.1) was drawn afterwards on due consultation and deliberations. The Supreme Court in the recent judgment of *Radha Mohan Singh v. State of U.P.*, 2006 (2) SCC 450 has held after taking note of all the earlier decisions on the point that in inquest proceedings as per provision U/s 174 of the Cr.P.C., mentioning of names of assailant, use of weapon, name of the eye witnesses and details as to how the deceased was assaulted, are not at all germane to the inquest proceedings and observed in para 15 as under :

> ".....Thus, it is well settled by a catena of decisions of this Court that the purpose of holding an inquest is very limited viz. to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eye witnesses or the gist of their statements, now is it required to be signed by any eye witness. In Meharaj Singh v. State of U.P. the language used by the legislature in Section 174 Cr.P.C. was not taken note of, nor the earlier decisions of this Court were referred to and some sweeping observations have been made which are not supported by the statutory provision. We are, therefore, of the opinion that the observations made in paras 11 and 12 of the reports do not represent the correct statement of law and they are hereby overruled. The challenge laid to the prosecution case by Shri Jain on the basis of the alleged infirmity or omission in the inquest report has, therefore, no substance and cannot be accepted.

On over all assessment and appreciation of the statements of all the 13 injured witnesses namely, Bhagirath (PW-2), Antarbai (PW-3), Kalabai (PW-4), Bhulibai (PW-5), Amarsingh (PW-12), Mangilal (PW-13), Lilabai (PW-14), Ganpatlal (PW-15), Dhulji (PW-16), Gokulbai (PW-19), Bhagwatibai (PW-20), Suganbai (PW-21) and Lilabai w/o Ghisalal (PW-26), we are of the considered view that the appellants formed an unlawful assembly whose common object was to give good beating to the opposite faction and the dispute arose on account of way to take their cattle to river and way to cremation ground. There was no common object of the unlawful assembly to commit murder of Ghisalal and because of using the number of weapons, it could not be said

that the members of unlawful assembly were knowing about likelihood of murder of Ghisalal.

Resultantly, this appeal is allowed in part. The conviction and sentences of all the appellants for the offence under Sections 449/149, 302/149 Indian Penal Code and Section 3(2)(v) of the SC & ST (Prevention of Atrocities) Act, 1989 are hereby set-aside. Instead, they are convicted under section 325 read with section 149 IPC on five counts (including deceased (Ghisalal) and each of the appellants is sentenced to suffer R.I. for THREE years and fine of Rs. 250/-, in default of payment of fine to suffer addl, R.I. for two months. Their conviction under section 323/149 as well as 147 IPC are hereby affirmed. The conviction and sentence of the appellant Jagdish under Section 148 IPC is also affirmed. Each of the appellants is also sentenced to suffer R.I. for six months under section 323/149 IPC (on nine counts). All the substantive sentences are directed to run concurrently. The appellants are on bail. They are directed through their counsel to appear before the trial Court on 23.01.2007 for depositing the amount of fine, if not already deposited and the learned trial Court is directed to send the appellants to jail for serving out the remainder part of their jail sentence, if any. On failure to comply with the aforsaid direction by the appellants, the learned trial Court shall take appropriate legal proceedings against them under intimation to this Court. On their surrender, their bail and surety bonds shall stand cancelled.

(Paras 16, 20 & 23)

Cases Referred :

Ram Udgarsingh v. State of Bihar; 2004 (X) SCC 443, *Gubbala Venugopala Swamy & ors. v. State of Andhra Pradesh;* AIR 2004 SC 2477.

Case Relied on :

Radha Mohan Singh v. State of U.P.; 2006 (2) SCC 450.

S.K.P. Verma & C.L. Yadav, for the appellants.

Girish Desai, Dy. Adv. General for the respondent/State.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **S.L. Kochar, J. :** The appellants named above being dissatisfied by the judgment dated 04.08.2003 rendered by the learned Special Judge, Shajapur in Special Criminal Case No. 233/2002 thereby they have been convicted and sentenced as under :

Appellant	Conviction & Sentence
Jagdish	U/s 148, 449/149, 302/149, 325/149 (on four counts) and 323/149 IPC (on 9 counts) sentenced to R.I. for one year, R.I. for 5 years with fine of Rs. 500/-, in default of payment of fine to suffer R.I. for 3 months, Imprisonment for life with fine of Rs. 1,000/- in default of payment of fine to suffer Addl. R.I. for six months R.I. for 3 years with fine of Rs. 250/-, in default of payment of fine to suffer R.I. for two months and R.I. for six months respectively.

Kumersingh	Under sec. 147, 449/149, 302/149, 325/149 (on 4 counts) and 323/149 IPC (on nine counts), sentenced to R.I. for one year, R.I. for 5 years with fine of Rs. 500/-, in default of payment of fine to suffer R.I. for three months, imprisonment for life with fine of Rs. 1,000/-, in default of payment of fine to suffer R.I. for six months, R.I. for 3 years with fine of Rs. 250/- in default of payment of fine to suffer R.I. for 2 months and R.I. for six months respectively.
Mahesh	-do-
Siddhulal	-do-
Gendalal	-do-
Mangilal	-do-
Rameshchandra	-do-
Mangilal s/o Devaji	-do-
Premsingh	-do-
Santosh	-do-
Hemraj	-do-
Bharasingh	-do-
Kailsh	-do-
Makhansingh	-do-
Elamsingh	-do-
Chander Singh	-do-
Ramesh S/o Sarlal	-do-
Premsingh S/o Amarsingh	-do-
Mohansingh	-do-
Santosh	-do-
Indersingh	-do-
Babalu	-do-
Omprakash	-do-
Rakesh	-do-
Mangilal s/o Bholaram	-do-
Jagdish s/o Hiralal	-do-

All the substantive sentences are directed to run concurrently.

2. Here it would be pertinent to mention that in all 33 accused persons were prosecuted and tried for the aforesaid offences, but out of 33 accused persons 26 have been convicted and sentenced and they have preferred this appeal.

3. Tersely, the facts of the prosecution case as unfolded before the trial Court are that in the year 2002, the State Government had given some lands in village Latahedi, situated by the side of the bank of river, to the members of scheduled caste, on Patta and possession thereof also was given to them. The respective Patta-holders of the

lands sown crops on the said lands. The residents of that village belonging to Brahmin, Yadav and Rathore communities were displeased on account of allotment of the said lands to the members of the scheduled caste, because their way to take their cattle to the river for water and the way to cremation ground was obstructed. The administrative officers attempted to pacify, but that exercise proved to be futile. On 12.08.03 in the head-man-ship of Sarpanch Kumersingh, the residents of the village 30-32 in number, armed with guns and lathis along with their cattle went to the lands so alloted on Patta at 9.00 AM and got the sown crop destroyed by the cattle. At 10.00 AM some people went to the houses of the Patta Holders and first of all dragged out one Ghisalal from his house and assaulted him by lathi. When his son Arjun and wife Leelabai came to his rescue they too were assaulted. Thereafter, they went to the house of Bhagirath and damaged his house. There they also assaulted the daughter-in-law of Bhagirath named Antarbai. Thereafter they went to the house of Amarsingh and assaulted his wife Bulibai and daughter-in-law Leelabai and damaged the roof tiles of his house. They also assaulted Ganpat, his wife Bhagwatibai, Kalabai w/o Banesingh, Mangilal, Gokulbai, Suganbai and also damaged their houses. Arjun went to the Police Station Talen and lodged the report Ex. P/1 whereupon Police registered Cr.No. 139/2002 under sections 307, 147, 148, 294, 452 and 323/149 of the Indian Penal Code as also under section 3(1)(x) and 3(2)(v) of the SC & ST (Prevention of Atrocities) Act against the accused persons. While taking Ghisalal to the Hospital, he succumbed to the injuries whereupon MURG No. 18/02 was registered at P.S. Rajgarh and after preparing the Inquest report by police. Dr. R.C. Bansiwal conducted postmortem and its report Ex. P/23.

4. Dr. R.B. Boriwal (PW-30) examined injured Bhagirath, Mangilal, Antarbai, Leelabai w/o Ghisalal, Leelabai w/o Banesingh, Kalabai, Ganpat, Arjun, Bhagwatibai, Dhansingh, Amarsingh, Leelabai, Gokulbai, Suganbai and Bulibai. Their MLC reports are Ex.P/87, P/89, P/90, P/91, P/92, P/93, P/94, P/95, P/96, P/98, P/99, P/100, P/101, P/103 and Ex. P/104 respecitvely. However, Ganpat was not found to sustain any injury. The X-Ray reports of Bhagwatibai and Gokulbai are Ex. P/97 and P/102 respectively.

5. Sub-Inspector Premnarayan Soni seized the blood stained clothes from injured and on disclosure statement of the accused persons seized a 12 bore gun along with its licence. After the arrest of the accused persons, respective weapons were also seized from them which were sent to the Forensic Science Laboratory for examination together with blood stained clothes. Ex. P/63 is the spot map prepared by the Patwari. After necessary investigation, charge-sheet was filed against the accused persons before the Court.

6-7. The accused/appellants denied the guilt. Their defence was that they have been falsely implicated due to political rivalry. The Government allotted the land to the deceased Ghisalal and his family members against which the villagers, lodged their grievance and on account of this they have been falsely roped in. It has been suggested to the eye witnesses in their cross-examination that village grazers were taking cattle to the river and they were stopped by the complainant party and pelted stones. At that

moment they had also pelted stones and because of which the members of the complainant party also sustained injuries. In order to establish its case, the prosecution examined as many as 33 witnesses. The accused persons did not examine any witness in their defence. The learned trial Court, finding the appellants guilty, convicted and sentenced them as indicated herein-above.

8. Learned counsel for the appellants have submitted that they eye-witnesses have adopted the method of pick and choose. They have given clean chit to the seven acquitted co-accused persons out of 33 and that the First Information Report Ex. P/1 was prepared afterwards and not as shown by the prosecution on the date and time. This argument is put forth on the basis of non-mention of the names of the accused persons in the MURG intimation report prepared as per provision under section 174 of the Cr. P.C. and medical requisition forms of the deceased and injured prosecution witnesses who are in total 13 in number an no evidence is led by the prosecution to prove the compliance of section 157 of the Cr.P.C. regarding sending of the copy of MURG intimation and FIR to the concerned Magistrate and it is not possible for a person to remember the full name with father's name as mentioned by the author of the First Information Report i.e. Arjun (PW-1) and that the incident did not take place in front of the house of deceased Ghisalal, because there was no seizure of blood stained earth from the spot. According to the learned counsel, the whole incident occurred on the Patta-land and not in the village and the prosecution examined all interested and partisan witnesses. On their testimony no implicit reliance could be placed and the witnesses have not assigned specific overt act.

9. To combat with, the learned Dy Advocate General Shri Desai supported the judgment and finding arrived at by the learned trial Court. He has also specifically submitted that there is no requirement of law to mention the names of the accused persons in the MURG intimation report, inquest report and the medical requisition forms. He has also submitted that the names of some of the accused persons with others are mentioned in all these documents. He also submitted that it is a case of mob furry and several persons involved in assaulting the deceased and as many as 13 witnesses of scheduled caste community on account of Patta of village land granted in their favour, by the appellants. Therefore, it was not possible for the witnesses to give specific account of individual accused.

10. Having heard learned counsel for the parties and after perusing the entire record carefully, we are of the considered view that the prosecution has successfully proved its case before the trial Court against the present appellants. The only question for determination before us is as to what offence would be made out against the appellants who all were the members of unlawful assembly for the reasons mentioned hereinafter.

11. In the instant case, one person Ghisalal has died and three eye witnesses namely Arjun (PW.1), Leelabai (PW.26) and Dhansingh (PW.27) sustained injuries caused by the appellants. Their medical reports are Ex. P.95, P/92 and P.98 respectively apart from other injured in the same transaction of the incident. There is also fourth eye witness named Babulal (PW.28). All the three injured eye witnesses were medically

examined by Dr. R.B. Goyal (PW.30) who proved their medical reports. Eye witness Leelabai (PW.26), wife of Ghisalal suffered four injuries caused by hard and blunt object and on x-ray examination vide Ex. P/91 fracture of ulna bone of left hand was found. Eye witness Arjun (PW.1) sustained four injuries i.e. swelling 7 x 4 cm left side of face, lacerated wound on right ring finger, two contusions on right small and middle fingers and contusion 20 x 2 cms on left scapula region. Dhansingh (PW.2) received seven injuries, lacerated wound on left parietal region 4 x 1 x 1/2 cms, contusion 10 x 2 cms and 7 x 2 cms on left arm, swelling on left arm, contusion 7 x 2 cm on right arm, another contusion 8 x 2 cm on right thigh and abrasions 2 x 2 cm on right leg. All these witnesses and other 10 injured witnesses were also examined by the same Doctor on the very day of the incident i.e. 12.8.2002 in the evening.

12. Now we advert to the testimony of eye witnesses about assault on deceased Ghisalal. Arjun (PW.1) has deposed that he was knowing all the accused persons who were put on trial. According to him, on the date of incident at 10.00 AM his mother Leelabai (PW.26) came to his house in a frightened condition from the side of the field. He over heard the war cry made by the accused persons because of which under fear they entered inside the house and closed the door.The present appellants and other co-accused persons reached at his house and started breaking roof tiles. Appellant Jagdish s/o Kumer Singh was having a gun and rest were having lathis. The fourteen accused persons dragged out his father deceased Ghisalal from the house and fifteen persons started assaulting him by lathis. Thereafter all the accused persons also started assaulting his father. When his mother Leelabai (PW.26) and Dhansingh (PW.27), brother tried to rescue his father, they, all the three were also badly beaten by the appellants. After their beating by the accused persons, accused persons went away in the colony situated behind his house. In cross examination, para 13, he has admitted that the villagers of his village belonging to chamaar and balai communities, were carrying on agricultural and labour work. They all were having good relations with the villagers and visiting terms on social functions. They were also having money transactions, but after grant of patta of lands in their favour, villagers were jealous with them. The lands were situated at the bank of Nevaj river. In para 18, he has admitted that before seven days prior to the incident, SDM had a talk with all the villagers and the villagers made a complaint for approach way to take their cattle to river as well as to the cremation ground. The SDM made the provision for this purpose. The villagers were allowed to use the way going by the side of the field of Amarsingh and Ghisalal chamaar. In para 23, he admitted that none of the accused persons was having farsa (sharp object edged iron object) and about 30 accused persons were having lathis and assaulted them. He was confronted with the FIR (Ex. P.1) and his statement (Ex. D/1) regarding omission that 15 persons mentioned in the examination-in-chief para three entered inside the house and dragged out his father, deceased Ghisalal and started assaulting him. According to this witness, he mentioned this fact in the FIR as well as in his case diary statement (Ex. D.1) anf if the same are not mentioned, he could not assign any reason.

13. This witness has admitted lodging of the report on the same day (Ex.P.1) at 11.30

a.m. recorded by Sub Inspectors S.C. Bohit (PW.25). The say of this witness is also that all the injured persons went in a police lorry were also medically examined the same day. He denied the defence suggestion of not lodging the report immediately and preparation of false report after two days.

14. Leelabai (PW.26), the next eye witness, wife of Ghisalal has deposed that she was knowing all the accused persons. They belongs to her village. Out of 33 accused persons five were not present and rest came towards her house. The appellant Jagdish was having a gun with him. Ramesh and Bholaram were having farsi and remaining were possessing lathis. Appellant Kumersingh sarpanch was exhorting the other accused persons saying to thrash them (NIPTA DO), the holders of the lease deed. Thereafter, 14 accused persons brought out her husband from the house and except five accused persons, remaining assaulted her husband. She, her son Arjun (PW.1) and Dhansingh (PW.27) were also assaulted by the accused persons when they tried to save Ghisalal. After assaulting them, the appellants fled away and the prosecution injured witnesses Antarbai, Bhagirath, Kala-bai, Amarsingh Balai, Bulibai, Leelabai, Mangu Balai, Ganpatlal, Bhagwatbai, Suganbai and Gokulbai reaeched over there. They all were injured and informed to each other of their being beaten by Kumersingh with his associates. Arjun (PW.1) went to the police station for lodging the report. Thereafter police reached in the village and took all the injured persons. Her husband died on the way. They all were medically exmined in Rajgarh Hospital. In cross examination, para 27, this witness has denied the defence suggestion that accused persons pelted the stones on their group and they also pelted stones on them because of which, they sustained injuries. It is pertinent to mention here that none of the accused persons has suffered even a single scratch whereas from the complainant side one person lost his life and 12 persons sustained number of injuries out of them four to five persons sustained grievous injuries. More or less same kind of statements with some difference have been given by eye witnesses Dhansingh (PW.27) and Bapulal (PW.8).

15. The learned trial Court in para 50 of the impugned judgment has rightly held, looking to the omission in the FIR and case diary statements of the eye witnesses that there is no dependable evidence on record to hold as to who were the accused persons, entered inside the house and brought out the deceased Ghisalal.

16. We do not find any legal force in the argument of the learned counsel for the appellants that in view of the non-mentioning of all the names in inquest report, medical requisition form, FIR (Ex. P.1) was drawn afterwards on due consultation and deliberations. The Supreme Court in the recent judgment of *Radha Mohan Singh v. State of U.P.*; 2006 (2) SCC 450 has held after taking note of all the earlier decisions on the point that in inquest proceedings as per provision U/s. 174 of the Cr.P.C. mentioning of names of assailants, use of weapon, name of the eye witnesses and details as to how the deceased was assaulted, are not at all germane to the inquest proceedings and observed in para 15 as under :

> ".....Thus, it is well settled by a catena of decisions of this Court that the purpose of holding an inquest is very limited viz. to ascertain as to

whether a person has committed suicide or has been killed by another or by an animal or machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eye witnesses or the gist of their statements, now is it required to be signed by any eye witness. In *Meharaj Singh v. State of U.P.* the language used by the legislature in Section 174 Cr.P.C. was not taken note of, nor the earlier decisions of this Court were referred to and some sweeping observations have been made which are not supported by the statutory provision. We are, therefore, of the opinion that the observations made in paras 11 and 12 of the reports do not represent the correct statement of law and they are hereby *overruled.* The challenge laid to the prosecution case by Shri Jain on the basis of the alleged infirmity or omission in the inquest report has, therefore, no substance and cannot be accepted."

17. The next facet of the argument of the learned counsel that the witnesses adopted the method of pick and choose and, therefore, they should not be relied upon for the present appellants. On consideration, we do not find support to this contention by law. The principle of *"falsus in uno falsus in omnibus"* (false in one thing false in every thing) is not applicable in India. It is merely a rule of caution and not a mandatory rule of evidence. The supreme Court in the case of *Ram Udgarsingh v. State of Bihar*; 2004 (X) SCC 443 and in the case of *Gubbala Venugopala Swamy and others v. State of Andhra Pradesh*; AIR 2004 SC 2477 has held as under :

"That even if a major portion of evidence of a witness is found to be deficient, in case the residual is sufficient to prove the guilt of an accuse, notwithstanding acquittal of a number of other co-accused persons, conviction can be maintained. The duty of the Court is to separate the grain from the chaff and appreciate in each case, as to what extent the evidence is worthy of acceptance."

18. The learned counsel for the appellants also raised a question about genuineness of the FIR because of mentioning of the names of all the accused persons with their father's name. On due consideration, we do not find any improbability on this issue. The witness Arjun (PW.1) was the resident of same village and was acquainted with the accused persons. It has come in cross examination that they were having visiting terms and also money transactions. In the instant case, all the appellants not only assaulted the deceased but assaulted Arjun, Leelabai and Dhansingh in front of their house and also assaulted about 10 persons in the same locality. This shows that the movement of accused persons was continued for a long time, therefore, the wintesses had sufficient opportunity to see and identify the accused persons.

19. Now the crucial question before us to determine is whether all the appellants were members of unlawful assembly and had the common object to commit murder of Ghisalal or being members of unlawful assembly knew that there was likelihood of

commission of murder of Ghisalal and in prosecution of such common object, assaulted the deceased Ghisalal.

In this connection, it is necessary to advert to the evidence of Dr. R.C. Bansiwal (PW.11) who conducted the postmortem examination the body of the deceased and proved the report (Ex. P.23) in the Court. This witness found five external injuries and all the injuries were on right and left hands, legs.Out of these injuries, three were contusions and two were punctured wounds. Puncure wounds were of the size 1/4" x 1/8" on right upper arm and second puncture wound was also of the same size on left palm. There were fracture of right femur bone of thigh, left tibia fibula bones, fracture of right humerus bone and fracture of left metacarpal bone. There was no external or internal injury to any vital part of the body of the deceased. In the opinion of medical expert, the deceased died because of shock due to multiple fractures and bleeding, within 12 hours from the date and time of postmortem examination i.e. 12.8.2002 at 5.30 p.m. The Doctor has nowhere stated that the injuries sustained by the deceased individually or cumulatively were sufficient in the ordinary course of nature to cause death. Out of five injuries, none could be caused by Farsi, a sharp edged heavy iron made cutting object which normally causes incised injuries. Looking to the dimensions of the punctured wounds, it appears that some of the appellants were having sticks with a little iron nail (KEEL) on its one end which are generally kept by the ploughman for driving the bullocks. According to the eye witnesses account of causing injuries to the deceased Ghisalal and others in all 13 injured witnesses, none had sustained injuries caused by dangerous weapon. Some of the witnesses have stated that the accused persons were having Farsas, but looking to the medical evidence and the medical reports of all the injuries persons, it is crystal clear that Farsa was not used. The appellant Jagdish was having a gun with him, but the same was also not used. If the appellants were having any intentionto commit murder of deceased Ghisalal, they could have used these dangerous weapons.

20. On over all assessment and appreciation of the statements of all the 13 injured witnesses namely, Bhagirath (PW-2). Antarbai (PW-3), Kalabai (PW-4), Bhulibai (PW-5), Amarsingh (PW-12), Mangilal (PW-13), Lilabai (PW-14), Ganpatlal (PW-15), Dhulji (PW-16), Gokulbai (PW-19), Bhagwatibai (PW-20), Suganbai (PW-21) and Lilabai w/o Ghisalal (PW-26), we are of the considered view that the appellants formed an unlawful assembly whose common object was to give good beating to the opposite faction and the dispute arose on account of way to take their cattle to river and way to cremation ground. There was no common object of the unlawful assembly to commit murder of Ghisalal and because of using the number of weapons, it could not be said that the members of unlawful assembly were knowing about likelihood of murder of Ghisalal.

21. On perusal of the statements of the eye witnesses, we do not find sufficient material to hold that the appellants assaulted the complainant party on the ground that they belonged to scheduled caste community (See Section 3(ii)(v) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989). The dispute arose only on account of way to the river and cremation ground being obstructed.

22. The total position boils out from the evidence available on record that the appellants, after forming unlawful assembly had the common object to cause grievous hurt or having knowledge of likelihood of causing grievous injuries to the deceased and other injured persons and in prosecution of said object, they assaulted the deceased and other injured persons, causing grievous injuries by hard and blunt object, to deceased and other four injured persons and simple injuries to remaining nine persons.

23. Resultantly, this appeal is allowed in part. The conviction and sentences of all the appellants for the offence under section 449/149, 302/149 Indian Penal Code and Section 3(2)(v) of the SC & ST (Prevention of Atrocities) Act, 1989 are hereby set aside. Instead, they are convicted under section 325 read with section 149 IPC on five counts (including deceased (Ghisalal) and each of the appellants is sentenced to suffer R.I. for THREE years and fine of Rs. 250/-, in default of payment of fine to suffer addl. R.I. for two months. Their conviction under section 323/149 as well as 147 IPC are hereby affirmed. The conviction and sentence of the appellant Jagdish under section 148 IPC is also affirmed. Each of the appellants is also sentenced to suffer R.I. for six months under section 323/149 IPC (on nine counts). All the substantive sentences are directed to run concurrently. The appellants are on bail. They are directed through their counsel to appear before the trial Court on 23.01.2007 for depositing the amount of fine, if not already deposited and the learned trial Court is directed to send the appellants to jail for serving out the remainder part of their jail sentence, if any. On failure to comply with the aforesaid direction by the appellants, the learned trial Court shall take appropriate legal proceedings against them under intimation to this Court. On their surrender, their bail and surety bonds shall stand cancelled.

Appeal partly allowed.

I.L.R.[2007] M.P., 1425
APPELLATE CRIMINAL
Before Mr. Justice Arun Mishra and Mr. Justice K.S. Chauhan
2 August, 2007

BHONERAJA @ BHONESINGH @ DHURJANSINGH --- Appellant*
Vs.
STATE OF M.P. --- Respondent

Penal Code, Indian (XLV of 1860)-Section 302-Murder-Deceased Police Inspector, Constable and eye witness going towards a village on a motor cycle-They noticed a truck parked in the middle of the road-Appellants having guns with them-Police Inspector exhorted miscreants-One of the accused grappled with Inspector-Firing started from both sides-Witness accompanying deceased persons ran behind the hunts of adivasis-On next morning he noticed dead bodies of Police Inspector and Constable-Other eye witnesses also corroborated the version of prosecution-Revolver, Belt, Holster, nine empty cartridges,

*Cri. A. No. 693/1998(J)

Silver ring belonging to Police Inspector recovered from possession of accused persons-Post mortem report of both the deceased police personals disclose gun shot injuries-Held-Prosecution has proved that revolver, holster and cartridges were issued to police inspector-Direct as well as Circumstantial Evidence led by prosecution fully established guilt against appellants-Conviction and sentence recorded by Trial Court affirmed-Appeal Dismissed.

The seized articles were sent for chemical examination vide Ex. P/34 and the reports Ex. P/35 and P/36 have been received therefrom. The detailed reports regarding the seized articles is contained therein.

The prosecution has adduced direct and circumstantial evidence against the appellants. Kishori (PW-1), Hari Singh (PW-2) and Babulal (PW-3) have stated that they have seen the appellants firing with the guns. The appellants have also been connected with the circumstantial evidence. There is overwhelming evidence against them. The prosecution has fully established the guilt against the appellants. There is no reason to falsely implicate them. No infirmity is found in the judgment of the Trial Court hence it does not call for any interference. We affirm the conviction and sentence as recorded by the Trial Court. There is no any merit in these appeals hence deserve to be dismissed. (Paras 45 and 46)

P.S. Gaharwar, with *U.S. Jaiswal* and *Smt. Durgesh Gupta,* for the appellant.
T.K. Modh, Deputy Advocate General for the respondent

Cur.adv.vult

JUDGMENT

The Judgment of the Court was delivered by **K.S.CHAUHAN, J.** :– These appeals arise out of the same judgment, therefore, being disposed of by the common judgment.

2. Criminal Appeal No.693/98 has been preferred by Bhoneraja @ Bhonesingh @ Dhurjansingh, Criminal Appeal No.694/98 by Sheikh Hakim and Criminal Appeal No.695/98 by Hardas, being aggrieved by the judgment, finding and sentence dated 6th February, 1998 passed by III Additional Sessions Judge, Sagar in Sessions Trial No.81/97 and Sessions Trial No.139/95 (suppl. case), whereby the appellant Sheikh Hakim has been convicted under Section 302 IPC and 25(1-b)(a), 27 of Arms Act and sentenced to life imprisonment + Rs.10,000/- fine in default 2 years R.I., 2 years R.I. + Rs.1,000/- fine, in default 6 months R.I. and 3 years R.I. + 1000/- fine in default 6 months R.I. respectively. Appellant Hardas has been convicted under Section 302/34 IPC and 25(1-b)(a), 27 of Arms Act and sentenced to life imprisonment + Rs.10,000/- fine in default 2 years R.I., 2 years R.I. + Rs.1,000/- fine, in default 6 months R.I., and 3 years R.I. + Rs.1000/- fine in default 6 months R.I. respectively and appellant Bhoneraja @ Bhonesingh @ Dhurjansingh convicted under Section 302 and sentenced to life imprisonment with fine of Rs.10,000/- in default 2 years R.I. The sentences were directed to run concurrently.

3. The accused persons Munna, Ratan, Gullu @ Guluchand and Natthu were also

prosecuted alongwith the present appellants but they have been acquitted by the trial Court from the offences levelled against them. Accused Jagbhan Singh was absconding but it is reflected from the para 2 of the judgment of the trial Court that Jagbhan Singh has expired. In the charge sheet, it is mentioned that Ashok Kachere also died.

4. According to the prosecution, the incident is of 23.10.1996 at 11:30 p.m. of village Sasan. Kishori Yadav has lodged the report on 24.10.1996 at 6:00 a.m. at police station Chhanbeela, District Sagar wherein it is mentioned that at 9-10 p.m. on 23.10.1996 he was going to see his relative Khumam Yadav at Chhanbeela. He was waiting for vehicle at Barayatha triangle. After sometime, Police Inspector of Chhanbeela, Maheep Singh Thakur came there with his Bullet Motorcycle and Constable Shyamlal Pandit was also sitting behind him. At his request, he was also allowed to sit on the motorcycle. As soon as they reached near Sasan village, they saw a truck standing in the middle of the road. Natthu Lodhi came from behind the truck told to the Inspector that 5 to 7 outsiders have stopped the truck. At that time, the complainant step down from the motorcycle and the Inspector carried it in front of the truck. He saw the appellants with other persons there. The search light of truck was on. These appellants were having the 12 bore guns with them. Others were also having 12 bore gun and katta. Inspector exhorted miscreants and asked them to surrender but Ashok Kachere grappled with Police Inspector, Shyamlal hit him by Danda and the Inspector took out his revolver. The firing started from both sides, therefore, he ran away behind the huts of the Adivasies. But while he was running, he saw that appellants and their companions have killed the Inspector and the Constable. He remained concealed throughout the night on account of fear and at morning at 5 a.m. he saw the dead bodies of the Inspector and Constable lying there. There were several gunshot injuries on their body. On his report, Crime No.65/96 under Section 396, 302 of IPC was registered. Marg intimation No.6/96 and 7/96 were registered regarding the death of Maheep Singh Thakur and Shyamlal. Blood stained, controlled soil as mentioned in Ex.P/3 to Ex.P/7 have been seized from the spot. The spot maps were prepared. The panchnama of dead body of Maheep Singh Thakur and Shyamlal were prepared. Their dead bodies were sent for postmortem examination to P.H.C., Shahgadh. Dr.G.S.Kesharwani conducted the postmortem examination and submitted the report. Sealed packet of baniyan and underwear etc were seized. The shirt and full pant of uniform of the deceased were also seized. The appellant Hardas was arrested on 15.12.1996 vide arrest memo Ex.P/33 and a gun with one empty and one alive cartridge were seized from him vide seizure memo Ex.P/21 which was enclosed in Sessions Trial No.139/97. Appellant Sheikh Hakim was arrested on 22.03.1997 vide arrest memo Ex.P/37. His memo under Section 27 of Indian Evidence Act (Ex.P/38) was recorded and in pursuance thereof the belt, holster and nine empty and one live cartridges were seized vide Ex.P/39 on 28.03.1997. His memo under Section 27 of Indian Evidence Act Ex.P/40 was also recorded and in pursuance thereof he got recovered silver ring tied in cloth kept in Zarkin of plastic vide seizure memo Ex.P/41. One single barrel 12 bore gun with other articles were also seized in Crime No.26/97 of Police Station Shahgadh from appellant Sheikh Hakim. The test identification parade was conducted

of the seized articles silver ring, belt, holster of revolver etc by Naib Tehsildar, Shahgadh wherein the son of deceased Rajesh Kumar identified the silver ring of his father and Jagdish Prasad constable identified the belt holster etc. Munna, Ratan, Gullu @ Guluchand and Natthu Singh were also arrested and the firearms were also recovered from Munna, Ratan and Gullu @ Guluchand. The seized articles were sent for chemical examination to F.S.L., Sagar from where the reports were received. After completing the investigation, the chargesheets were filed in the Court of Judicial Magistrate First Class, Banda, wherein case No.56/97 was registered which was committed to the Sessions Court on 15.02.1997.

5. The appellants were charged under Section 120-B, 396 or in alternative 302, 302/34 of Indian Penal Code and appellants Sheikh Hakim and Hardas were further charged under Section 25(1b)(a), 27 of Arms Act alleging that on 23.10.1997 at 11:30 p.m. at village Sasan armed with illegal weapons they alongwith their associates agreed to commit dacoity and murder thereby stopped the truck and committed decoity and in committing such decoity they used fire arms and caused the death of Maheep Singh Thakur, Police Inspector and Shyamlal, Constable or in alternatively the charge is that on the same date, time and place they committed murder intentionally or (knowingly) by causing the death of Maheep Singh Thakur and Shyamlal. The appellant Sheikh Hakim and Hardas were further charged that they were found having in possession of country made katta and live cartridges without valid licence and also used the firearms in committing such offence.

6. The appellants abjured the guilt and claimed to be tried mainly contending that they have been falsely implicated.

7. The prosecution has examined as many as 22 witnesses and the defence only 5 witnesses. After considering the evidence, the trial Court acquitted Munna, Ratan, Gullu @ Guluchand and Natthu from all the charges levelled against them. The present appellants were also acquitted from the charges of 120-B and 396 of I.P.C. but convicted under Section 302, 302/34 of I.P.C. and further appellants Sheikh Hakim and Hardas were also convicted under Section 25(1b)(a) and 27 of Arms Act and sentenced thereunder as stated in para No.2 of this judgment. Being aggrieved by the judgment, finding and sentence, the appellants have preferred these appeals on the grounds mentioned therein.

8. The learned counsel of the appellants has submitted that the trial Court has not appreciated the evidence in the proper perspective. Therefore, the finding of conviction is erroneous hence requires to be set aside and the appellants be acquitted.

9. On the other hand, Shri T.K.Modh, learned Dy.A.G. appearing on behalf of the respondent/State submitted that prosecution has proved the offence against the appellants beyond reasonable doubt and hence rightly convicted and sentenced thereunder. Therefore, it does not call for any interference.

10. The main point for consideration in these appeals is that whether the trial Court has committed any illegality in convicting and sentencing the appellants.

11. We have perused the entire record and evidence recorded therein.

12. Kishori (PW-1) has deposed that he was also going on the same motorcycle with Maheep Singh Thakur and Shyamlal to Chhanbeela. But nearby to the village Sasan one truck was parked on the middle of road and as soon as they reached to that truck Natthu informed the Police Inspector that there are 5-7 miscreants who have stopped the truck. Police Inspector stepped down from motorcycle and reached in front of truck, four-five persons in number were standing there having armed with guns. Inspector exhorted and asked them to surrender but Ashok Kachera grappled with Police Inspector and Constable hit him with Danda. The appellants fired with guns. There were atleast 10 to 15 fires. Police Inspector and Shyamlal sustained the gunshot injuries and fell down. Sheikh Hakim and Jagbhan threatened that if anybody will inform he will also be killed like them.

13. He further deposed that he ran away and sat behind the huts of Adivasies. He remained there throughout night and in the dawn he saw the dead body of Maheep Singh Thakur and Shyamlal at the spot. Motorcycle and belt etc were also lying there but the revolver was not there. He went at the police station to lodge the report which is Ex.P/1. Marg intimation Ex.P/2 was also recorded.

14. He has further deposed that blood stained, controlled soil and other articles as mentioned in Ex.P/3 to Ex.P/7 were also seized from the spot. The spot maps were prepared. The panchnama of dead bodies of Maheep Singh Thakur and Shyamlal were prepared.

15. He has further stated that he knows the appellants. Bhone Raja is of village Jagara and he used to come to the market. He has seen him before one month on the field. Appellant Sheikh Hakim is also known to him for several years.

16. He has been subjected to lengthy cross examination to test his veracity regarding his presence on the spot. But he has clearly stated that his relative was ill at Chhanbeela, therefore, he was going there. Since he was waiting for vehicle and at the same time Maheep Singh Thakur, Police Inspector with his motorcycle came there and as they were knowing each other, therefore, he permitted him to sit on his motorcycle. They were going to Chhanbeela but on the way they saw a truck parked on the middle of road and as soon as the Police Inspector carried the motorcycle in front of truck, he stepped down from it and ran away seeing the gunshot fires and concealed behind the huts. He informed the police in the morning. Under these circumstances, his presence can not be doubted.

17. On appraisal of his entire statement it reveals that his testimony has not been shattered in cross examination. Since his relative was ill therefore, he was going to Chhanbeela. The Inspector was also going towards that direction and they were knowing each other under these circumstances, his presence can not be doubted at the spot.

18. Hari Singh (PW-2) has stated that at that time he was returning back to his house with cattle and was having a torch. He saw that the appellants there. At the same time, Maheep Singh Thakur, Police Inspector of Chhanbeela with constable came by motorcycle and went in front of the truck. At that time he heard the cry "Maro Sale Ko". He saw that the appellants were firing with the guns. He ran away

to his house and on the next day he came to know that Police Inspector and Constable have been killed.

19. He has also stated that previously appellants Hakim caused marpeet with the son of this witness Kanchhedi. The report was also lodged but subsequently the matter was compromised.

20. The questions have been put in the cross examination to this witness regarding his presence at the spot but he has clearly stated that at that time he was returning back alongwith cattle but he was called by Natthu, therefore, he went at his 'Dhava' then he saw the incident.

21. He has clearly stated that he saw the appellants firing with guns on Police Inspector and Constable. Under these circumstances, his presence at that the spot can not be doubted. His testimony has also not been shattered in cross examination.

22. Babulal (PW-3) has stated that he went to Gokul for brining Beedi from him. The appellants came there. Appellant Hakim demanded cock from Gokul but he refused hence he inflicted a danda blow to him then he brought the cock from the house of his grandfather and then they took meals at 'Dhava' of Natthu. He saw that the appellants were having the 12 bore guns and the cartridges. When they were riding on the truck, the Police Inspector alongwith a constable came there on motorcycle. The altercation took place and appellants fired with guns. The bullets hit Inspector and Constable, consequently they died.

23. He has also stated that at the time of firing he was standing 2 to 3' away. The truck was in the running condition and the light was on. Some contradictions have been brought from his police statement Ex.D/2 but they are not on the material point to discredit his testimony.

24. Gokul (PW-7) has also supported the fact that Babu and Natthu came to him and asked for Beedi at the same time appellant Hakim also came there and asked for cock but he refused so he inflicted the danda blow to him. Thus, the presence of Babulal (PW-3) at the spot has also been established by this witness.

25. All these witnesses have deposed that these appellants fired with the guns and killed Maheep Singh Thakur Police Inspector and Shyamlal Constable.

26. As stated earlier, the dead bodies of Maheep Singh Thakur and Shyamlal were sent for postmortem examination and Dr.G.S. Kesharwani (PW-14) conducted the postmortem. He has stated in his evidence that on 24.10.1996 at 3:45 p.m. he conducted the postmortem examination of Maheep Singh Thakur and found the following injuries:

> (i) A gunshot would of entry at the prominence of the right cheek 5 x 3cms x bone deep margins inverted, irregular, blackened and charred. Tattooing around the wound present in an area of 7 x 7 cms in diameter. Coagulated blood on and around the wound present.
>
> (ii) A postmortem gunshot wound found involving middle conthus of the right eye and right eye orbit exposed. Wound is dry and subcutaneous tissues are completely pale.

(iii) A gunshot wound found on the right side of the upper lip 5 x 3 x 2 cms in size.

(iv) A gunshot wound of entry on the right side of the chest involving right nipple 4 x 3cms x cavity deep. Margins inverted, irregular, blackened and charred. Tattooing around the wound present. Coagulated blood on and around the wound present.

(v) A gunshot wound on the medial side of the upper part of the right upper arm 1.5 x .5 x 2cms.

(vi) A gunshot wound of entry on the posterior part of the upper part of the right upper arm oval in shape 2.5 x 2cms x bone deep on exploration muscles are lacerated and a big haematoma found over the corresponding muscles along with compound # of the upper part of the shaft of the right humeres.

(vii) A gunshot wound of entry found at the right supraclavicular fossa in the midclavicular line 4 x 3cms x muscle deep.

(viii) A gunshot wound of entry at the mid axillary line at the midthoracic region left side 2.5 x 1.5cms x cavity deep.

(ix) A wound of exit at the anterior axillary line on the right lower thoracic region 4 x 4 cms x cavity deep. Margins everted and lacerated blood clots found on and around the wound.

(x) A wound of exit at the right mid axillary line at the right subcondriac region 4 x 4cms x cavity deep. Margins everted and lacerated blood clots found on and around the wound.

(xi) A wound of exit at the right axillary region 2 x 2cms x cavity deep.

(xii) Lacerated wound on the anterior aspect of the upper part of the left forearm 3 x 1 x 1cms in size.

27. According to his opinion the death was due to excessive haemorrhage, shock and coma resulting from gunshot injuries caused within 24 hours of examination. He has deposed that all the injuries were sufficient in the ordinary course of nature to cause death. The postmortem report is Ex.P/24 which contains his signature.

28. He handed over the packets containing six pieces of articles recovered from the body of deceased such as four pieces of caps of plastic made, one rounded lead bullet, one torned off bullet, a white buniyan matted with blood with multiple tear holes and one underwear pale yellow in colour with bloods stains.

29. He has further deposed that on the same date at 2:45 p.m. he also conducted the postmortem examination of Shyamlal and found the following injuries :

(i) Gunshot wounds of entry three in numbers found on the lateral aspect of the upper part of the left thigh. Wounds are in a triangle form :. Two on the anterior side and one on the posterior side in an

area 4 x 3cms in size. 2cms apart to each other. Wounds are rounded in shape. Each is 1.5cms x 1.5cms x muscle deep in size. Margins are inverted, irregular, blackened and charred. Coagulated blood present on and around these wounds. These wounds are surrounded by multiple punctured wounds 35 in numbers. Each is 1/5 x 1/5 x 1/5cms in size scattered in an area of 8 x 8cms in diameter. On exploration subcutaneous tissues and muscles are badly lacerated and a big haematoma found over the corresponding muscles. A small pallet size of lentil found inside.

(ii) Gunshot wound of entry found on the right temporal region of the skull 2cms lateral to the lateral conthus of the right eye 2 x 2 cms x bone deep in size. Severe bleeding from the wound present. Margins inverted, irregular and blackened. Tattooing around the wound present on exploration subcutaneous tissues and muscles are badly lacerated and a big haematoma found over the corresponding muscles.

(iii) Wound of exit found on the left thoracic region of the chest to the mid-axillary line just above the left sub costal margin 3 x 2 cms in size. Margins everted and piece of omentum protruding out from the wound. On opening the wound huge clot of blood along with food matter from the ruptured stomach coming out. 10th and 11th ribs showing multiple compound comminuted fractures corresponding to the site of wound.

(iv) A lacerated wound found on the left temporal region of the skull 3cms lateral to the lateral conthus of the left eye 1 x ½ x 1/5 cms in size. Coagulated blood on and around the wound present.

(v) A compressed lacerated wound found on the right pectoral region of the chest ½ x ½ x 1/5 cms in size. Bluish discoloration present around the wound in an area of 5 x 5 cms in size. Coagulated blood on and around the wound present on exploration underlying soft tissues and muscles are found to be ecchymosed and lacerated.

30. According to his opinion the death was due to excessive haemorrhage, shock and coma resulting from gunshot injuries caused within 24 hours of examination. He has deposed that all the injuries were sufficient in the ordinary course of nature to cause his death. The postmortem report is Ex.P/25 which contains his signature.

31. He handed over the packets containing one underwear pale yellow in colour with multiple tear holes corresponding to the wounds of left thigh blood stained, one white buniyam with multiple tear holes corresponding to the wound of exit one the left side of the chest blood stained.

32. Thus, from the medical evidence, it is corroborated that the death of Maheep Singh Thakur and Shyamlal were caused due to gunshot injuries.

33. Vishnu Kumar (PW-16) has seized the blood stained and controlled soil, empty lead bullets and cartridges of 12 bore guns, their caps, motorcycle, name plate and

buttons vide seizure memo Ex.P/3. Likewise, he also seized blood stained and controlled soil and the caps of cartridges of 12 bore and a danda vide seizure memo Ex.P/4. He also seized the empty cartridges of 38 bore vide Ex.P/5. These memos were prepared by him before Kishori (PW-1) and Bhagwatsharan. Kishori (PW-1) has also supported the fact.

34. He has further deposed that he seized shirt and pant of uniform of Maheep Singh Thakur and also his shoes vide Ex.P/14. Likewise he also seized the shirt and full pant of uniform and blue cap of Shyamlal vide seizure memo Ex.P/15. He also seized the clothes of the deceased persons vide Ex.P/20. He also arrested accused Hardas on 15.12.1996 vide Ex.P/33.

35. G.R.Kasera (PW-13) seized one gun, empty cartridges and live cartridges vide seizure memo Ex.P/21.

36. On 22.03.1997 Vishnu Kumar (PW-16) arrested Sheikh Hakim vide arrest memo Ex.P/37. He recorded his memorandum Ex.P/38 and in consequence thereof he recovered belt, holster and one live cartridge and 9 empty cartridges vide seizure memo Ex.P/39. The details description of these articles has been given in the seizure memo.

37. On 28.03.1997 he further recorded the memo Ex.P/14 of appellant Sheikh Hakim and in pursuance thereof he recovered silver ring kept in Zarkin vide seizure memo Ex.P/41.

38. He has further deposed that he seized one 12 bore gun with other articles. The original seizure memo is enclosed in the Crime No.26/97 of Police Station Shahgarh.

39. Shankar (PW-9) has deposed that one revolver, four cartridges and blankets were seized vide seizure memo Ex.P/19. The original seizure memo is filed in the S.T.No.183/97.

40. K.K.Pandey (PW-15) had deposed that District Magistrate Sagar granted permission for prosecution against Hardas and Sheikh Hakim for having one country-made 12 bore gun with two cartridges and katta of 12 bore with one live cartridge vide Ex.P/26.

41. The seized articles silver ring, belt, holster etc were put to identification parade which were identified by witness Rajesh Kumar (PW-17) and Jagdish Prasad (PW-18) respectively.

42. Ramsharan (PW-12) has deposed that the revolver alongwith five live cartridges in working condition were issued to Maheep Singh Thakur on 23.10.1996. The entries thereof has been made in the Rojnamacha Sanha Ex.P/22-C. This revolver has been robbed and its entry has been made in stock register Ex.P/23. The service revolver and the live cartridges article-I and article-H. Empty cartridges article J, K are the same which were issued to Maheep Singh Thakur.

43. Umesh Tiwari (PW-22) has also deposed that the entry is made in the stock register Ex.P/43 regarding robbing of the revolver.

44. Thus, from the evidence of these witnesses, it is established that the revolver,

holster, cartridges were issued to Maheep Singh Thakur on 23.10.1996 and who went on road patrolling. He was killed and his service revolver was looted.

45. The seized articles were sent for chemical examination vide Ex.P/34 and the reports Ex.P/35 and P/36 have been received therefrom. The detailed reports regarding the seized articles is contained therein.

46. The prosecution has adduced direct and circumstantial evidence against the appellants. Kishori (PW-1); Hari Singh (PW-2) and Babulal (PW-3) have stated that they have seen the appellants firing with the guns. The appellants have also been connected with the circumstantial evidence. There is overwhelming evidence against them. The prosecution has fully established the guilt against the appellants. There is no reason to falsely implicate them. No infirmity is found in the judgment of the trial Court hence it does not call for any interference. We affirm the conviction and sentence as recorded by the trial Court. There is no any merit in these appeals hence deserve to be dismissed.

47. Consequently, these appeals fail and are hereby dismissed accordingly.

48. The order regarding the disposal of criminal properties passed by the trial Court is hereby affirmed.

Appeal dismissed.

I.L.R. [2007] M.P., 1434
APPELLATE CRIMINAL
Before Mr. Justice Arun Mishra and Mr. Justice K.S. Chauhan
9 August, 2007

KALLU SINGH --- Appellant*

vs.

STATE OF M.P. --- Respondent

A. Penal Code, Indian (XLV of 1860)-Section 300-Murder-Appellants hiding behind bushes when the deceased and injured were coming back from their fields -Appellants surrounded the deceased and injured and caused as many as 35 injuries on three persons by deadly weapons-Two persons died in the incident-Evidence of injured witness and independent witnesses cannot be discarded on the ground of delay in recording Statement by Police-Merely because the witnesses could not attribute specific act to each accused prosecution case cannot be doubted-Provision of Section 149 of I.P.C. applies-Oral dying declaration made by deceased to witness reliable-Accused persons guilty of committing murder-Appeal dismissed. (No Para)

B. Criminal Procedure Code, 1973 (II of 1974)-Section 161-Delayed recording of statement of injured witness-Injured witness receiving 9 injuries including 2 incised wounds, 4 penetrating wound and 3 injuries caused

*Cri. A. No. 633/1998 (J)

by hard and blunt object-Witness remained in hospital for 26 days-Returned back to village after staying for more 4 days-Statement of witness recorded thereafter-Dying declaration of witness also recorded by Executive Magistrate within 9 hours of incident-No dent caused to the prosecution case.

These injuries had been proved by Dr. M.K. Prajapati (PW.11), injury no. (1) and (3) were caused by shard edged weapon, injury no. (4), (5), (6) and (8) by penetrating wound, injury no. (2), (7) and (9) were caused by hard and blunt object. Medical report of Mijaji Singh has been proved by Dr. Prajapati. Thus, Mijaji Singh's presence on the spot has found support by aforesaid 9 injuries. His version was of utmost significance to unfold the story in the instant case. We do not find merit in the submission raised by learned counsel appearing for accused/appellants that his police statement had been recorded with undue delay after one month seven days of the incident, incident took place on 1.9.92, no doubt his police statement (D/3) had been recorded on 9.10.92, recording of belated police statement (Ex. D.3) has been rendered insignificant in view of the admitted fact that considering his bad condition his dying declaration (D/4) had been recorded by Executive Magistrate Cum Naib Tahsildar Shri B.B. Pandey (DW.8). It was recorded on 2.50 AM on 2nd September, 1992 within 9 hours of incident whereas incident took place on 1st September, 92 in between 6-6.30 PM. As dying declaration has been proved by examination the defence witness B.B. Pandey (DW. 8) and the witness Mijaji Singh remained admitted in hospital for 26 days and after staying for another 4 days, he went back to the village, it was only thereafter that his police statement came to be recorded by I.O. Thus, in the aforesaid circumstance, no dent was caused to the prosecution case as in the earlier statement (D/4) only the name of accused Natthu Singh had not been stated by Mijaji Singh and due to that Natthu Singh has been given benefit of doubt by the trial Court. (Para 7)

C. Penal Code, Indian (XLV of 1860)-Section 149-Unlawful Assembly-7 persons causing 35 injuries to three persons out of which 2 died-Injured witness could not attribute specific role to each accused-Where several persons were inflicting injuries at the same time it may not be possible for witness to state with precision about role played by each accused-Section 149 of I.P.C. attracted-Presence of injured witness cannot be doubted.

Similarly Mijaji Singh has not been able to state which accused person had inflicted injury on which part, though he has given the version that for about half an hour accused inflicted the injuries. He has also stated in para 13 that Chhuttu Singh had inflicted two injuries, thereafter he fell down, he had also given specific role of certain other accused persons also. In case a witness is not able to give details as to the role of each accused with precision in a case where Section 149 IPC is attracted, mere presence of accused was enough and considering the fact that several accused persons were inflicting the injuries at the same time on three persons resulting into 35 injuries to them, it may not be possible for a persons to state with precision the role of each accused person.

(Para 7)

D. Penal Code, Indian (XLV of 1860)-Section 300-Murder-Injuries on accused persons-Simple injuries found on the body of some accused persons-Nature of injuries is not such calling for explanation-Accused persons were aggressors-Right of Private Defence not available to them.

An attempt is also made to discredit the statement of Mijaji Singh (PW.5) on the ground that he has not explained the injuries caused to the accused Shankar, Maheepat Singh and Chhuttu Singh. These injuries were simple as stated by Dr. Ramesh Chandra Malare (DW.5) as apparent from injury report (D.14) of Maheepat Singh, (D/16) of Chhuttu Singh and (D/18) of Shankar Singh.

Considering the dimensions also the injuries were quite simple, in the instant case apparently the accused were the aggressors, they were hiding in a bush, waiting for deceased and injured Mijaji Singh to arrive and thereafter they had started beating them with lethal weapons. Thus, right of private defence by no stretch of imagination could be extended to them in the circumstances of the case. We have no iota of doubt on the statement of Mijaji Singh that these accused person were hiding in the bush and came out and started beating them. Plea of private defence was, thus, not available to accused in the instant case. (Para 9)

E. Criminal Procedure Code, 1973 (II of 1974), Section 161-Evidence Act, Indian, 1872, Section 3-Witness-Murder-Examination of witness by Investigating Officer-Delay-Statement of independent eye witness recorded after one day-For that Investigating Officer has to be categorically questioned on aspect of delayed examination-Delay in examination of witnesses by I.O.-I.O. not asked about delay-Name of witness mentioned in F.I.R. which was lodged promptly-Witness cannot be disbelieved.

He has stated that police made enquiry from him on the same day, however, it appears, that his police statement had been recorded on 3.9.92 as stated by I.O. Abdul Mubin Qureshi (PW. 16), ASI for the delay of one day, his explanation has not been obtained by the accused. The Apex Court in *State of U.P. v. Satish,* (2005) 3 SCC 114 has held that unless I.O. was categorically asked that why there was delay in examination of the witness, the defence could not gain any advantage therefrom. It could not be laid down as a rule of universal application that if there was any delay in examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination was plausible and acceptable and the court accepts the same as plausible, there was no reason to interfere with the conclusion.

(Para 11)

Cases Referred.

Kallu alias Masih & Ors. v. The State of M.P., A.I.R. 2006 SC 831; *Mohinder Singh & Ors. v. State of Punjab,* AIR 2006 Sc 1639; *Takhaji Hiraji v. Thakore Kubersing Chamansingh & Ors.,* AIR 2001 Sc 2328; *Surendra Paswan V. State of Jharkhand,* (2003) 8 Supreme 47; *Triloki Nath & Ors. v. State of U.P.,* 2006 SAR

(Criminal) 57; *Shahjahan & Ors. v. State of Kerala and anr.*; 2007 SAR (Criminal) 338; *Lakshmi Singh & ors. v. State of Bihar,* AIR 1976 SC 2263; *State of U.P. v. Satish,* (2005) 3 SCC 114; *Banti alia Guddu v. State of M.P.,* (2004) 1 SCC 414; *Naveen Chandra v. State of Uttaranchal,* AIR 2007 SC 363.

L.N. Sakle and *Siddharth Datt,* for the appellant
R.S. Patel, Addl. Advocate General for the State

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeals have been preferred by the seven accused appellants aggrieved by their conviction under Section 302/149 IPC and sentence of imprisonment for life and fine of Rs.200/-, convictions, under Section 324/149 IPC and sentence of two years R.I. and fine of Rs.100/-, under Section 147 IPC R.I. for six months and fine of Rs.100/-, under Section 148 IPC R.I. for six months and fine of Rs.100/-, in default of payment of fine additional imprisonment for one month each ,imposed by 2nd Addl. Sessions Judge, Chhatarpur in ST No. 26/1993.

2. Prosecution case in brief is that on 1.9.92 accused persons formed unlawful assembly armed with weapons, they inflicted injuries on Komal Singh, Sumer Singh and Mijaji Singh, two of them, namely, Komal Singh and Sumer Singh died, Mijaji Singh sustained injuries. FIR has been lodged by Rajjan Singh, resident of Village-Chhati Bamhori, brother of deceased and injured Mijaji Singh, incident took place at about 6-6.30 PM on 1.9.92 when Komal Singh, Sumer Singh and Mijaji Singh were going back from their agricultural field, when they reached near Thudwaghat, they found accused Shankar Singh, Babu Singh, Chhuttu Singh, Laxman Singh, Kallu Singh, Natthu Singh, Maheepat Singh and Bhimsingh hiding behind Besharm bush, they were armed with spear, dagger, ballam and lathis and inflicted injuries on Komal Singh, Sumer Singh and Mijaji Singh, Sumer Singh and Komal Singh succumbed to the injuries on the spot itself, thereafter they ran away to catch hold of Rajjan Singh, complainant, he ran away to the village and informed the incident to the villagers brother,Nana, Peshwani Shukla, Mangal Singh, Ramsingh, Raju, Binda,etc. and went to the spot along with them, on the spot he met with Jagdish and Kalicharan of village Silgaon. Thereafter he went to PS-Chandla to lodge the report, he reached to the police station at about 10.50 PM and report (P/1) was reduced in writing. Investigation was done, Patwari prepared the spot map (P/2), Mijaji Singh was sent along with requisition (P/4) for treatment to the hospital at Chandla, on the next day inquests of body of Komal Singh and Sumer Singh (P/6 and P/7) were prepared. Blood stained and plain soil were seized along with shoes, spot map (P/40) was also drawn, the bodies of Sumer Singh and Komal Singh were sent for autopsy to the District Hospital, Chhatarpur. After arrest of accused, at their instance, ballam, dagger, farsa were seized. Seized articles were sent to FSL, an arrangement was made to record dying declaration of Mijaji Singh, Executive Magistrate recorded dying declaration of Mijaji Singh on 2.9.92 at 2.50 AM, ultimately he survived.

3. Accused had been charged for commission of offence under Sections

147,148,302,302/149,307 and 307/149 IPC, they abjured their guilt and contended that due to party fractionalism and old enmity they had been falsely implicated in the case and set up their innocence. Accused Maheepat Singh, Chhuttu Singh and Shankar Singh in their statements under Section 313 Cr.P.C. stated that when they were returning back, they were beaten by Sumer Singh, Komal Singh and other, Sumer Singh inflicted injuries with ballam on the back of Shankar Singh, Maheepat Singh,. Kallu and Chhuttu Singh went to PS-Chandla along with Shankar Singh to lodge the report. Shankar Singh had been sent for medical examination . Accused had also adduced defence evidence in order to prove the FIR lodged by them and statement of Mijaji Singh recorded by Executive Magistrate in the intervening night of 1st/2nd September, 1992. Aggrieved by the conviction and sentence as aforesaid, appeals have been preferred.

4. Shri L.N.Sakle and Shri Siddharth Datt, learned counsel appearing for appellants have submitted that Rajjan Singh (PW.1) has not witnessed the incident. This witness has also relied upon oral dying declaration made by Sumer Singh, Sumer Singh was not in a position to give any oral dying declaration to Rajjan Singh (PW.1), thus, FIR appears to be manipulated and concocted document, prosecution has failed to establish on what basis it had been lodged. Police statement of Mijaji Singh was recorded after more than one month, though he had suffered injuries in the incident, however, owing to delay in recording his police statement and also considering his statement, he has failed to attribute specific act to the accused, consequently it could not be said that he was a reliable witness, apart from that there were contradictions in the statements of these two witness Mijaji Singh and Rajjan Singh, thus, it would not be safe to convict the appellants on the basis of their statements. Counsel further submitted that injuries had been found on the person of accused Shankar Singh, he has suffered one stab wound, Maheepat Singh has suffered two stab wounds, Chhuttu Singh two injuries, one contusion and one stab wound,found by Dr.Ramesh Chandra Malare , (DW/5), Assistant Surgeon, injury reports D/16,D/18 and D/14 respectively had been proved. The prosecution has failed to offer explanation to the injuries found on the accused. Thus, from version of accused it was probable that deceased and injured Mijaji Singh were aggressors, thus, it was within the realm of right of private defence of the accused to defend and to cause injuries, involvement of all accused persons has not been established beyond reasonable doubt. With respect to involvement of Natthu Singh, trial Court has disbelieved the case. Haricharan (PW.8) was also not credible witness, his testimony does not inspire confidence. He has been contradicted by Gangacharan (DW/3) that he has visited the village of Gangacharan on the date of incident, Haricharan was a chance witness, he has not been able to give the description expected of an eye witness. Thus, conviction could not be based on his testimony, he belongs to the party of complainant, consequently, accused appellants deserve to be acquitted. Alternatively, it was submitted that conviction be altered to Section 304 IPC.

5. Shri R.S.Patel, learned Addl. AG appearing for State has submitted that FIR had been lodged promptly,statement of Mijaji (PW.5) the injured witness, Rajjan Singh (PW.1), Haricharan (PW.8) were reliable, accused persons were much in number, not attributing specific act to each of the accused persons with precision could not dilute

the evidential value of the eye witness account. In the instant case, accused persons were hiding behind Besharm bush, they were armed with lethal weapons, when they saw deceased Komal Singh, Sumer Singh and injured Mijaji Singh were going back from their field, they came out, encircled them and started beating them with various weapons carried by them. On the person of injured, Mijaji Singh (PW.5) in all 9 injuries were found on various parts of the body, on deceased Komal Singh 10 injuries were found in the postmortem report (P/31) whereas on the body of Sumer Singh in the postmortem report (P/32) in all 16 injuries were found, thus, total 35 injuries had been found on aforesaid three persons. Thus, involvement of large number of accused persons being writ large, recording of statement of Mijaji Singh on 9.10.92 with delay was of no significance as dying declaration (D/4) stood recorded at 2.50 AM in the intervening night of 1st/2nd September,92 recorded by Executive Magistrate Braj Bihari Pandey (PW.8) , Haricharan was also a truthful witness beside Rajjan Singh (PW.1). Sumer Singh had also made oral dying declaration to Rajjan Singh. Accused had formed unlawful assembly, they were waiting for Sumer Singh, Komal Singh and Mijaji Singh to arrive, thus, they were aggressors, right of private defence could not be said to be available to them in the circumstances of the case. Simple injuries had been found on the person of three accused Shankar, Maheepat and Chhuttu Singh, non-explanation of such simple injuries could not be said to be of any significance in the facts and circumstances of the case. Investigation has been done with promptitude and fairness. Prosecution has proved its case against the accused. Appellants had been rightly convicted under Section 302 IPC, no case for interference in this appeal was made out.

6. First we have to consider lodging of FIR in the instant case. FIR (Ex.P/1) had been lodged by Rajjan Singh (PW.1) at 10.50 PM on 1.9.92 at PS-Chandla situated at a distance of 10 kms.from the place of incident. Rajjan Singh (PW.1) has stated that on the date of incident he was in the field, he came to know that Sumer Singh, Komal Singh and Mijaji Singh had been beaten, he came to the spot, deceased Sumer Singh made oral dying declaration to him that Shankar Singh, Babu Singh Chhuttu Singh, Laxman Singh, Bhim Singh, Maheepat Singh, Kallu Singh and Natthu Singh had inflicted injuries on them. He has owned report (P/1) as apparent from the statement that Sumer Singh had disclosed the names of accused to him. In cross-examination he has stated that Komal Singh, Mijaji Singh and Sumer Singh were unconscious but at the same time he has stated in examination in chief that out of them Sumer Singh was in the position to speak inspite of his bad condition. This part of statement inspire confidence as Mijaji Singh has ultimately survived the injuries and Mijaji Singh's dying declaration had been recorded in the night by Executive Magistrate, in that he has disclosed the names of accused persons except that of Natthu Singh. This witness Rajjan Singh (PW.1) appears to be truthful as he has not stated that Mijaji Singh was conscious at the time when he reached. It appears that Komal Singh has died, Mijaji Singh was unconscious and though condition of Sumer Singh was bad, but still he could speak, as stated by the witness Rajjan Singh (PW.1), we find no reason to discard his deposition.

7. Coming to the deposition of Mijaji Singh (PW.5), he has sustained as many as 9 injuries, injury no. (1) was incised wound over parietal bones obliquely of 3 x .4 x .3 Inch (2) lacertaed wound over right parietal bone of .5 x .5 x .2 Inch (3) incised wound on index finger of left hand of .8 x .2 x .2 Inch, penetrating wound over right dorsal palm near 2nd metacarpal of .4 x .3 x .8 Inch (5) penetrating wound on the left side of chest of .4 x .3 x .4 Inch (6) penetrating wound of .3 x .3 x .3 Inch, 4 Inch below the right scapula bone (7) contusion of 3 x 1.3 Inch on the left leg (8) abrasion of 1 x .4 x 1.2 Inch on right leg 3.5 Inch below knee and (9) contusion of 3 x 2 Inch on the outer side of right toe. These injuries had been proved by Dr. M.K.Prajapati (PW.11), injury no. (1) and (3) were caused by shard edged weapon, injury no. (4), (5) , (6) and (8) by penetrating wound, injury no. (2), (7) and (9) were caused by hard and blunt object. Medical report of Mijaji Singh has been proved by Dr. Prajapati. Thus, Mijaji Singh's presence on the spot has found support by aforesaid 9 injuries. His version was of utmost significance to unfold the story in the instant case. We do not find merit in the submission raised by learned counsel appearing for accused/appllants that his police statement had been recorded with undue delay after one month seven days of the incident, incident took place on 1.9.92, no doubt his police statement (D/3) had been recorded on 9.10.92, recording of belated police statement (Ex.D/3) has been rendered insignificant in view of the admitted fact that considering his bad condition his dying declaration (D/4) had been recorded by Executive Magistrate Cum Naib Tahsildar Shri B.B.Pandey (DW.8). It was recorded on 2.50 AM on 2nd September,1992 within 9 hours of incident whereas incident took place on 1st September,92 in between 6-6.30 PM. As dying declaration has been proved by examining the defence witness B.B.Pandey (DW.8) and the witness Mijaji Singh remained admitted in hospital for 26 days and after staying for another 4 days, he went back to the village, it was only thereafter that his police statement came to be recorded by I.O. Thus, in the aforesaid circumstances, no dent was caused to the prosecution case as in the earlier statement (D/4) only the name of accused Natthu Singh had not been stated by Mijaji Singh and due to that Natthu Singh has been given benefit of doubt by the trial Court.

Much has been tried to be made out by the counsel on behalf of accused that statement of Mijaji Singh (PW.5) cannot be said to be reliable for the reason that he was unable to state whether he had disclosed the names to Executive Magistrate or not as he did not remember the said fact. In our opinion when names of 7 accused/ appellants were clearly mentioned in the statement, aforesaid could not be said to be the contradiction. An effort was made by cross examiner to test the memory of the witness, it may not be possible for witness to state what infact he had disclosed at the time when his dying declaration was recorded and since he had named seven accused appellants in statement (D/4), it could not be said to be the contradiction to the advantage of accused.

Similarly Mijaji Singh has not been able to state which accused person had inflicted injury on which part, though he has given the version that for about half an hour accused inflicted the injuries. He has also stated in para 13 that Chhuttu Singh had inflicted two injuries, thereafter he fell down, he had also given specific role of

certain other accused persons also. In case a witness is not able to give details as to the role of each accused with precision in a case where Section 149 IPC is attracted, mere presence of accused was enough and considering the fact that several accused persons were inflicting the injuries at the same time on three persons resulting into 35 injuries to them, it may not be possible for a person to state with precision the role of each accused person.

8. The Apex Court in *Kallu alias Masih and others vs. The State of M.P.,* AIR 2006 SC 831 has laid down that it is not sufficient to disbelieve the evidence of injured eye witness on the ground that there is inconsistency and discrepancies regarding the exact place or the point at which the incident took place or as to who landed the blows as it is not necessary that all eye witnesses should specifically refer to the distinct acts of each member of an unlawful assembly, infact it is difficult if not impossible. In *Mohinder Singh and others vs. State of Punjab;* AIR 2006 SC 1639, the Apex Court has held that presence of injured witness cannot be doubted at the spot.

9. An attempt is also made to discredit the statement of Mijaji Singh (PW.5) on the ground that he has not explained the injuries caused to the accused Shankar, Maheepat Singh and Chhuttu Singh. These injuries were simple as stated by Dr. Ramesh Chandra Malare (DW.5) as apparent from injury report (D/14) of Maheepat Singh, (D/16) of Chhuttu Singh and (D/18) of Shankar Singh. When we consider the nature of injuries on these accused persons, injury on Maheepat was of .5 x .5 x .5 cm. on left hand, it was caused by penetrating weapon, 2nd stab wound of 1.2 x 1.2 x 1.2 cm.over left hand and 18 cm. below left shoulder, it was also caused by penetrating weapon. Considering the nature of these injuries, they were simple and considering the dimensions, it could not be said to be injuries calling for explanation in the facts of instant case. On the person of Chhuttu Singh, one contusion of 5 x 4 cm.over right outer side of neck was found and one stab wound of .8 x .8 x 1.7 cm. as apparent from report (D/16). On Shankar Singh, one stab wound of .9 x .9 x 3.6 cm.was found in the abdominal region, considering the dimension of the aforesaid injuries, these were quite simple, no radiological examination report had been produced so as to show that these injuries were grievous, considering the dimensions also the injuries were quite simple, in the instant case apparently the accused were the aggressors, they were hiding in a bush, waiting for deceased and injured Mijaji Singh to arrive and thereafter they had started beating them with lethal weapons. Thus, right of private defence by no stretch of imagination could be extended to them in the circumstances of the case. We have no iota of doubt on the statement of Mijaji Singh that these accused person were hiding in the bush and came out and started beating them. Plea of private defence was,thus, not available to accused in the instant case.

The Apex Court in *Takhaji Hiraji vs. Thakore Kubersingh Chamansing and others;* AIR 2001 SC 2328 has held that when three accused persons suffered injuries of very minor nature, their non-explanation did not cause any infirmity in the prosecution case. The Apex Court has held that it cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of prosecution to do so

the prosecution case should not be disbelieved. Before non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution case, the Court has to be satisfied of the existence of two conditions :(1) that the injury on the person of the accused was of a serious nature; and (2) that such injuries must have been caused at the time of the occurrence in question. Since the injuries are not grievous in nature to any of the aforesaid three accused persons, in the facts of the instant case the method and manner in which incident has taken place, no dent was caused to prosecution case due to non-explanation of simple injuries. In *Mohinder Singh and others vs. State of Punjab* (supra) witnesses were injured and non-explanation by the prosecution of the minor injuries suffered by Beant Singh and Nirbhay Singh could not dislodge the prosecution case. In Surendra Paswan vs. State of Jharkhand (2003) 8 Supreme 476 and in *Anil Kumar vs. State of U.P.;* JT 2004 (8) SC 355 it has been observed that trifling and superficial injuries on accused are of little assistance to them to throw doubt on the veracity of the prosecution case. In *Triloki Nath and ors. vs. State of* U.P. 2006 SAR (Criminal) 57 the Apex Court has laid down that plea of private defence is not available to aggressors accused. In the instant case also as the accused were aggressors, we have found that they are not entitled to raise the plea of private defence. In *Shajahan and others vs. State of Kerala and another;* 2007 SAR (Criminal) 338 non-explanation of injuries of minor nature was held to be inconsequential. Counsel have relied upon a decision of Apex Court in *Lakshmi Singh and others vs. State of Bihar;* AIR 1976 SC 2263 . No doubt about it that in the aforesaid dictum, it has been laid down that prosecution has to explain the injuries on the accused, but as in the instant case the injuries are found to be superficial and accused were the aggressors, right of private defence was not available to them in the circumstances of the instant case no dent was caused to the prosecution case due to non-explanation of minor injuries found on body of three accused persons.

10. Mijaji Singh (PW.5) has also stated that he became conscious in the hospital, thereafter his statement was recorded by Naib Tahsildar. He has clearly stated that Shankar Singh and other 8 accused persons and 2 unknown persons surrounded them, Shankar Singh asked Mijaji Singh what was his intention, on that he told that they did not want to fight, thereafter accused Laxman Singh inflicted injury on the head of Komal Singh with the Farsa , Komal Singh fell down, thereafter all of them started beating Sumer Singh and Komal Singh, they were carrying Farsa, Ballam, etc. He was also beaten, Shankar Singh inflicted Ballam injury on his back, Laxman Singh inflicted injury on his left hand with the Farsa, Babu Singh with Ballam, Maheepat Singh with Farsa, Kallu Singh inflicted injury with Ballam, Chhuttu Singh inflicted injury with axe from the blunt side. He became unconscious on the spot and regained consciousness in the hospital. There was old enmity between them. Enmity is a double edged weapon, that was the cause for the accused in the instant case to commit the offence. Being the injured witness, no doubt he was present on the spot and his deposition alone was sufficient to sustain the conviction of accused/appellants as he has been found to be truthful and reliable witness.

11. Haricharan (PW.8) is yet another eye witness examined by prosecution. He

had gone to the Village- Tikuri in order to purchase an Ox,while he was coming back along with Jagdish, had witnessed the incident. He had named 8 accused persons who were put to trial, one of them Natthu Singh has been given benefit of doubt by the trial Court. He was unable to state the individual act of the accused, by that no dent was caused in the light of aforesaid discussion made with respect to Mijaji Singh (PW.5) as it was quite difficult to assign individual acts in such circumstance. He has stated that police made enquiry from him on the same day, however, it appears that his police statement had been recorded on 3.9.92 as stated by I.O.Abdul Mubin Qureshi (PW.16), ASI for the delay of one day, his explanation has not been obtained by the accused. The Apex Court in *State of U.P. vs. Satish;* (2005) 3 SCC 114 has held that unless I.O. was categorically asked that why there was delay in examination of the witness, the defence could not gain any advantage therefrom. It could not be laid down as a rule of universal application that if there was any delay in examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination was plausible and acceptable and the court accepts the same as plausible, there was no reason to interfere with the conclusion. Similar observation was made by Apex Court in *Banti alias Guddu vs. State of M.P.* ; (2004) 1 SCC 414. In the instant case, no question had been put to the aforesaid ASI (PW.16) why statement of Haricharan (PW.8) had been recorded on 3.9.92 when he was available in the night on 2.9.92, there was not much delay in the instant case and no explanation has been obtained, thus, we are not inclined to accept the submission on behalf of accused appellants that this witness has been added as an after thought. His name has been mentioned in the FIR, names of Jagdish and Haricharan were mentioned as eye witnesses of the incident, out of them Haricharan has been examined by the prosecution. Maheepat Singh accused had lodged a complaint against him, the defence has cross-examined the witness Haricharan to the effect that he was also present and inflicted the injuries on the accused that also supports his presence on the spot, though in our opinion he was present as witness not as aggressor. Similarly statement of this witness could not be discredited for non-explaining the simple injuries on three accused persons and his statement that all the accused persons were beating with lethal weapon appears to be quite reliable and has been supported by injured witness Mijaji Singh, thus, we find that statement of Haricharan has been rightly believed by trial Court. Merely on the basis of party fractionalism his statement could not be brushed aside in the facts of instant case.

Statement of Gangacharan (DW.3) to the effect that Haricharan did not visit him on the date of incident has no effect on the otherwise reliable statement of Haricharan (PW.8). Haricharan has not improved upon his earlier version and has substantially supported the case of prosecution, thus, we do not find any force in the submission raised by learned counsel for appellants that version of aforesaid three witnesses Mijaji Singh, Haricharan and Rajjan were not reliable and conviction could not be based on that basis.

12. Arrest and factum of seizure has not been impinched upon by the counsel for appellants, however, V.N.Singh (PW.12) has stated that he had arrested the accused

Kallu and seized Lathi as per memos (P/18 and P/19), at the instance of Laxman Farsa was seized as per seizure memo (P/20), from accused Babusingh, Ballam was seized as per memo (P/22). Krapal Singh (PW.15) has supported the prosecution with respect to seizure from the accused Chhuttu Singh, Maheepat Singh, Shankar Singh, Kallu Singh and Laxman Singh. Ashok Kumar (PW.3), Patwari, had prepared the spot map (P/2) , he has proved it. Another spot map was prepared by Shri Abdul Mubin Qureshi (PW.16), inquest has also been proved by him and the seizure of blood stained and control soil.

13. Dr. M.K.Prajapati (PW.11) has clearly proved the injuries found on the person of deceased in his medical reports (P/16-A , P/16-B) and the reports (P/16 and P/17) of deceased Komal Singh and Sumer Singh. With the help of diagrams also he has explained the injuries, he has opined that injuries could be caused by the weapons seized. Sumer Singh's right parietal bone was found to be broken beside peritoneum was found to be cut, fractures were also found on the right leg, on the person of Komal Singh 10 injuries were found, his parietal bone had been fractured, peritoneum of brain was found cut, cause of death was due to excessive bleeding and shock due to brain injury. The injuries were found to be sufficient in ordinary course of nature to cause death. He has also examined Mijaji Singh in the night and has proved the injuries on him and the report.

14. Considering the facts and circumstances of the case, in our opinion, it cannot be said to be a case falling under Section 304 Part I IPC. The counsel for appellants have relied upon a decision in *Naveen Chandra vs. State of Uttaranchal;* AIR 2007 SC 363 . It was a case of "sudden fight" in a Panchayat which had been convened, three persons died, case was held to be falling within the said exception and they were convicted under Section 304 Part I IPC. Facts of the instant case were quite different, incident has not taken place all of a sudden, but accused had formed an unlawful assembly, they were hiding behind Besharm bush and started beating mercilessly when deceased Komal Singh and Sumer Singh, and injured Mijaji Singh were going back to the village from the field. Thus, neither plea of self-defence could be said to be available to accused nor it would be a case falling under Section 304 Part I IPC. Accused knew what they were doing and what was intended. It was not a case falling under any of the exception to Section 300 IPC. Thus, accused were rightly convicted for commission of offence under Sections 302, 149 of IPC for causing death of Komal Singh and Sumer Singh, under Section 324/149 IPC for causing injuries to Mijaji Singh (PW.5) and also under Sections 147 and 148 IPC.

15. In view of above, the appeals being devoid of merits are hereby dismissed.

Appeal dismissed.

I.L.R.[2007] M.P., 1445

APPELLATE CRIMINAL

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

9 August, 2007

MADHURI --- Appellant*

Vs.

STATE OF M.P. --- Respondent

Penal Code, Indian (XLV of 1860)-Sections 302, 304-I-Culpable Homicide not amounting to murder-Deceased sitting near a well and was cleaning his teeth-Appellant came with axe and threw deceased in the well and hurled a big stone in well as a result of which deceased died-Held-Eye witnesses supporting prosecution case-Plea of alibi appears to be after thought-Post mortem report disclosed fracture of occipital bone-Medical evidence also supports prosecution case-Relations of appellant and deceased were initially cordial but became tense as deceased had gone to police station along with complainant for lodging report against appellant for outraging modesty of daughter of complainant-However, there is no evidence that how quarrel started-Case squarely covered by exception 4 to Section 300-Appellant acquitted from offence under Section 302 and convicted under Section 304-I-Appellant already in jail for the last 12 years-Appellant directed to be released on the sentence already undergone-Appeal partly allowed.

The submission of learned counsel of the appellant appears to be correct because no evidence has been adduced regarding cause of quarrel on that day. Moreover, it has come on record that they were friends and their relations were cordial but became tense recently because deceased went with Puranlal to lodge the report regarding outraging the modesty of his daughter by the appellant. How the quarrel started has not been brought on record, therefore, it appears that sudden quarrel is squarely covered by exception 4 to Section 300 of I.P.C. Exception 4 of Section 300 runs as follows:-

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

Since his case is covered under the above exception, therefore, the offence of murder is not made out. His case falls under Section 304-I of I.P.C.

(Paras 22 and 23)

Z.M. Shah, for the appellant

S.K. Rai, Government Advocate for the respondent.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **K.S. Chauhan J.** :– This criminal appeal has been preferred under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment, finding and sentence

*Cri. A. No. 1631/1998 (J)

dated 14th July, 1998 passed by II Additional Sessions Judge, Tikamgarh in Sessions Trial No.25/95, whereby the appellant has been convicted under Section 302 of IPC and sentenced to life imprisonment with fine of Rs.5,000/-, in default R.I. for six months.

2. The brief facts of the prosecution case are that on 02.07.1995 Kishan was cleaning his teeth sitting near to a well situated at village Kachhora at about 9:30 a.m., at the same time, the appellant came with axe and caught hold of Kishan from behind and threw him into the well and hurled a big stone in the well upon him consequently he died. The report was lodged by his uncle Kanhaiya Lal at outpost Khajuri wherein the crime under Section 302 IPC was registered. This was sent to police station Palera wherein the Crime No.01/95 under section 302 was registered under Section 174 of the Code of Criminal Procedure. Panchnama of dead body of Kishan was prepared. His dead body was sent for postmortem examination. Dr.C.P.Arya conducted postmortem and opined that death was caused by fracture of occipital bone due to coma. The packet of his clothes were seized. Spot map was prepared. One Kulhari, towel and shoes of deceased and two stones were also seized from the well. The statement of the witnesses were recorded under Section 161 of the Code of Criminal Procedure. After completing the investigation, the charge sheet was filed in the court of Judicial Magistrate First Class, Jatara, wherein the Criminal Case No.236/95 was registered which was committed to the Sessions Court on 07.02.1995.

3. The appellant stood charged under Section 302 of Indian Penal Code that on 02.01.1995 at 9:30 a.m. on the well situated at village Kachhora he committed the murder intentionally or (knowingly) caused the death of Kishan and thereby committed an offence punishable under Section 302 of Indian Penal Code.

4. The appellant abjured the guilt and claimed to be tried mainly contending that he has been falsely implicated.

5. The prosecution examined as many as 11 witnesses whereas the appellant examined only 3 witnesses. After appreciating the evidence, the appellant was convicted under Section 302 and sentenced thereunder as stated in para 1 of the judgment. Being aggrieved by the judgment, finding and sentence the instant appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure on the grounds mentioned in the memo of appeal.

6. The learned counsel for the appellant has submitted that the trial Court has not appreciated the evidence in the proper perspective. Most of the witnesses have not supported the prosecution story. The guilt is not proved beyond reasonable doubt hence the trial Court has committed an illegality in convicting and sentencing the appellant under Section 302 IPC, therefore, he is entitled for acquittal.

7. On the other hand, Shri S.K.Rai, learned G.A. appearing on behalf of the respondent/State supported the finding and sentence passed by the trial Court and submitted that the prosecution has proved the case beyond reasonable doubt against the appellant, therefore, the trial Court has rightly convicted and sentenced him hence it does not call for any interference.

8. The main point for consideration in this appeal is that whether the trial Court has

committed any illegality in convicting and sentencing the appellant under Section 302 of the Indian Penal Code for committing the murder of Kishan.

9. We have perused the entire record and evidence recorded therein.

10. Mst. Ladkunwar (PW-3) is the daughter of Kishan. She has stated that her father was cleaning his teeth at well. She heard his cries. She rushed there and saw that her father is lying in the well and appellant was throwing the stone upon her father. She tried to prevent but the appellant rushed to beat her. She fell down and cried to save her father. Her mother Mst.Leelabai (PW-4) came there to whom she told that appellant has thrown her father in the well and throwing the big stone from the platform of well, as a consequence thereof, her father died in the well. Here statement is supported by her mother Mst.Leelabai (PW-4) and also stated that she saw the appellant running from there.

11. The attempt is made on behalf of the appellant to bring the contradictions and omissions in the statement but they are not on the material point and are of no consequence.

12. Kanhaiya Lal (PW-2) has stated in examination-in-chief that he saw appellant was throwing the stone in the well and he came to know from the persons present at the well that appellant as thrown Kishan into the well and has also hurled 3-4 big stones in the well. He saw Madhuri running from there and tried to catch him but could not. He lodged the report Ex.p/1 at the concerned police station.

13. He has been subjected to a lengthy cross-examination wherein he has admitted that he did not saw the appellant throwing the stone into the well is self contradictory. Further, his statement that he saw the appellant running from there is intact in the cross examination also.

14. Raju (PW-7) is the son of deceased Kishan. He has stated that his Babba (Kanhai) told that appellant has thrown Kishan into well and hurled the stone and killed. He immediately rushed to the well and found that his father was sunken into the well.

15. Chhidami (PW-9) has also seen appellant running from there.

16. By this evidence, the prosecution tried to establish that appellant threw Kishan into the well and hurled the big stones. The statement of Ganesh (DW-3) that Kishan himself fell down in the well is not acceptable in the light of the statement of these witnesses. The appellant has taken the plea alibi examined Swami Prasad (DW-1) and Janki (DW-2) who have stated that he was at their village at Kapasi. This village is situated only two kilometers away from village Kachhora and their evidence is not acceptable in the light of the prosecution witnesses who have seen the appellant running from there at the relevant time. The defence is an after thought and not acceptable. The statement of Mst. Ladkunwar (PW-3) is clear on the point wherein she has stated that the appellant was throwing the stone in the well and consequently her father died. The other prosecution witnesses Kanhaiya Lal and Chhidami have also seen him running from there.

17. Puranlal (PW-11) has stated that Kulhari and two stones were seized on 03.01.1995 vide Ex.P/13 by Shri S.N.Singh who has now been retired and the shoes were also seized vide Ex.P/14.

18. From the prosecution evidence, it is clear that after preparing panchnama the dead body was sent for postmortem examination which was conducted by Dr.C.P.Arya (PW-1) wherein he found the following injuries on the person of the deceased :

(i) Abrasion 2cm x 1cm in size right post surface of the right base of the little finger.

(ii) Lacerated injury 3" x ½" upto deep bone.

According to his opinion, death was caused by fracture of occipital bone due to coma. Compression of the brain resulting form injuries. In brain substance due to subordinoid haemorrhage. The death occurred within 24 hours of examination. He has submitted the report Ex.P/1.

19. On 27.01.1995 he made the reply of queries asked by police station Palera that the death may be caused by the stone. The stone is heavy and the fracture of occipital bone may be caused by this stone. In cross examination he has stated that if the person drowns in the water then such fracture is not possible. His opinion is that if immediately after the fall in the well if the stones are thrown then such injuries possible.

20. Thus, medical evidence supports the ocular evidence adduced by the prosecution.

21. The learned counsel of the appellant has submitted that there is sudden quarrel and no intention of killing has been proved, therefore, the offence of murder is not made out.

22. The submission of learned counsel of the appellant appears to be correct because no evidence has been adduced regarding cause of quarrel on that day. Moreover, it has come on record that they were friends and their relations were cordial but became tense recently because deceased went with Puranlal to lodge the report regarding outraging the modesty of his daughter by the appellant. How the quarrel started has not been brought on record, therefore, it appears that sudden quarrel is squarely covered by exception 4 to Section 300 of I.P.C. Exception 4 of Section 300 runs as follows :-

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

23. Since his case is covered under the above exception, therefore, the offence of murder is not made out. His case falls under Section 304-I of IPC.

24. Section 304 IPC runs as follows :-

"Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with

the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

25. Keeping in view the facts and circumstances and the evidence adduced thereon, the offence under Section 304-I is established instead of Section 302 of I.P.C., therefore, he is acquitted from the offence under Section 302 of I.P.C. but convicted under Section 304-I of Indian Penal Code.

26. The learned counsel for the appellant has submitted that the accused is languishing in jail for more than 12 years. The submission of the learned counsel of the appellant also finds supports from record. In such circumstances, we deem it proper to release the appellant on the sentence already undergone.

27. Consequently, the appeal is partly allowed as indicated above. Conviction under Section 302 IPC is set aside instead he is convicted 304-I IPC and sentenced to already undergone. He be released forthwith, if not required in any other case.

28. The order regarding the disposal of criminal properties passed by the trial Court is hereby affirmed.

Order passed accordingly.

I.L.R.[2007] M.P., 1449
APPELLATE CRIMINAL
Before Mr. Justice K.S.Chauhan
27 August, 2007

SHASHI KUMAR ...Appellant*
Vs.
STATE OF MADHYA PRADESH ...Respondent

A. Penal Code, Indian (XLV of 1860)-Sections 498A, 306- Cruelty and Abetment to commit suicide- Deceased committing suicide by consuming poison- Death occurred within 7 years of marriage- In-laws of appellant/husband clearly stating about harassment due to demand of dowry - Letters written by deceased also disclose harassment due to demand of dowry- Threat to expel from home and to remarry due to failure of deceased to conceive- Dying declaration of the deceased that she committed suicide on account of death of two children not found reliable- Conduct of appellant in not informing police and relatives of deceased does not appear to be *bonafide*- Appellant guilty of committing offence under Section 498A and 306 of I.P.C.- Appeal dismissed.

B. Evidence Act, Indian (I of 1872)-Section 32- Dying Declaration- Dying declaration recorded by Police Officer- Dying declaration does not

*Cr. Appeal No.765/1993 (J)

contain certificate of Doctor- Officer recording dying declaration admitted that she was not in a fit state to depose- Recital of note inserted in red ink in between statement and thumb impression- Deceased was an educated lady she would have signed on dying declaration- There was no occasion to obtain thumb impression- Police officer has not properly recorded dying declaration- Dying Declaration cannot be relied upon.

From the oral and documentary evidence adduced by the prosecution, it is clearly established that the deceased was being harassed by the appellant in connection demand of dowry and also threatening to expel her from house and to remarry. She has clearly mentioned in her last letter Ex.P/4 that she will commit suicide because now she is not in a position to tolerate more the miseries practiced upon her, therefore, the defence of the appellant that Smt. Anita Namdeo died on account of the frustration of not conceiving the child, is not acceptable. By the persistent misbehaviour, ill-treatment and harassment the appellant abetted the commission of suicide as a result of which she committed suicide.

The incident is of 12.11.1991 at 9:00 a.m. She was admitted in hospital at 10:45 a.m. at P.H.C. Dindori. Dr. S.K.Khare informed the S.H.O. at 11:00 a.m. A.S.I. R.P.Garg (PW-13) recorded her statement at 3:30 p.m. but he has not taken any certificate from the doctor that she was in a fit mental condition to depose the statement. He himself has admitted in his deposition that she was not in a fit state to depose the statement otherwise her statement might have been recorded by the Tehsildar in question and answer form. He has clearly stated that the statement is not recorded in the question and answer form by him. On perusal of document, it is apparently clear that he has inserted the recital of note in the red ink in between the statement and thumb impression of deceased which clearly indicates that this recital has been added later on after recording her statement. From the record, it is apparently clear that Smt. Anita Namdeo was an educated woman and used to write several letters and sign. If she might have been conscious in the fit condition to give statement, then she would have signed on this statement and, therefore, there was no occasion to affix thumb impression. Thus, the police officer not properly recorded her statement.

(Paras 32 and 25)

Cases Referred :

Vashir Shah and Others Vs. State of Rajasthan, 1994 Cr.L.J.2526; *Munna Raja Vs. State of M.P.,* AIR 1976 SC 2199; *Khushal Rao Vs. State of Bombay,* AIR 1958 SC 22; *Ramavati Vs. State,* AIR 1983 SC 164; *Navratan Vs. State,* 1985 CrLR (Raj) 644; *State Vs. Lichma Devi,* 1986 (1) WLN 106; *Kishore Vs. State,* 1988 CrLR(Raj) 376; *Pratap Vs. State of Rajasthan,* 1989 (1) PLR 594; *Bhag Singh Vs. State of H.P.,* 1994 Cr.L.J. 1398 H.P.; *Kake Singh Vs. State of M.P.,* AIR 1982 SC 1021; *Ram Manorath Vs. State of UP.,* 1981 SCC (Cri) 281; *Sunil Bajaj Vs. State of M.P.,* AIR 2001 SC 3020.

Surendra Singh, with *Manish Mishra,* for the appellant.

R.S.Patel, A.A.G., for the respondent.

Cur.adv.vult.

JUDGMENT

K.S. CHAUHAN, J.– This criminal appeal has been preferred under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment, finding and sentence dated 29.06.1993 passed by the Additional Sessions Judge, Dindori in Sessions Trial No.21/92 whereby the appellant has been convicted under Section 306 and 498-A of IPC and sentenced to R.I. for 3 years and 6 months respectively to run concurrently.

2. The prosecution case is that Chhatar Singh Rathore, Ward Boy, P.H.C., Dindori submitted a written report given by Dr.R.M.Mishra, Assistant Surgeon, P.H.C., Dindori on 12.11.1991 to Station House Officer, Police Station Dindori that Smt.Anita Namdeo W/o Shashi Kumar, aged about 29 years was admitted in hospital. It was a case of finite poisoning. She expired on 12.11.1991 at 6:45 p.m. On this report, the marg intimation No.4/91 was registered and the inquiry was made. It was found that Smt.Anita Namdeo committed suicide on account of harassment and ill-treatment for demand of dowry by husband and his relatives and not conceiving the child. The crime No.210/91 was registered under Section 306 of I.P.C. The dead body of deceased was sent for postmortem examination which was conducted by Dr.R.M.Mishra on 13.11.1991. He opined that the death was due to asphyxia as a result of some poisoning. The container of Begon spray was seized from the spot. The statement of Smt. Anita Namdeo was recorded. Her brother submitted some letters which were seized by the police for proof of her handwriting. A copy was also seized. Her brother Umesh Kumar Namdeo also submitted a written report to the police. After completing the investigation, the charge sheet was filed in the Court of Judicial Magistrate First Class, Dindori wherein the Criminal Case No.813/91 was registered and the case was committed to the Sessions Court on 31.01.1992.

3. The accused persons were charged under Section 498A, 304-B and 306 of I.P.C. The charges were that before 12.11.1991 within 7 years of marriage at Civil Lines, Dindori the accused Shashi Kumar being the husband of Smt.Anita Namdeo and other accused persons being the relatives of her husband subjected to cruelty for demand of dowry and for not conceiving the child as a result of which she committed suicide by taking poison on account of abetment.

4. The accused abjured the guilt and claimed to be tried. However, they have contended that Smt.Anita Namdeo came to know that she will not conceive the child in future, therefore, on account of frustration she committed suicide.

5. The prosecution examined as many as 13 witnesses and the accused persons 7 witnesses. After considering the evidence concluded that the prosecution has failed to prove the offence under Sections 498-A, 304-B and 306 of IPC against Beni Bai, Satendra Kumar and Shraddha @ Naina and hence acquitted them from the charges levelled against them. The trial Court also acquitted Shashi Kumar from the charge of 304-B of IPC but convicted and sentenced under Section 498-A and 306 of IPC as stated in para No.1 of this judgment. Being aggrieved by the judgment finding and sentence of the trial Court, the instant appeal has been preferred by the appellant under Section 374(2) of Cr.P.C. on the grounds mentioned in the memo of appeal.

6. The learned counsel for the appellant has submitted that the trial Court has not appreciated the evidence in the proper perspective. Smt.Anita Namdeo died on account of the frustration as her two children died and further she left the hope for conceiving the child in future. The prosecution has not proved that Smt.Anita Namdeo committed suicide on account of the abetment of the appellant. Further he has submitted that the appellant himself carried the deceased at hospital and Smt.Anita Namdeo also gave the statement Ex.P/6 to the police which indicates that she committed suicide on account of the death of her two children and nobody has harassed her. Therefore, on the basis of this dying declaration, appellant ought not to have been convicted.

7. On the other hand, Shri R.S.Patel, learned Addl.A.G. appearing on behalf of the respondent/State supported the judgment, finding and sentence passed by the trial Court and submitted that the appellant and his family members used to harass her after marriage, therefore, she committed suicide. The prosecution clearly established the guilt against the appellant, therefore, the trial Court has rightly convicted him under Section 306 and 498-A of IPC and sentence thereunder.

8. The main point for consideration in this appeal is that whether the trial Court has committed any illegality in convicting and sentencing the appellant under Section 498-A and 306 of IPC.

9. I have perused the entire case and evidence adduced therein.

10. Smt.Anita Namdeo was married with Shashi Kumar, the appellant on 12.03.1986 and she died on 12.11.1991. Her death occurred within the span of seven years of her marriage. Dr.R.M.Mishra (PW-1) has conducted the postmortem examination of deceased and submitted the report Ex.P/1. According to him, the death was due to asphyxia as a result of some poisoning. Shri R.P.Garg (PW-13), A.S.I. has seized Bagon spray vide Ex.P/5. Sukal Kumar Namdeo (PW-3) has also supported the fact that a container of Bagon spray was seized by the police officer. From the evidence of prosecution, it is established that Smt.Anita Namdeo has committed suicide.

11. The parents, brothers and other relatives of Smt.Anita Namdeo have deposed that the appellant subjected Smt.Anita Namdeo to cruelty for demand of dowry and ill-treated that she was unable to conceive the child. He also threatened to expel her from house and to remarry. Thus, he caused the mental torture to the deceased.

12. Shiv Kumar Namdeo (PW-5) has deposed that the appellant started harassing her after six months of marriage by demanding dowry articles such as portable T.V. set and motorcycle. The portable T.V. set was provided to him by Umesh Kumar Namdeo (PW-11) but the demand of motorcycle could not be fulfilled because they were not in a position to purchase the motorcycle and to provide him.

13. Shyamwati (PW-8) has also deposed that the behaviour of appellant changed after 3-4 years of the marriage of her daughter because her two children died and he was thinking to expel her from house and also to remarry. Her mother-in-law and sister-in-law were used to demand dowry articles.

14. Sitaram Namdeo (PW-12) has also deposed that after two years of marriage

his daughter used to complaint her mother that she is being misbehaved in her in-laws house and they pressurize for providing the dowry articles. The father-in-law of deceased wrote a letter (Ex.P/12) to him demanding motorcycle and T.V. set. He has stated that his daughter was being harassed.

15. Umesh Kumar Namdeo (PW-11) has also stated that his sister told him that she is ill-treated in her in-laws house for demand of dowry.

16. Pushpa Namdeo (PW-9) has also stated that the demand of golden ring and T.V. set was made by the appellant and his relatives.

17. Sudha Namdeo (PW-10) has also stated that Anita Namdeo told her that she is being harassed in her in-laws house in connection with the dowry. She also stated that she should not be sent to her in laws house.

18. Rampyari Bai (PW-7) has also stated that Smt.Anita Namdeo told her that the demand of golden ring, Luna vehicle etc are being made in her in-laws house. It was also told by her that they have said that if demanded articles were not provided, she will be killed.

19. Apart from the oral evidence regarding the demand of dowry and harassment, the letters written by deceased has also been produced which have been seized by the police officer. Shiv Kumar Namdeo (PW-5) has deposed that Ex.P/4 is the last letter written by his sister. It is written in Ex.P/4 that she is being harassed for last six years in connection with demand of dowry. The appellant has also stated that since she is unable to conceive the child and, therefore, he is going to remarry. The appellant as well as his relatives have committed atrocities on her. Now she can not tolerate more and therefore, she has no option except to commit suicide for which the entire family of Krishndayal Namdeo is responsible.

20. Some other letters have also been produced, noticeable are Ex.P/9 which is written on 21.07.1988 wherein she has made request to his elder brother to take her back to the parental house so that she can live comfortably for some days of her life. Ex.P/11 is the letter dated 01.06.1989 wherein she has stated that she is now not in a position to tolerate the misbehaviour being done with her. In Ex.P/13 it is written that they were firstly not demanding any dowry but now they want this thing and that thing. These are some letters in which Smt.Anita Namdeo has written that she is being harassed for the demand of dowry by the appellant and his relatives.

21. The letter Ex.P/12 is said to be written by the father-in-law of Smt. Anita Namdeo, wherein it is clearly mentioned that Luna, utensils, almirah, Mangalsutra etc were not given at the time of second marriage. It clearly indicates that the demand of dowry persisted even after the marriage. Thus, by oral and documentary evidence, the prosecution tried to establish that Smt.Anita Namdeo was subjected to cruelty and harassment for demand of dowry.

22. The evidence of Suresh Chand Gupta (DW-2), Niranjan Singh (DW-3), Gaya Prasad (DW-4), Rajkumar Pachori (DW-5), Jaiprakash (DW-6), Balmukund (DW-7) have been adduced on behalf of the appellant. Some letters Ex.D/2 to Ex.D/10 have also been referred to Shiv Kumar Namdeo (PW-5) to show that there were cordial

relations in between the husband and wife but the letter Ex.P/4 which was her last letter outweighs such defence of appellant.

23. It also transpires that Smt. Anita Namdeo used to write letters confidentially to her parental house with the request not to disclose to the appellant which clearly goes to show that she was not even free to write letters. Moreover, the subsequent conduct of the appellant does not appear to be bona fide because he did not intimate to the concerned police as well as to her parents that Smt.Anita Namdeo has committed suicide. The police came to know about this incident only at the intimation given by the doctor for recording the dying declaration, therefore, subsequent conduct of the appellant is not *bona fide.*

24. The main defence of the appellant is document Ex.P/6, dying declaration which is recorded by R.P.Garg (PW-13) A.S.I. on 12.11.1991 at 3:30 p.m. before two witnesses Prashant Dubey and Greesh Tiwari.

25. The incident is of 12.11.1991 at 9:00 a.m. She was admitted in hospital at 10.45 a.m. at P.H.C. Dindori. Dr. S.K.Khare informed the S.H.O. at 11:00 a.m. A.S.I. R.P.Garg (PW-13) recorded her statement at 3:30 p.m. but he has not taken any certificate from the doctor that she was in a fit mental condition to depose the statement. He himself has admitted in his deposition that she was not in a fit state to depose the statement otherwise her statement might have been recorded by the Tehsildar in question and answer form. He has clearly stated that the statement is not recorded in the question and answer form by him. On perusal of document, it is apparently clear that he has inserted the recital of note in the red ink in between the statement and thumb impression of deceased which clearly indicates that this recital has been added later on after recording her statement. From the record, it is apparently clear that Smt.Anita Namdeo was an educated woman and used to write several letters and sign. If she might have been conscious in the fit condition to give statement, then she would have signed on this statement and, therefore, there was no occasion to affix thumb impression. Thus, the police officer has not properly recorded her statement.

26. It is true that the dying declaration recorded by the Police Officer is admissible in evidence but the practice of investigating officer himself in recording dying declaration should not be encouraged as held in *Vashir Shah and others v. State of Rajasthan,* 1994 Cr.L.J. 2526. The following cases may also be seen in this respect :

Munna Raja v. State of MP, A 1976 SC 2199;
Khushal Rao v. State of Bombay, A 1958 SC 22;
Ramavati v. State, A 1983 SC 164;
Navratan v. State, 1985 CrLR(Raj) 644;
State v. Lichma Devi, 1986(1) WLN 106;
Kishore v. State, 1988 CrLR(Raj) 376;
Pratap v. State of Rajasthan, 1989(1) PLR 594.

In case the doctor is available, he should also remain present when such a statement is recorded as has been held in the case of *Bhag Singh v. State of H.P.,* 1994 Cr.L.J. 1398 H.P.

In the case of *Kake Singh v. State of M.P.*, 1982 SC 1021, it has been held that where the deceased unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

In *Ram Manorath v. State of UP,* 1981 SCC (Cri) 281, it has been held that a dying declaration which suffers from infirmity can not form the basis of a conviction.

27. No doubt, the statement Ex.P/6 is the document which has been produced by the prosecution itself which contains that Smt.Anita Namdeo gave the statement that she has consumed the finite poison because her two children died but this statement has not been properly recorded by the police officer. The infirmities are there. This is not the true and voluntary statement in the light of the several letters written by her complaining about the harassment and ill-treatment by appellant and his family members. Her last letter Ex.P/4 outweighs the defence of innocence of the appellant and his family members. In Ex.P/4 she has described the troubles and miseries being faced by her in her in-laws house. The trial Court after giving reasons has not placed any reliance on this document and has rejected. The conclusion of trial Court is reasonable proper and correct.

28. There is overwhelming evidence in this case regarding the demand of dowry articles and to harass her in connection with the dowry demand, and there is also the evidence that the appellant threatened her to expel from his house because she was unable to conceive the child and to remarry. She has been constantly tortured mentally and harassed by the appellant and his family members.

29. Section 498-A of IPC runs as follows :

> "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> **Explanation.**-For the purposes of this section, 'cruelty' means-
>
> (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
>
> (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security is on account of failure by her or any person related to her to meet such demand."

30. There is ample evidence in this case that Smt.Anita Namdeo was subjected to cruelty by the appellant and his family members in connection with the dowry demand, therefore, the finding of the trial Court that prosecution has proved the charge under Section 498-A IPC against the appellant is correct. Such finding is affirmed being based on evidence.

31. So far as the offence under Section 306 IPC is concerned, the evidence of the prosecution is that the appellant persistently harassed his wife Smt.Anita Namdeo in

connection with demand of dowry articles and also used to threaten her to expel from his house and to remarry. But the defence of the appellant is that Smt. Anita Namdeo was frustrated on account of the fact that she was not going to conceive child in future and, therefore, on that frustration she committed suicide. It has not been brought on record as to what was happened on the day of incidence because this fact that she is not going to be conceived child in future was well known to her before this incident. Actually something was happened which was within the knowledge of the deceased and the appellant himself. It increased the intensity of her harassment and consequently she committed suicide.

32. From the oral and documentary evidence adduced by the prosecution, it is clearly established that the deceased was being harassed by the appellant in connection demand of dowry and also threatening to expel her from house and to remarry. She has clearly mentioned in her last letter Ex.P/4 that she will commit suicide because now she is not in a position to tolerate more the miseries practiced upon her, therefore, the defence of the appellant that Smt.Anita Namdeo died on account of the frustration of not conceiving the child, is not acceptable. By the persistent misbehaviour, ill-treatment and harassment the appellant abetted the commission of suicide as a result of which she committed suicide.

33. The learned counsel for the appellant placed the reliance on the judgment rendered by the Apex Court in the case of *Sunil Bajaj v. State of M.P.*, AIR 2001 SC 3020 but the facts and circumstances of this case are quite distinguishable on facts because in this case there is ample evidence regarding persistent demand of dowry articles and harassment.

34. The trial Court has properly appreciated the evidence and rightly came to the conclusion that the guilt under Section 306 of I.P.C. has been proved beyond reasonable doubt against the appellant. There is no any infirmities in the judgment of trial Court hence interference is unwarranted.

35. Consequently the appeal fails and is dismissed accordingly. The appellant is on bail. His bail bonds are cancelled. He be directed to surrender before C.J.M., Dindori on 24.09.2007 to serve out the remaining part of sentence.

Appeal dismissed.

I.L.R.[2007] M.P., 1456
CIVIL REVISION
Before Mr. Justice A.K. Shrivastava
8 August, 2007

SMT. SAROJINI MAHULE --- Applicant*
Vs.
KAILASH CHANDRA VISHWAKARMA --- Non-applicant

Civil Procedure Code (V of 1908)-Section 152-Review-Clerical or Arithmetical error-1103/14 mentioned as House No. in plaint-Whereas in judgment

*C.R. No. 195/2007 (J)

passed by Additional District Judge House No. mentioned is 113/14-Application for review rejected by Court below-Held-Accidental Slip or omission can be corrected at any time by Court either at its own motion or on application of party-It is gathered from plaint that house number 1103/14 is mentioned-It was incumbent upon the Court below to correct the said error-Correct No. of House is held to be 1103/14-Revision allowed.

On bare perusal of copy of the plaint, it is gathered that house number 1103/14 has been mentioned in para 1 of the plaint. If by accidental slip or by clerical error in the judgment of learned first Appellate Court incorrect number 113/14 has been typed, it was incumbent upon the Court below to correct the said error when it was brought to its notice by the applicant by filing an application u/s. 152 C. P. C. Thus, I am of the view that learned Court below has failed to exercise the jurisdiction so vested in it by law and thus acted illegally and with material irregularity by rejecting the application u/s. 152 C. P. C. (Para 4)

Ashmita Mukhopadhyay and *A. Mukhopadhyay,* for the applicant
None, for the Non-applicant

Cur.adv.vult.

ORDER

A.K.Shrivastava, J. :–An application under section 152 CPC was moved before learned 4th Additional District Judge, Jabalpur that in the judgment dated 14.9.1998 passed in Civil Appeal No.2-A/98 *(Smt. Sarojini Mahule Vs. Kailash Chandra Vishwakarma)* incorrect house number 113/14 got typed. According to learned counsel, indeed, the correct number of the house is 1103/14. The contention of learned counsel is that this Court vide judgment dated 10/7/2006 dismissed Second Appeal No.1046/1998 *(Kailash Chandra Vishwakarma Vs. Smt. Sarojini Mahuley).* Now the decree-holder is facing difficulty in getting the decree executed because incorrect house number (113/14) is mentioned in the judgment of learned 4th Additional Distarict Judge, Jabalpur. The contention of learned counsel is that an application u/s 152 CPC was moved for necessary correction but the same has been rejected by the impugned order.

2. By inviting my attention to section 152 CPC, it has been argued by learned counsel that clerical or arithmetical mistakes in judgments or decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties. By inviting my attention to para 1 of the plaint, it has been argued by learned counsel that correct number of the house "1103/14" has been mentioned, therefore, learned Court below acted illegally and with material irregularity in exercise of its jurisdiction and has failed to exercise a jurisdiction so vested by law in it by not allowing the application u/s. 152 CPC.

3. Having heard learned counsel for the applicant, I am of the view that this revision deserves to be allowed.

4. On bare perusal of copy of the plaint, it is gathered that house number 1103/14 has been mentioned in para 1 of the plaint. If by accidental slip or by clerical error in the judgment of learned first appellate Court incorrect number 113/14 has been typed, it was incumbent upon the Court below to correct the said error when it was brought to its notice by the applicant by filing an application u/s. 152 CPC. Thus, I am of the view that learned Court below has failed to exercise the jurisdiction so vested in it by law and thus acted illegally and with material irregularily by rejecting the application u/s. 152 CPC.

5. The revision application is accordingly allowed. The impugned order is hereby set aside and it is hereby held that correct number of the house is 1103/14.

Appeal allowed.

I.L.R. [2007] M.P., 1458
CIVIL REVISION
Before Mr. Justice K.S.Chauhan
24 August, 2007

RAJESH KUMAR. ....Applicant*

v.

RAKESH KUMAR & anr. ....Non-applicant

Civil Procedure Code (V of 1908) - Order 23 Rule 3 - Compromise of Suit - Parties to the suit filed compromise petition during pendency of suit - Statements recorded on the same day - Case fixed for orders - Application for cancellation of compromise petition filed by respondent no. 1 before orders could be passed - Court directed for enquiry and for adducing evidence and no evidence adduced by parties - Compromise petition dismissed by Court - Held - Court is required to satisfy itself whether there has been complete adjustment of compromise of suit - Court was not satisfied that lawful agreement or compromise has been entered between parties - Rejection of Compromise petition proper - No jurisdictional error - Revision dismissed.

The trial Court made an enquiry and directed the parties to adduce the evidence but no any evidence was adduced. Therefore, the Court on the basis of objection raised by the respondent no.1, cancelled the compromise petition.

So far as the present case is concerned, the trial Court was not satisfied that the lawful agreement or compromise has been entered between the parties, therefore, did not pass any decree on the basis of compromise petition, allowed the objections made by respondent no.1 and cancelled the compromise petition. Therefore, no jurisdictional error appears to have been committed by the trial Court. Hence, it does not call for interference in this revision. The revision deserves to be dismissed.

(Paras 12 & 14)

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*Civil Revision No. 161/2005 (J)

Cases Referred :

Chandrahasa Shetty Vs. Jayaram Sasani; AIR 1970 *Mysore 209, Misrilal Vs. Sobhachand;* AIR 1956 Bombay 569.

Pranay Verma, for the applicant.
Sheel Nagu, for the non-applicant no.1.
None, for the non-applicant no.3.

ORDER

K..S. CHAUHAN, J.:–This civil revision has been filed under section 115 of the CPC being aggrieved by the order dated 2.2.2005 passed by 3rd Civil Judge Class II, Narsinghpur in Civil Suit No.18A/04 whereby the application filed by respondent no.1 has been rejected.

2. The applicant instituted a civil suit for declaration of title regarding the disputed land situated at Mouja Kandeli and Khamaria and also for the decree of issuance of permanent injunction against respondent no.1 for not to interfere in his peaceful possession and also to restrain him not to alienate the same.

3. The respondent no.1 submitted the written statement denying the most of the averments made in the plaint. The issues were framed. The evidence was being recorded. During the course of trial, the applicant and respondent no. 1 filed the compromise petition on 9.9.2004. Their statements were recorded on the same day. After hearing the arguments, the case was posted for orders on 17.9. 2004 but the order could not be passed on that day. The case was adjourned for 27.9.2004. In the meantime, on 23.9.2004, the respondent no.1 filed an application for cancellation of the compromise petition.

4. The applicant filed its reply. The Court directed for an enquiry on application under order 23 Rule 3 of CPC and also to adduce evidence of the parties. No any evidence was adduced by the parties. The arguments were heard on 24.1.2005 and the impugned order was passed on 2.2.2005 whereby the application filed by respondent on 23.9.2004 was allowed and the compromise petition was cancelled. Being aggrieved by that order, the instant revision has been filed under section 115 CPC on the grounds mentioned therein.

5. Shri Pranay Verma, learned counsel for the applicant submitted that the compromise petition was filed on 9.9.2004. the evidence of both the parties were recorded. Arguments were also heard. Nothing was to be done by the Court except to pass the order. Therefore, the trial Court failed to exercise jurisdiction in not passing the decree on the basis of compromise petition and also illegally exercised jurisdiction in allowing the application dated 23.9.2004 cancelling the compromise petition.

6. On the other hand, Shri Sheel Nagu, learned counsel for the respondent no.1 has submitted that the Court must be satisfied prior to passing the decree on the basis of compromise petition and this satisfaction should be continued from filing of the compromise petition till passing the order. The learned counsel has further submitted that after filing the compromise petition, respondent no.1 came to know that fraud has been placed, hence he filed application for cancellation of compromise petition. The

trial Court has rightly allowed the application. There is no illegal exercise of jurisdiction by the trial Court. Hence, does not call for any interference.

7. The main point for consideration in this revision petition is that whether the trial Court has committed any jurisdictional error in allowing the application of respondent no.1 filed on 23.9.2004 and thereby cancelling the compromise petition filed by the parties.

8. There is no dispute that the compromise petition was filed by both the parties and the evidence were also recorded thereon but before passing the order, respondent no.1 moved an application on 23.9.2004 wherein it is mentioned that he is not agree on the compromise because the compromise petition was entered with respect to the agricultural land but not to house and other movable property but the same has been included in the compromise petition, written by applicant and his counsel. The conspiracy has been done. The properties mentioned in para 1 of the compromise petition, have not yet been partitioned. If any decision is made, then he will suffer irreparable injury. It is also mentioned that no opportunity was provided to him to read this compromise exhaustively and applicant's counsel got it signed at 5.30 p.m. But when he read the copy of compromise petition, he found that the other properties have also been included in this compromise petition. Therefore, it is illegal and hence be rejected.

9. The applicant filed reply as is reflected from the order sheet dated 1.10.2004 but the same is not traceable in the record. Concerned be directed to place on record.

10. The trial Court found that no document has been produced regarding the house and other movable properties included in the compromise petition. The application was allowed and the compromise petition was cancelled.

11. Order 23 Rule 3 of CPC contains the provisions relating to compromise of suit which reads as follows :-

> "Compromise of Suit.- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfied the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit.
>
> Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question, but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.
>
> [Explanation- An agreement or compromise which is void or under the Indian Contract Act, 1872 (9 of 1872) shall not be deemed to be lawful within the meaning of this rule.]"

Thus, the Court is required to satisfy itself whether there has been as a fact a completed adjustment of compromise of the suit between the parties embodying the terms of the compromise in the written document signed by the parties. (See *Gurpreet Singh v. Chatur Bhuj* A 1988 SC 400).

The wording of the rule "where it is proved to the satisfaction of the court" makes it clear that when a party alleges that a suit has been adjusted by a compromise and the other party denies it, the Court has power to decide whether the agreement had been effected.

12. The trial Court made an enquiry and directed the parties to adduce the evidence but no any evidence was adduced. Therefore, the Court on the basis of objection raised by the respondent no.1, cancelled the compromise petition.

13. Learned counsel for the respondent no.1 has placed reliance on the judgment rendered in Chandrahasa Shetty v. Jayaram Sasani (AIR 1970 Mysore 209) wherein it is held :

> "The words "proved to the satisfaction of the Court" in O.23 R.3 are comprehensive enough and indeed seem to have been intended to impower the court to go into the merits of the allegations set up by the party denying or disagreeing with the terms of compromise or agreement and decide them, so that the parties get full justice in the suit in which a decree in terms of the compromise is to be passed under the rule. Where the court finds during the course of the enquiry that the alleged agreement or compromise is vitiated by fraud, misrepresentation etc. it cannot be said legally that an agreement has been arrived at. The agreement contemplated under the rule envisages the two parties coming to certain terms voluntarily and of a free will so as to put an end to the litigation pending between them in the court. If it decides that as the agreement or compromise is vitiated, it can reject it and proceed to dispose of the suit on merits."

The learned counsel also placed reliance in *Misrilal v. Sobhachand;* (1956 Bombay 569), wherein it is held that :-

> "The Court has power under R.3, where an agreement or compromise is denied, to decided whether as a fact, the alleged agreement or compromise was made, and if it is satisfied that it was made, to record it. When the Court is required to satisfy itself as to the existence of an agreement and is further required to satisfy itself that there is a lawful agreement adjusting the suit the Court must on an application record compromise consider, especially where a plea of undue influence is raised, whether the agreement is not vitiated on any such ground as illegality, fraud, misrepresentation etc. Therefore, the contention that the trial Judge while recording the compromise should not have recorded any finding on the question whether there was or was not any undue pressure or undue influence as set up by a party in his application is not acceptable."

The learned counsel also placed reliance on the judgment rendered in Smt. Sita Devi v. Narain Singh and another(AIR 1976 Himachal Pradesh 39), wherein it is held that once the Court is satisfied that the parties have compromised the dispute, it must dismiss the suit. No further enquiry is necessary.

14. So far as the present case is concerned, the trial Court was not satisfied that the lawful agreement or compromise has been entered between the parties, therefore, did not pass any decree on the basis of compromise petition, allowed the objections made by respondent no.1 and cancelled the compromise petition. Therefore, no jurisdictional error appears to have been committed by the trial Court. Hence, it does not call for interference in this revision. The revision deserves to be dismissed.

15. Consequently, the revision is dismissed accordingly. The parties shall bear their own cost.

I.L.R. [2007] M. P., 1462
CRIMINAL REVISION
Before Mr. Justice K.S.Chauhan
29 August, 2007

SHRINATH and anr. ....Applicants*
Vs.
TRILOKINATH and ors. ....Non-applicants

Penal Code, Indian (XLV of 1860), Section 325, Criminal Procedure Code, 1974, Section 397, 401- Revision against acquittal- Applicant lodged F.I.R. that respondents had assaulted them while injured was constructing Pagra on government land- Respondents tried for offence under Section 325/34- Applicants also tried for offence under Section 307/34 for causing injuries to respondents-Trial Court acquitted respondents on the ground that applicants were aggressors and respondents had acted in private defence- Held- Independent witnesses not supported prosecution case-Material omissions and contradictions in the statements of injured persons- No perversity found in finding of the Trial Court that applicants were aggressors and respondents had acted in self defence- Keeping in view the limited scope of revision such finding does not call for interference- Revision dismissed.

The Trial Court after discussing the evidence came to the conclusion that the applicants were aggressor and the injuries to them were caused in the self defence of the respondents, such finding appears to be based on evidence. No perversity is found in such finding, therefore, it can not be interfered in revision. (Para 14)

Imtiaz Husssain, for the applicants.
T.K.Modh, Dy. A.G. for the non-applicants/State

Cur.adv.vult.

*Cr. Rev. 340/1991 (J)

ORDER

K. S. CHAUHAN, J. :–This criminal revision under Section 397 read with Section 401 of the Code of Criminal Procedure has been filed against the judgment dated 09.04.1991 passed by the II Additional Sessions Judge, Rewa in Sessions Trial No.101/90, whereby the respondents No.1 and 2 have been acquitted from the charges under Section 325/34 of Indian Penal Code.

2. The admitted facts in the case are that appellant Shrinath Mishra who is now deceased as reported in Criminal Appeal No.417/91 was the son of Trilokinath. Respondent No.2 is also the son of respondent No.1 Trilokinath. Sanjay Kumar Mishra, applicant No.2 is son of Shrinath Mishra. They were residing in different portion of the old house of Trilokinath situated at village Ruhiya. The appellants also constructed a house on government land bearing khasra No.442 before 8-9 years back. They were constructing 'pagra' near this house which was objected by the respondents. On this count, they quarreled with each other and caused marpeet. Both the parties lodged the report at police station Churhata. The case and counter case were registered against them. Sessions trial No.63/89 was initiated against the applicants and Sessions Trial No.101/90 was initiated against the respondents. Both cases have been disposed of by the trial Court on 09.04.1991 whereby the applicants were found guilty under Section 307, 307/34 of Indian Penal Code and sentenced thereunder whereas the respondents were acquitted from the charge sunder Section 325/34 of Indian Penal Code.

3. The prosecution case in short is that on 19.02.1988 at 9:00 a.m. Sanjay Kumar Mishra was constructing the 'pagra' on government land to which respondents obstructed. The altercation took place. The respondents caused marpeet to the applicants and consequently they received the injuries. The information was given to police station Chorahata which was taken down as Rojnamcha sanha No.704 (Ex.P/6). The injured persons were referred for medical examination. Dr.Y.S.Tiwari (PW-5) conducted the medical examination and found the injuries on their persons. Medical reports were submitted. Dr.D.S.Kapur (PW-7) found the fracture in scapula bone of applicant Sanjay Kumar Mishra and gave the report Ex.P/8. Sanjay Kumar Mishra was also got admitted in the hospital on the basis of medical and x-ray report. The crime was registered on 23.06.1988 under Section 325 and 323 of IPC at police station Churahata vide Ex.P/7. The spot map was prepared. After completing the investigation, the chargesheet was filed in the Court of C.J.M., Rewa wherein the criminal case and counter case was triable by the Sessions Court and the same was also committed.

4. The respondents were charged under Section 325 read with Section 34 alleging that on 19.02.1988 at 9:00 a.m. at village Ruhiya they voluntarily caused the grievous hurt to Sanjay Kumar Mishra and Shrinath Mishra.

5. The respondents abjured their guilt and claimed to be tried. Their main defence was that Sanjay Kumar Mishra was abusing them and on asking not to abuse he inflicted Farsa blow on the head of Ramesh Prasad Sharma and also caused injuries to his father Trilokinath. The report was lodged and they were also medically examined. The right parietal bone of Ramesh Prasad Sharma was fractured. He remain hospitalized for 10 days. They denied to cause marpeet of the applicants.

6. After appreciation of evidence, the trial Court found that the applicants were aggressor and the injuries to them were caused in self defence by the respondents, therefore, giving the benefit of doubt acquitted them. Being aggrieved by the judgment of acquittal, the applicants have preferred this revision under Section 397 read with Section 401 of CrPC on the grounds mentioned in the memo of revision.

7. The learned counsel for the applicants has submitted that the finding of the trial Court that the applicants were aggressor is not based on the evidence adduced in the case. Moreover, the trial Court ought to have accepted that the respondents were themselves aggressor and caused the grievous hurt to the applicants. In such situation, the order of acquittal passed by the trial Court is erroneous. The learned counsel for the applicants has further submitted that the case be remanded back to the trial Court for further inquiry and to dispose of it according to law.

8. Non appeared on behalf of the respondents No.1 and 2 though served.

9. Shri T.K.Modh, learned Dy.A.G. appearing on behalf of the respondent/state has supported the judgment and finding of the trial Court and submitted not to interfere in this revision.

10. The main point for consideration in this revision is that whether the trial Court has committed any illegality or impropriety in acquitting the respondents from the charges levelled against them.

11. I have perused the entire case and evidence adduced therein.

12. Sanjay Kumar Mishra (PW-2) has deposed that on 19.02.1988 at 9:00 a.m. when his father Shrinath Mishra came out of the house for going to Amarpatan to attend a case at the same time Ramesh Prasad Sharma abused him and when his father said that after returning from Amarpatan he will go to the police station. The respondents started causing marpeet by Lathi, he was attacked and caused marpeet by Lathi. He and his father sustained the injuries. Shrinath Mishra (PW-3) has also deposed in the same manner and stated that Sobhnath and Lakhpati saved him. These persons have not been examined by the prosecution. The name of eye witnesses have not been mentioned in the report. Prosecution examined Ramlal (PW-1) and Ishwardeen (PW-4) as eyewitnesses but they have not corroborated the prosecution story and consequently declared hostile. Thus, no independent witness has supported the prosecution story. The statement of father and son are against the respondents but in their statements also there are several contradictions and omissions on the material facts. Such contradictions and omissions have been brought in para No.7 of deposition of Sanjay Kumar Mishra and para No.4 to 6 of Shrinath Mishra (PW-3). No doubt Sanjay Kumar Mishra and Shrinath Mishra sustained the injuries in the incident. Dr.Y.S.Tiwari (PW-5) who conducted the medical examination Sanjay Kumar Mishra found seven injuries as mentioned in Ex.P/5 on his person. Out of which injury No.1 incised wound was found on the skull left side of parietal region. He was admitted in the hospital and also referred for x-ray examination. Dr.D.S.Kapur (PW-7) found fracture of scapula bone vide x-ray report (Ex.P/8) has been submitted in this behalf. Thus, it can be said that Sanjay Kumar Mishra sustained the grievous injury.

13. Dr.Y.S.Tiwari (PW-5) also conducted the medical examination on the person of Shrinath Mishra and found four injuries as mentioned in Ex.P/4. He advised for x-ray examination of injury No.1 but was examined to prove the fracture in the left hand of Shrinath Mishra. However, it is apparent that he sustained the simple injury.

14. The trial Court after discussing the evidence came to the conclusion that the applicants were aggressor and the injuries to them were caused in the self defence of the respondents, such finding appears to be based on evidence. No perversity is found in such finding, therefore, it can not be interfered in revision.

15. Since finding of acquittal is proper and the trial Court has given the benefit of doubt to the respondents. Keeping in view the limited scope of revision filed by the applicants, such finding does not call for interference. The revision is meritless hence deserves to be dismissed.

16. The submission of the learned counsel for the applicants that the case be remanded back to the trial Court for inquiry, is not acceptable because the incident is of 1988 and there is no infirmity, impropriety or illegality in the order of acquittal passed by trial Court hence does not call for interference.

17. Consequently, the revision petition is hereby dismissed.

Revision petition dismissed.

I.L.R. [2007] M. P., 1465
CRIMINAL REVISION
Before Mr. Justice Rakesh Saksena
30 August, 2007

I.J. DIWAN — Applicant*
Vs.
STATE OF M.P. — Non-applicant

Prevention of Corruption Act (XLIX of 1988)-Section 13(1)(d), Criminal Procedure Code, 1974-Section 227-Framing of Charge-Purchase Committee recommended purchase of articles from Laghu Udyog Nigam-Articles purchased from private suppliers without inviting tenders-No objection Certificate purported to have been issued by Laghu Udyog Nigam found to be forged-Members of Accepting Committee and Assistant Quarter Master forged the record of verification and receipt of goods on 27-3-1997 whereas most of the articles were not received on 27-3-1997-Money withdrawn from treasury and kept in Chest-Roles assigned to various accused persons right from issuing purchase orders to the verification and acceptance of goods in store appear to be different step in same direction forming a complete whole-It cannot be said that there is no material prima facie sufficient for proceedings against applicants-Submission that it is a case of mere irregularity/misconduct which could be dealt with by departmental action cannot be accepted-Criminal Revision dismissed.

* Cr. R. No. 1747/2006 (J)

I.J. Diwan v. State of M. P., 2007

In the circumstances of the case, roles assigned to various accused persons in whole of the episode, right from issuing purchase orders to the verification and acceptance of goods in the store, appear to be different steps in the same direction forming a complete whole. At this stage they appear inseparable.

In this view of the matter, at this stage, it cannot be held that there was no material, *prima-facie* sufficient for proceeding against the accused/applicants for framing the charges against them. The submissions made by learned counsel for applicants that it was a case of mere irregularity and/or misconduct which could be dealt with by departmental action, cannot be accepted. (Paras 14 and 15)

Cases Referred :

State of M.P. v. S.B. Johri and ors., (2000) 2 SCC 57; *Rajbir Singh v. State of M.P.*, (2006) 4 SCC 51; *State of Bihar v. Ramesh Singh*, (1977) 4 SCC 39.

Jayant Nikhra, for the applicant

G.S. Ahluwalia, Standing Counsel for SPE Lokayukta.

Cur.adv.vult.

ORDER

RAKESH SAKSENA, J. :–These revisions arise out of the common order dated 15th September 2006, passed by Special Judge (POC) Jabalpur in Special Criminal Case No. 02/05, framing charges against applicants under Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 read with Section 120-B of IPC and Sections 420, 467, 468 and 471 of IPC. By the same order an application filed by applicant I J. Diwan under Section 227 of Cr.P.C. was also rejected. Therefore, these revisions are being disposed off by this common order. This order shall govern the disposal of all the revision petitions.

2. Short facts of the case are that FIR was lodged with Special Police Establishment, Bhopal, Jila Jabalpur Thana, to the effect that Prakash Singh Rajput, Senior Staff Officer, Home Guards, Jabalpur, made a complaint to Lokayukta that during financial year 1996-97 Purchase Committee of Home Guards, Jabalpur recommended for purchase of Saris, Jerseys, Ground Sheets, Barret caps from Government Undertakings. Despite the recommendations of the Purchase Committee and in contravention of M.P. Store Purchase Rules, those articles were purchased from private firms without inviting tenders instead of purchasing from Govt. Undertakings. These articles should have been purchased from Small Scale Industries,Corporations, M.P. Laghu Udyog Nigam etc.. If the aforesaid Government Undertakings were unable to supply the said articles, the department had to obtain a 'No Objection Certificate' from M.P. Laghu Udyog Nigam. The purchase was made from the private firms on the pretext that 'No Objection Certificate' was given by M.P. Laghu Udyog Nigam. This 'No Objection Certificate' was found to be forged. It is said that the members of the Purchase Committee and Acceptance Committee had entered into a conspiracy with accused Jagdish Narayan, Proprietor of M/s Bombay Tailoring Shop and D.J. Maheshwari, Mhow, for obtaining pecuniary advantage by illegal means.

3. Allegations against I.J. Diwan, Senior Staff Officer and Shriram Choubey, Assistant Quarter Master, Home Guards, Jabalpur, is that they had forged the record of verification and receipt of goods on 27.3.1997, whereas most of the goods was not received till 24.4.1997. In all the goods worth Rs. 24,37,200/- was purchased from private firms instead of Government Undertakings. On 27.3.2007, when Verification Board comprising of S.R. Raj, Commandent, C.R. Yadav, Chairman, CTI, Jabalpur and R.R. Singh, Company Commander, verified the stock in the store, it was found that 5000 Woolen jerseys, 5000 Ground sheets and 7000 Barret caps were not in the stock.

4. The case of the prosecution is that though the aforesaid goods were not received in the stock, but on the basis of forged verification, an amount of Rs. 18,10,880/- was withdrawn from the treasury on 19.3.2007 and was kept in Chest of Home Guard Department. This amount was shown to have been paid to the suppliers, whereas on 1.5.1997 accounts in the name of Vimalchand Kasliwal, Manager of M/s Bombay Tailoring Shop and firm D.J. Maheshwari were opened in the State Bank of India, Tularam Chowk, Jabalpur and on the same day Rs. 4,82,560/- and Rs. 11,10,880/- were deposited. On 2.5.1997 and 5.5.1997, bank drafts were prepared from those accounts and the accounts were transferred to State Bank of Indore, Mhow. Thus, according to prosecution, all the accused persons entered into a conspiracy for purchasing goods from private firms in contravention of the rules prescribing the purchase from M.P. Laghu Udyog Nigam after forging and using forged 'No Objection Certificate' purported to be issued by the said Nigam, for obtaining pecuniary advantage which resulted into loss to Government.

5. On the basis of material on record, learned Special Judge framed the charges under Section 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 read with Section 120-B of IPC and Sections 420, 467, 468 and 471 of IPC.

6. Shri Jayant Nikhra, learned counsel for the applicant I.J. Diwan, submits that though applicant I.J. Diwan was Member of the Purchase Committee, but he did not participate in the meeting of the Committee, which was held on 24.12.1996, as he was on leave from 16.12.1996 to 11.2.1997. As such, it cannot be said against him that he acted against the rules and ordered supply of goods from private firms without inviting tenders. According to him, the only allegation against I.J. Diwan is that he verified the quantity and quality of goods supplied by said firms on 27.3.1997, though, according to prosecution, aforesaid goods were not supplied. He further submits that verification report given by the Verification Board was wrongly relied, as it was not possible that goods supplied on 27.3.1997 could have been verified by the Board, which started functioning from 27.3.1997 itself.

7. Learned Senior Advocate, Shri P.R. Bhave, on behalf of applicant Shriram Choubey, submits that the goods received on 27.3.1997 could not have been verified by the Board. It is also submitted that the act of applicant at the most may amount to misconduct, but not a criminal offence.

8. Shri Sanjay Patel, Advocate, for applicant M.L. Shyam, submits that there is no

evidence that applicant participated in commission of any offence. There is no evidence to show that 'No Objection Certificate' purported to be given by M.P. Laghu Udyog Nigam, was fabricated or produced by him. The goods were purchased in hurry in the apprehension that the budget of the year 1997 may not lapse. There was no criminal intent on the part of accused persons.

9. On the other hand, Shri G.S. Ahluwalia, counsel for SPE Lokayukta, vehemently opposing the arguments advanced by the learned counsel for the applicants, submits that from the material and evidence, documentary and oral, on record, it is prima-facie established that the accused persons hatched a conspiracy to purchase the goods from private firms after cancelling the previous order of supply given to Govt. Corporations and Undertakings. Before issuing the orders of supply to private firms, NOC from M.P. Laghu Udyog Nigam was forged and used. These all acts were done with a view to derive pecuniary advantage by abusing their position as public servant.

10. On perusal of record, it is seen that in view of the Notification issued on 29.4.1978 under Rule 14 of the Store Purchase Rules a list of 'Reserved Articles' was given, which can be purchased only through M.P. Laghu Udyog Nigam. Similarly, by Notification Dated 25.5.1994, issued under Rule 14 of the Store Purchase Rules, it was provided that goods, which were being manufactured by the Government undertakings could be purchased directly from them, on the rates which are prescribed by the Committee of the Government. However, ignoring the recommendations of Committee, members of the Purchase Committee ordered the purchase of goods from private firms without inviting tenders.

11. From the Statements of witnesses V.K. Bhalla, the then Director General of Police and Bhimrao Sakre, LDC, Home Guards, it is apparent that petitioner M.L. Shyam had taken active part in purchase of goods from private firms. On his oral directions, letters were issued to Bombay Tailoring Shop for supply of goods. From the statement of V.K. Bhalla, it is found that in the past, the orders issued for supply of the goods were cancelled and it was directed that such orders might be issued only on the condition that 'No Objection Certificate' was given by M.P. Laghu Udyog Nigam. When file had been put up before him, NOC issued from Laghu Udyog Nigam was annexed in it, which was annexed by petitioner M.L. Shyam. Witness Bhimrao Sakre stated that if NOC would have been received in routine manner, it would have been initialed by the concerned official and would have been forwarded to Incahrge Officer, but the present NOC was not initialed and was found kept in the file which was with M.L. Shyam, it was only he who could have disclosed as to where from it was received. Ashok Naronha, Principal Officer of Sales Department of M.P. Laghu Udyog Nigam, in his statement, recorded during investigation, very clearly said that the 'NOC' dt. 4.2.1997 was never issued from his office. It was not signed by any authorized officer and that it was in different form, then used by the Nigam.

12. On perusal of the proceedings of Acceptance Committee, which comprised of Members M.L. Shyam, I.J. Diwan, A.S. Kushwah and N.R. Wadia, it is seen that the supply of 5000 Woolen Jerseys, 7000 Cap Barret and 5000 Ground Sheets was verified

and accepted on 27.3.1997. Supply of 600 Mts. cloth and 600 Saris was received on 15.3.1997. Acceptance of those articles was also verified by Shriram Choubey and certificates were issued certifying that the aforesaid articles were received and accepted in Central Stores of Head Quarters on 27.3.1997, whereas Verification Board did not find Jerseys, Barret caps and Ground Sheets in the stock. According to prosecution, only 2005 Blankets, 600 Saris and 600 Mts. cloth were found in the stock. The relevant entries of these articles were found in the Ledgers on 15.3.1997. According to prosecution, in the concerned Ledger, the entries showing the receipt of 5000 Jerseys, 1000 Barret caps and 5000 Ground Sheets were forged by making ante-dated entries. The entries of Ledger, which were made before 28.3.1997 were closed and countersigned.

13. In view of the above circumstances, the contentions raised by petitioners that the stock registers were not available on 27.3.1997, therefore, entries could not be made, cannot be accepted. This documentary evidence is supported from the evidence of witness Shivram Raj, Commandant, who in his statement, recorded during investigation, clearly stated that he was the Chairman of the Verification Board since 27.3.1997 to 12.4.1997. He had made physical verification on the basis of Ledgers and had found that before 27.3.1997 only 600 Saris, 600 Mts. cloth and 2004 Blankets were in the stock. The stock of Ground Sheets was nil and only one jersey and 29 Barret caps were in the stock. It was also stated that after his submitting the verification report, some of the officers had added some more articles in the list.

14. In the circumstances of the case, roles assigned to various accused persons in whole of the episode, right from issuing purchase orders to the verification and acceptance of goods in the store, appear to be different steps in the same direction forming a complete whole. At this stage they appear inseparable.

15. In this view of the matter, at this stage, it cannot be held that there was no material, *primafacie* sufficient for proceeding against the accused/applicants for framing the charges against them. The submissions made by learned counsel for applicants that it was a case of mere irregularity and/or misconduct which could be dealt with by departmental action, cannot be accepted.

16. In case of *State of M.P. v. S.B. Johri & ors;* (2000)2 SCC 57, it has been held by the Apex Court that the exercise of appreciating the material produced by the prosecution at the stage of framing of the charge is wholly unjustified. The approach of the High Court should not be as if the Court is deciding the case as to whether the accused are guilty or not. In most of the cases, it is only from the available circumstantial evidence the inference of conspiracy is to be drawn. It is only prima-facie case which is to be considered. High Court has not to appreciate and weigh the material on record for coming to the conclusion that charge against the petitioners could not have been framed. It is settled law that at the stage of framing the charge the Court has to prima-facie consider whether there is sufficient material on record for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the material produced are sufficient or not for convicting the accused. If the court

is satisfied that the prima-facie case is made out for proceeding further then a charge has to be framed.

17. In case of *Rajbir Singh v. State of U.P.*; (2006)4 SCC 51, the Apex Court observed that the scope of provisions under Sections 227 and 228 of the Code of Criminal Procedure has been considered in catena of decisions of Supreme Court. In *State of Bihar v. Ramesh Singh;* (1977) 4 SCC 39, it was held :

> "Reading [Ss. 227 and 228] together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the judge at that stage of athe trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused."

18. In the light of above proposition of law, on examining the facts and material adduced by the prosecution in the present case, there appear sufficient material to indicate the commission of offences charged against the applicants.

19. Taking into consideration the aforesaid material and the reasonings assigned by the Special Judge in the impugned order of framing the charges against the applicants, I do not find that any error has been committed by him. Accordingly, no ground for interference in the impugned order is made out. All the revisions are, therefore, dismissed.

20. Before parting, it is however observed that any observation appearing in this order shall not prejudice the case of accused on merits in the trial.

21. A copy of this order be placed in the record of all the revisions disposed of by this order.

Revision disposed of.

I.L.R. [2007] M. P., 1471

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

14 March, 2007

JUGAL RATHORE .... Applicant*

v.

JAGDISH RATHORE & ors. .... Non-applicants

Criminal Procedure Code, 1973 (II of 1974)–Sections 145, 482–Third party intervention–S.D.M. in proceedings under Section 145 Cr.P.C. held that party no. 3 to 6 were forcibly dispossessed by party no. 1 & 2–Order of S.D.M. affirmed by Higher Courts–Party No. 3 to 6 filed application for restoration of possession–Applicant filed objection that he is in possession of the disputed land and was not party to the proceedings–Held–S.D.M. is required to give notice to those who are concerned in such dispute–Section 145 nowhere provides notice be also given to all other persons who are not party to dispute–No scope of third party intervention or providing opportunity of hearing in a proceeding which is already decided–Petition dismissed with costs.

Chapter X of the Code is relating to maintenance of public orders and tranquility. Sections 145 to 148 of the Code are relating to the dispute as to immovable property. Sub-section (1) of Section 145 clearly provides that on the basis of a report of Police Officer and on other information whenever an Executive Magistrate is satisfied that the dispute likely to cause a breach of peace exists concerning any land or water or the boundaries thereof within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his court in person or by pleader, on a specified date and time and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. Sub-section (1) of Section 145 refers the words, "parties concerned in such dispute" shows that the SDM is required to give notice only to those parties who are concerned in such dispute or in other words, "between whom the dispute likely to cause breach of peace exists concerning any land or water'. This section nowhere provides notice under this sub-section is also to be given to all other persons who are not party to any dispute likely to cause breach of peace. Therefore, considering this provision, it was not necessary for SDM to issue any notice to the present petitioner.

In any case, there appears no scope of third party intervention or providing opportunity of hearing to him in a proceeding which has already been decided and learned SDM has rightly held that remedy is not available to the third party by way of filing objection, but would be available by filing the same before appropriate forum.

It appears that present petition has been filed solely with an intention to create hurdle and obstruction in delivery of possession of the disputed land to party no. 2 in whose favour orders have been passed by competent court and has been confirmed

* M.Cr. C. No. 181/2007 (I)

by the superior court. The effort on the part of the present petitioner is nothing, but, sheer abuse of process of course and such course should be curbed with hard hands.
(Paras 10, 15 & 16)

S.K. Vyas with Amit Vyas, for the applicant.
B.L. Pavecha with Akash Pahadiya, for the non-applicants.

Cur.adv.vult.

ORDER

S.C. VYAS, J. :– This is a petition under S. 482 of the Code of Criminal Procedure preferred by petitioner seeking direction to Sub Divisional Magistrate, Barwah to the effect that the objection raised by present petitioner before him be heard and decided on merits by passing an appropriate order.

2. Facts of the case are quite interesting. Present petitioner Jugal son of Gendalal was not a party in the proceedings which were pending before the Sub Divisional Magistrate in which first of all order was passed on 23.12.2000 in criminal case No. 5/145/04 filed by Police Sanawad under the provisions of S.145 of Cr.P.C. in which non applicants no. 1 & 2 Jagdish and Marubai wd/0 Ghisalal were party no. 1 and non applicants no. 3 to 6 (names are mentioned in the cause title) were party no. 2. It was stated in the complaint that the land bearing survey no 56; Patwari circle No. 50; situated in Sanawad having an area of 09.63 acres and party no. 1 & 2 having dispute with regard to the title and possession over the said land.

3. The Sub Divisional Magistrate Barwaha after hearing both the parties, passed an order dated 23.12.2000 that non applicants no. 1 & 2 (Party No.1) had forcibly dispossessed to non-applicants No. 3 to 6 (Party No. 2) from the aforesaid disputed land on 17.4.2000 i.e. within two months from the date of passing preliminary order and therefore direction was issued against party No. 1 and it is ordered that possession of party no. 2 be restored. This order was challenge by filing criminal revision no. 27 of 01 before Addl. Sessions Judge, Barwaha who in turn dismissed the same vide order dated 09.1.02. Thereafter a petition under S. 482 of the Code was filed by party no. 1 before this court bearing no. 569 of 02 and was dismissed by order dated 25.2.02.

4. In the meantime one civil suit was filed by non applicant no. 2 Marubai against non-applicants no. 3 to 6 (Party no. 2) before Civil Judge Cl. II Sanawad alongwith an application for temporary injunction in respect of the disputed land, which was dismissed by the Civil Judge. The said order was challenged before Addl. District Judge, Barwaha by filing Misc. appeal, which was dismissed on 20.11.01. Thereafter a writ petition was filed before this court by non-applicant no. 1 bearing No. 6858 of 02 which also dismissed on 17.09.03.

5. After dismissal of the said writ petition, non-applicants (party no.2) moved an application before SDM Barwaha for execution and implementation of its order dated 23.12.00 for delivery of possession of the disputed land. The said application was allowed vide order dated 09.05.04. The non-applicants no.1 & 2 (Party No. 1) again filed a revision before Addl. Sessions Judge, which was allowed vide order dated 09.10.04. This order was challenged by non-applicants no. 3 to 6 (Party no.2) before

this court by filing revision no. 838 of 04 which was decided vide order dated 13.09.06 setting aside the order of Addl. Sessions Judge Barwaha and restored the order passed by SDM Barwaha and directed him to implement his own order dated 9.5.04.

6. Non applicants no. 3 to 6 (Party no. 2) again moved an application before SDM on 20.12.06 alongwith copy of order passed by this court in revision No. 838 of 04 and prayed for delivery of possession of the disputed land. At that point of time present petition has filed by petitioner Jugal before this court on 9.1.07 stating in the petition that present petitioner was never made a party by any one in any of the proceedings initiated before the SDM with regard to the disputed land. He was not aware of the proceedings filed under the provisions of S.145 of the Code pending before SDM Barwaha. It has been stated when he got knowledge of the said proceedings, he immediately filed this objection on 5.1.07 before SDM Barwaha mentioning therein that the disputed land was in possession of present petitioner, and Kamlabai as well as other non applicants joined their hands to demolish the title of present petitioner and concealed the actual facts of the case and order dated 9.10.04 has been obtained by them. The alleged objection application was dismissed by SDM Barwaha on the same day, holding that petitioner may file his claim before the competent court.

7. It has been averted in the petition that it was the duty of SDM to provide him an opportunity of hearing before dismissing the objection without considering on merits and therefore such order of dismissal is liable to be quashed.

8. I have heard learned counsel appearing for both parties and perused all the documents filed alongwith the petition as well as reply filed by non applicants no. 3 to 6 (Party no. 2).

9. After considering the matter from all angles, I am of the opinion that this petition has no merits and substance and is liable to be dismissed at the motion hearing stage itself.

10. Chapter X of the Code is relating to maintenance of public orders and tranquility. S.145 to 148 of the Code are relating to the dispute as to immovable property. Sub-section (1) of S. 145 clearly provides that on the basis of a report of Police Officer and on other information whenever an Executive Magistrate is satisfied that the dispute likely to cause a breach of peace exists concerning any land or water or the boundaries thereof within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his court in person or by pleader, on a specified date and time and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. Sub-section (1) of S. 145 refers the words, "parties concerned in such dispute" shows that the SDM is required to give notice only to those parties who are concerned in such dispute or in other words, "between whom the dispute likely to cause breach of peace exists concerning any land or water". This section nowhere provides notice under this sub-section is also to be given to all other persons who are not party to any dispute likely to cause breach of peace. Therefore, considering this provision, it was not necessary for SDM to issue any notice to the present petitioner

when a report of Police Officer was submitted before the SDM. Sub-sect. 3 & 4 also refers the same parties concerned in such dispute and the SDM was not required to hear any third party who was not a party to the dispute regarding which report was filed before him. Sub-sect. 6 of S. 145 of the Code also provides that if the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possessior until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

11. This proviso again clarifies that the dispute which required to be adjudicated by SDM should only to be the dispute between the parties between whom the dispute likely to cause breach of peace exists and not between all other persons who are interested in the property.

12. Mr. SK Vyas, learned Sr. counsel appearing for petitioner has submitted that in the facts of present case all the non applicants joined their hands and a false claim was projected before SDM. On the other hand, Mr. BL Pavecha, Sr. Advocate appearing for non applicants no. 3 to 6 (Party No.2) vehemently opposed the aforesaid arguments and submitted that as many as 3-4 rounds of litigations had already been over between both the parties. Both the parties had contested the litigatiosn with full strength in various courts and lastly in High Court. One civil suit with regard to the disputed land is still pending. In view of the aforesaid facts, he submitted that the allegation of joining hands by both parties, is apparenlty false and no inference can be drawn on the basis of such allegation. Mr. Pavecha has drawn attention to the order dated 23.12.2000 passed by SDM which shows that the matter was fully contested by both the parties. He also drawn attention to the order dated 25.2.02 (Annexure P.3) passed in M.Cr.C. No. 27 of 01 by this court which also shows that there was nothing like joining hands between the parties. Ultimately party no. 1 (NA. 1 & 2) last their battle in every court including in WP No. 6858 of 03 decided on 17.9.03.

13. After perusal of all these orders, I am convinced that there was nothing like joining hands between the parties.

14. A very important fact has been brought to the notice of this court by Mr. Pavecha that no applicant no. 1 Jagdish son of Gendalal Rathore and present petitioner Jugal son of Gendalal Rathore and real brothers. NA-1 Jagdish son of Gendalal rathore was the Attorney Holder of NA-2 Marubai wd/o Ghisalal Rathore and he is the person who executed the sale deed in favour of non applicants no. 3 to 6 (Party no. 2). He submitted that the same person has now started another round of litigation through his brother Jugal who was aware and has full knowledge of earlier litigation going on between both the parties. This argument prima facie appears to be true looking to the copies of the orders filed alongwith the petition.

15. In any case, there appears no scope of third party intervention or providing opportunity intervention or providing opportunity of hearing to him in a proceeding which

has already been decided and learned SDM has rightly held that remedy is not available to the third party by way of filing objection, but would be available by filing the same before appropriate forum.

16. It appears that present petition has been filed solely with an intention to create hurdle and obstruction in delivery of possession of the disputed land to party no. 2 in whose favour orders have been passed by competent court and has been confirmedby the superior court. The effort on the part of the present petitioner is nothing, but, sheer abuse of process of course and such course should be curbed with hard hands.

17. In view of the aforesaid discussions, I do not find any merits and substance in the present petition which is dismissed in limine with a cost of Rs. 2,500/- which would be payable by present petitioner to the non applicants (party no. 2).

Petition dismissed.

I.L.R.[2007] M.P., 1475

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice P.P. Naolekar

19 July, 2007

STATE OF M.P. ...Petitioner*

vs.

KUSUM ...Respondent

Prisoners' Release on Probation Act, M.P.(XVI of 1954) - Section 2–Release on Probation–Division Bench of High Court deprecated practice of releasing convicts on probation whose applications for bail were already rejected–Inspector General of Prisons issued circular that persons whose appeals are pending before appellate court are not entitled to be considered for the purpose of release on probation–Circular quashed by High Court–Held–Judgment by Division Bench of High Court was rendered to curb illegality in decision making process– High Court in its earlier decision had not held that even making of application is to be barred–There cannot be any bar for making application–While considering the application principles set out by Supreme Court in the case of *Arvind Yadav Vs. Ramesh Kumar and others* are to be kept in view–Appeal dismissed.

The parameters of consideration were only highlighted by the Division Bench. It never held that even making of an application is to be barred. Therefore, the Circular has been rightly held to be illegal by the High Court. There cannot be any bar for making an application. Whether the prayer as contained in the application is to be accepted or not is another question. It needs no re-iteration that while considering an

*Crl. Appeal No. 913 of 2007

application the principles set out by this Court in *Arvind Yadav v. Ramesh Kumar and ors.* (2003 (6) SCC 144) are to be kept in view. Para 7 of the judgment reads as follows:

> "Apart from the fact that there are factual infirmities in the impugned judgment, it is also to be borne in mind that the victim and the family of the victim who have suffered at the hands of the convict have also some rights. The convicts have no indefeasible right to be released. The right is only to be considered for release on licence in terms of the Act and the Rules. The Probation Board and the State Government are required to take into consideration the relevant factors before deciding or declining to release a convict. In the present case, the Probation Board had not recommended the release. The State Government had confirmed the order of the Board. The writ petition had failed before the learned Single Judge. The facts of individual cases were not considered by the Division Bench. In the case of Ramesh Kumar, the stand of the State Government was that he along with six others had formed an unlawful assembly and murdered Jitendra, son of Shashi Mohan Yadav on 20.9.1994 in Hoshangabad, Madhya Pradesh causing seventeen injuries on him and swords, knives and gupti and that Ramesh Kumar was the accused in fourteen cases filed under various sections of the Indian Penal Code. The manner of commission of crime is a relevant consideration. In a given case, the manner of commission of offence may be so brutal that it by itself may be a good sole ground to decline the licence to release. The Rules provide for a detailed procedure for consideration of application for release. Once rejected, again application for release can be made after two years. The Board comprises of the Home Secretary of the State Government or any other empowered officer, IG of Prisons or Deputy IG and another member." (Para 7)

Case Referred :

Arvind Yadav Vs. *Ramesh Kumar and others;* (2003) 6 SCC 144.

JUDGMENT

The Judgment of the Court was delivered by **Dr. Arijit Pasayat, J. :–**

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Madhya Pradesh High Court at Jabalpur quashing the Circular dated 3.8.2005 issued by the State.

3. Background facts in a nutshell are as follows:

Respondent is convicted for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and was sentenced to rigorous imprisonment for

life. She filed an application for release under the Madhya Pradesh Prisoners' Release on Probation Act, 1954 (in short the 'Act') and the rules framed thereunder. On 3.8.2005 a Circular was issued by the Inspector General of Prisons that persons whose appeals are pending before the Appellate Court are not entitled to be considered for the purpose of release on probation. The Circular was purportedly issued on the basis of the decision rendered by a Division Bench of the Madhya Pradesh High Court, Gwalior Bench in Writ Petition No.941 of 2004 dated 14.10.2004.

Respondent's prayer was rejected by the Probation Board on 8.8.2005. The State Government formally approved the rejection by rejecting the prayer for release by order dated 29.10.2005. A writ petition was filed before the High Court questioning the legality of the Circular dated 3.8.2005. Primary stand taken was that the same was contrary to the provisions of the Act. The High Court noted that the Division Bench in the earlier case had adverted to the concept of conditions precedent and the irregularity in release on probation of certain convicts particularly those whose applications for bail had been rejected and their appeals were pending. The High Court noted that in the said case there was a question mark over the decision making process of the Probation Board as in some cases where prayer for bail had been rejected convicts have been released on probation. The High Court further noted that the concerned authorities by the Circular dated 3.8.2005 have directed that the Probation Board should not consider the case of convicts whose appeals are pending in the High Court. That apart, there has been a direction not to consider the mercy application for grant of release. According to the High Court, the earlier Division Bench's decision was rendered to curb the illegality in the decision making process. But the Circular to the effect that no case would be considered by the Probation Board where the appeal is pending could not have been issued. The entertainment of mercy petition was also not prohibited by the earlier Division Bench. Therefore, the same cannot be prohibited by the Circular if otherwise entertainable in law. The High Court noted that the Circular was absolutely general, sweeping and inconsistent with the Act and M.P. Prisoners' Release on Probation Rules, 1964 (in short the 'Rules'). It was noted that the judgment of the earlier decision of the High Court was mis-construed by the authorities concerned. The writ petition was allowed by quashing the Circular.

4. In support of the appeal, learned counsel for the appellant submitted that the observations and views expressed in the earlier Division Bench's judgment have ot been properly appreciated by the Division Bench in the instant case. It has been pointed out that the High Court had deprecated the practice of releasing the convicts whose applications had been rejected. The Circular therefore was not illegal and had only encompassed what was decided in the earlier case.

5. Learned counsel for the respondent on the other hand submitted that the High Court in the earlier decision had not in any way prohibited making of an applications. Whether the applications would be entertained and/or were to be allowed or not is

another matter. But by the Circular even making of an application was provided to be impermissible.

6. The observations of the Division Bench in the earlier decision which form the foundation of the Circular reads as follows:

> "It may be mentioned that after rejection of earlier application by the subsequent order after the remand, the Board has passed similar order rejecting the application and Board has not considered the directions given by this Court. We have also issued notice to State to show cause why persons have been released on 5 years and the reasons for releasing them on 5 years or 6 years. No explanation has been submitted by the respondents. It appears that there are some irregularities in the release of probationers on probation particularly those dreaded criminal whose application for bail has been rejected and their appeal are pending, they too had been released. This Court has come across number of appeals thereafter rejection of bail application the convicts had been released on bail. This act of probation puts a question mark on their decision making process."

7. The parameters of consideration were only highlighted by the Division Bench. It never held that even making of an application is to be barred. Therefore, the Circular has been rightly held to be illegal by the High Court. There cannot be any bar for making an application. Whether the prayer as contained in the application is to be accepted or not is another question. It needs no re-iteration that while considering an application the principles set out by this Court in *Arvind Yadav v. Ramesh Kumar and Ors.* (2003 (6) SCC 144) are to be kept in view. Para 7 of the judgment reads as follows:

> "Apart from the fact that there are factual infirmities in the impugned judgment, it is also to be borne in mind that the victim and the family of the victim who have suffered at the hands of the convict have also some rights. The convicts have no indefeasible right to be released. The right is only to be considered for release on licence in terms of the Act and the Rules. The Probation Board and the State Government are required to take into consideration the relevant factors before deciding or declining to release a convict. In the present case, the Probation Board had not recommended the release. The State Government had confirmed the order of the Board. The writ petition had failed before the learned Single Judge. The facts of individual cases were not considered by the Division Bench. In the case of Ramesh Kumar, the stand of the State Government was that he along with six others had formed an unlawful assembly and murdered Jitendra, son of Shashi Mohan Yadav on 20.9.1994 in Hoshangabad, Madhya

Pradesh causing seventeen injuries on him and swords, knives and gupti and that Ramesh Kumar was the accused in fourteen cases filed under various sections of the Indian Penal Code. The manner of commission of crime is a relevant consideration. In a given case, the manner of commission of offence may be so brutal that it by itself may be a good sole ground to decline the licence to release. The Rules provide for a detailed procedure for consideration of application for release. Once rejected, again application for release can be made after two years. The Board comprises of the Home Secretary of the State Government or any other empowered officer, IG of Prisons or Deputy IG and another member."

8. The appeal is, therefore, dismissed.

I.L.R.[2007] M.P., 1479

SUPREME COURT OF INDIA

Before Mr. Justice S. B. Sinha & Mr. Justice H. S. Bedi

10 October, 2007

STATE OF M.P. and others — Appellants*

Vs.

SANJAY KUMAR PATHAK and others — Respondents

Non-Gazetted Class III Education Service (Non-Collegiate Service) Recruitment and Promotion Rules, M. P. 1973 - Rule 10(3) proviso - State Govt. sponsored project known as Operation Black Board - Asstt. Teachers were to be appointed in order to improve standard of education- Proviso to Rule 10(3) was added by amendment empowering State Govt. to prescribe criteria and procedure for selection of candidates in specific circumstance - Recruitment process started - Validity of Proviso to Rule 10(3) was challenged before Administrative Tribunal - Tribunal passed interim order directing that no appointment should be made as Asstt. Teachers in terms of said Scheme - No select list was prepared, no tabulation was done in respect of interviews of candidates - No select list could be issued in absence of preparation of tabulation - Tribunal struck down the Proviso to Rule 10(3) - Order of Tribunal was stayed by Supreme Court - State Govt. offered appointment in favour of candidates who had been selected except those who had appeared in interview before Selection Committee - Selection Process was upheld by Supreme Court - Tribunal on application of candidates directed that aborted process of selection be completed and select list be drawn and those placed in select list be offered appointment - Writ Petition

*C.A. No. 1062/2005 (J)

dismissed by High Court, however restricted the relief only to the case of those who had approached the Tribunal - Held - Tabulation of marks was not finalized-Members of Selection Committee were entitled to undergo consultative process so as to enable them to arrive at consensus in regard to candidates who should be appointed - As tabulation process itself was not completed, question of preparing any select list also did not arise- As selection process was not complete there was nothing before Tribunal or High Court to indicate that candidates had acquired legal right of any kind - Appearance of name in slection list would not give rise to legal right unless action on the part of State is found to be unfair, unreasonable or malafide - No such plea was raised nor same was otherwise found to be existing - However respondents shall be entitled to relaxation of age in the event they intent to take part in next selection process - State also directed to pay sum of Rs. 10,000 to each respondent-Appeal allowed.

The Tribunal as also the High Court did not call for the documents pertaining to the selection process. No finding of fact has been arrived at that the respondents herein were bound to be selected and consequently appointed. Whether all of them had fared better than the other candidates who had not approached the Tribunal had not been found. As the selection process itself was not complete, there was nothing before the Tribunal as also the High Court to indicate that they had acquired legal right of any kind whatsoever. Even where, it is trite, the names of the persons appeared in the selection list, the same by itself would not give rise to a legal right unless the action on the part of the State is found to be unfair, unreasonable or mala fide. The State, thus, subject to acting bona fide as also complying with the principles laid down in Articles 14 and 16 of the Constitution of India, is entitled to take a decision not to employ any selected even from amongst the Select List.

If the action of the State was not bonafide and/ or otherwise unfair, in our opinion, the Tribunal and consequently the High Court could exercise their jurisdiction to issue a writ of or in the nature of Mandamus, as has been sought to be done, but neither any such plea was raised nor the same was otherwise found to be existing.

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. However, keeping in view the peculiar facts and circumstances of the case, we direct that the respondents shall be entitled to relaxation of age in the event they intend to take part in the next selection process. The State is also directed to pay a sum of Rs. 10,000/- each to the respondents concerned. The appeals are allowed. No costs. (Paras 13, 14 & 21)

Cases Referred :

Shankarasan Dash Vs. Union of India; 1991 (2) SCR 567, *Asha Kaul (Mrs.) and another Vs. State of Jammu and Kashmir and others;* (1993) 2 SCC 577, *K.*

Jayamohan Vs. State of Kerala and another; (1997) 5 SCC 170, *Munna Roy Vs. Union of India and others;* (2000) 9 SCC 283, *All India SC & ST Employees' Association and another Vs. A. Arthur Jeen and others;* (2001) 6 SCC 380, *Food Corporation of India and others Vs. Bhanu Lodh and others;* (2005) 3 SCC 618, *Pitta Naveen Kumar and others Vs. Raja Narasaiah Zangiti and others;* (2006) 10 SCC 261, *Ramakrishna Kamat and others Vs. State of Karnataka and others;* (2003) 3 SCC 374, *Maruti Udyog Ltd. Vs. Ram Lal and others;* (2005) 2 SCC 638, *State of Bihar and others Vs. Amrendra Kumar Mishra;* 2006 (9) SCALE 549, *Regional Manager, SBI Vs. Mahatma Mishra;* 2006 (11) SCALE 258, *State of Karnataka Vs. Ameerbi and others;* 2006 (13) SCALE 319.

Cur.adv.vult.

JUDGMENT

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

1. Leave granted in SLP

2. The Government of India sponsored a project commonly known as Operation Black Board during the Eighth Plan period, i.e. 1992-1997 in terms whereof financial clearance was to be given for appointment of Additional Teachers in all primary / middle schools which had only one teacher in order to improve the standard of education. With a view to implement the said project, the State intended to appoint 7000 to 11000 teachers.

3. Indisputably, the matter relating to recruitment of Assistant Teachers in Madhya Pradesh is governed by Madhya Pradesh Non-Gazetted Class III Education Service (Non-Collegiate Service) Recruitment and Promotion Rules, 1973 (hereinafter called and referred to for the sake of brevity as "said Rules"). In terms of the said Rules, the method of recruitment was to be by holding competitive examination followed by interview. With a view to expedite implementation of the project having regard to the fact that the same was to be implemented within the Eighth Plan period, Rule 10(3) of the Recruitment Rules was amended on or about 10.05.1993 by adding a proviso thereto which reads, thus:

> "Provided that in any specific circumstance of the State Government may, in consultation with the General Administrative Department prescribe the criteria and procedure for selection of candidates."

4. For the aforementioned purpose, Selection Committees were constituted for recruitment of Assistant Teachers in each and every district. Selections were to be made district-wise by inviting applications from the Employment Exchanges. The Selection Committee was to prepare a panel upon considering the eligibility criteria of the candidates concerned as also upon taking viva voce list.

5. Recruitment process was started in the State on or about 5.08.1993. Selection process was to be started from 13.08.1993 and was to be completed within a period of

about one month, viz., 13.08.1993 to 15.09.1993. Appointments were to be made in phases.

In these appeals, we are concerned with recruitment of 64 Assistant Teachers in Phase 3 and 66 Assistant Teachers in Phase 4.

As per the recruitment process, interviews were held in Damoh District for selection of Assistant Teachers from 1.09.1993 to 9.09.1993. Questioning, however, the validity of the amendment to Rule 10(3) of the Recruitment Rules, one Zila Mansevi Shikshak Sangh filed an original application before the Administrative Tribunal. The said application was marked as Application No. 2395 of 1993. An interim order was passed therein directing that no appointment should be made to the persons selected for the appointment as Assistant Teachers in terms of the said Scheme. When the Select List for Assistant Teachers for Damoh District was under preparation, a telephonic information was received by the appropriate authority as regards the interim order passed by the Tribunal. Further selection process was directed to be stayed pursuant thereto. No Select List, therefore, was prepared by the District Selection Committee. No tabulation was done in respect of the interviews of the candidates and in absence of preparation of tabulation, the Select List could not have been and was not prepared.

By an order dated 18.03.1994 the State Administrative Tribunal declared the said amendment to be illegal being violative of Articles 14 and 16 of the Constitution of India. Aggrieved thereby, the State Government and other aggrieved candidates filed Special Leave Petitions before this Court and by an order dated 04.01.1995, this Court stayed the said order of the Tribunal. It is not in dispute that on 24.04.1995 the State Government issued offers of appointments in favour of the candidates who had been selected in the year 1993 except those who had appeared in the interview before the Selection Committee of the Damoh District. By an order dated 1.12.1997 this Court in *Arun Tewari v. Zila Mansevi Shikshak Sangh* [(1998) 2 SCC 332], upheld the selection process.

6. 39 Assistant Teachers filed an original application before the Tribunal for a direction upon the State to issue appointment letters to the selected candidates. Before the Tribunal, Appellant State specifically raised the plea that the matter relating to recruitment of Assistant Teachers has since been entrusted to Janpad Panchayats under the Madhya Pradesh Panchayat Raj Adhiniyam, in the existing vacancies of the Assistant Teachers which were since then known as Samvida Shala Shikshak Varg III and Shiksha Karmi Varg III, and teachers were appointed by the Janpad Panchayats in December, 1995. The said application was allowed by an order dated 19.05.1999 stating:

> "In view of the above discussion it is directed that the aborted process of selection in Damoh District be now completed and the select list be drawn out as per the laid down procedure and those placed on the select list be offered appointment after following the usual formalities for appointments under the Government. The entire exercise of

drawing out the select list and issue of appointment orders shall be completed within two months of the date of this order. Respondents No. 3 and 4 that is Collector and Deputy Director Education Damoh shall be personally responsible for complying with these directions."

The Chairman of the Tribunal, however, passed a separate order observing that the defence taken by the State that there was no vacancy for recruitment to the post of Assistant Teacher was not acceptable. The Administrative Member of the Tribunal expressed his views separately.

7. By reason of the impugned judgment, the High Court has dismissed the writ petition filed by the appellant. It, however, did not go into the merit of the matter and based its decision on the purported peculiarity of the case. It although took into consideration the legal question that even if a persons name appears in the Select List, ordinarily, no right accrues but proceeded to opine:

"10. After hearing the learned counsel for the parties, we think that the present cases have their own peculiarity. It is well settled in law that if the name appears in the select list ordinarily no right accrues. There may be cases which would depend on different facts and circumstances of the case. We do not intend to dilate on that score because of the pertaining factual matrix which are enumerated hereunder:

(a) The State Government had taken steps to appoint 11000 Assistant Teachers in the entire undivided Madhya Pradesh and appointments have been made in number of districts before the Tribunal granted stay.

(b) After the final order was passed by the Tribunal, the matter travelled to apex Court and, thereafter, their Lordships passed the order of stay. The State Government promptly filled up the posts in respect of other districts.

(c) The selection process in the districts of Damoh lingered and, therefore, the persons who were in the select list or on the third phase could not get the benefit.

(d) The persons who have rendered services for a brief period long back because of the direction given by the Tribunal to consider their cases, they have been appointed."

The High Court restricted the matter relating to grant of relief only to the case of the original applications directing:

"(a) The State Government shall prepare a list of candidates who had approached the Tribunal in the original applications in the order of merit as per the select list.

(b) The State Government shall offer them appointments in respect of Assistant Teachers or equivalent posts within a reasonable period of time.

(c) The State shall start taking action within a period of three months from today so that bonafide of the State would be demonstrative.

(d) The candidates who have not approached the Tribunal could not be benefited by this order for the simple reason that he who is not vigilant loses his right."

8. Ms. Vibha Datta Makhija, learned counsel appearing on behalf of the appellant, would submit that the High Court committed a manifest error in passing the impugned judgment insofar as it failed to take into consideration :

(i) the respondents did not have any legal right to be appointed:

(ii) there exists a distinction between two categories of candidates, viz., those in whose favour letters of appointments had been issued but had to be cancelled in view of the order of the Tribunal and the respondents herein whose names did not figure in the Select List at all.

(iii) writ petition should not have been allowed on equity alone as it must flow from a legal right.

9. Mr. Prakash Shrivastava, learned counsel appearing on behalf of the respondents, on the other hand, would submit that the Tribunal and consequently the High Court having passed the impugned judgments in the peculiar fact situation obtaining therein, the matter must be considered in the backdrop of the following facts:

(i) the Recruitment Rules had been struck down;

(ii) a stay was operating upto 4.01.1995.

(iii) the State had issued instructions directing appointment of all the successful candidates as a result whereof the impugned judgment had been passed.

10. Respondents do not dispute before us that the tabulation of the marks obtained by them was not finalized. For the purpose of selection, the marks allotted to each of the candidates should be known to the members of the Selection Committee. Members of the Selection Committee before preparing the Select List were entitled to undergo a consultative process so as to enable them to arrive at a consensus in regard to the candidates who should be appointed. As the tabulation process itself was not completed, the question of preparing any Select List also did not arise.

11. It is true that after the order of stay was vacated by this Court in *Arun Tewari* (supra), the State issued a circular letter dated 24.04.1995 which reads as under:

"On the above subject vide referred departmental memo, it is directed that of all those teachers whose services were terminated should be

reinstated in compliance with the judgment of the Honble Court. In connection with this as per reconsidered decision taken after obtaining opinion of the Advocate General appointment should be given to all such persons who have been selected legally under operation black board, in accordance with the rules and after compliance of all the formalities. Remaining condition shall remain unchanged."

12. Recruitment to the posts of Assistant Teacher is governed by statutory rules. Rule 10 of the Rules was amended only for the purpose of implementation of the Scheme of the Central Government "Operation Black Board". It is trite law that while the recruitment process is governed by the Rules, the same should be scrupulously complied with. The State, having regard to the ultimate decision rendered by this Court, was bound to reinstate those whose services had been terminated and appoint those who had been selected legally. The condition of selection was to remain unchanged. One of the conditions for recruitment was, therefore, selection of the candidates.

13. The Tribunal as also the High Court did not call for the documents pertaining to the selection process. No finding of fact has been arrived at that the respondents herein were bound to be selected and consequently appointed. Whether all of them had fared better than the other candidates who had not approached the Tribunal had not been found. As the selection process itself was not complete, there was nothing before the Tribunal as also the High Court to indicate that they had acquired legal right of any kind whatsoever. Even where, it is trite, the names of the persons appeared in the selection list, the same by itself would not give rise to a legal right unless the action on the part of the State is found to be unfair, unreasonable or mala fide. The State, thus, subject to acting bona fide as also complying with the principles laid down in Articles 14 and 16 of the Constitution of India, is entitled to take a decision not to employ any selected even from amongst the Select List. Furthermore, we have noticed hereinbefore, that selections were made in 4 phases. It is not the contention of the respondents that the State Government acted malafide. The dispute, as noticed hereinbefore related to appointment in Phase 3 and Phase 4 only.

14. If the action of the State was not bonafide and/ or otherwise unfair, in our opinion, the Tribunal and consequently the High Court could exercise their jurisdiction to issue a writ of or in the nature of Mandamus, as has been sought to be done, but neither any such plea was raised nor the same was otherwise found to be existing.

15. It is well-known that even selected candidates do not have legal right in this behalf. [See *Shankarasan Dash v. Union of India* - 1991 (2) SCR 567, *Asha Kaul (Mrs.) and Another v. State of Jammu and Kashmir and others* (1993) 2 SCC 577].

16. In *K. Jayamohan v. State of Kerala and Another* [(1997) 5 SCC 170], this court held:

"5. It is settled legal position that merely because a candidate is selected

and kept in the waiting list, he does not acquire any absolute right for appointment. It is open to the Government to make the appointment or not. Even if there is any vacancy, it is not incumbent upon the Government to fill up the same. But the appointing authority must give reasonable explanation for non- appointment. Equally, the Public Service Commission/recruitment agency shall prepare waiting list only to the extent of anticipated vacancies. In view of the above settled legal position, no error is found in the judgment of the High Court warranting interference."

[See also *Munna Roy v. Union of India and others,* (2000) 9 SCC 283].

17. In *All India SC & ST Employees Association and Another v. A. Arthur Jeen and others* [(2001) 6 SCC 380], it was opined:

"10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution Bench of this Court, after referring to earlier cases in *Shankarsan Dash Vs. Union of India.* Para 7 of the said judgment reads thus :-

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of *Haryana vs. Subhash Chander Marwaha, Neelima Shangla vs. State of Haryana or Jatendra Kumar vs. State of Punjab."*

18. The principles laid down in the aforementioned cases have been upheld by this Court in *Food Corporation of India and others v. Bhanu Lodh and others* [(2005) 3 SCC 618] stating:

"14. Merely because vacancies are notified, the State is not obliged to

fill up all the vacancies unless there is some provision to the contrary in the applicable rules. However, there is no doubt that the decision not to fill up the vacancies, has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution. Again, if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Whether to fill up or not to fill up a post, is a policy decision, and unless it is infected with the vice of arbitrariness, there is no scope for interference in judicial review..."

19. In *Pitta Naveen Kumar and others v. Raja Narasaiah Zangiti and others* (2006) 10 SCC 261], this Court observed :

> "The legal position obtaining in this behalf is not in dispute. A candidate does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of India has only a right to be considered therefor. Consideration of the case of an individual candidate although ordinarily is required to be made in terms of the extant rules but strict adherence thereto would be necessary in a case where the rules operate only to the disadvantage of the candidates concerned and not otherwise..."

In a situation of this nature, no appointment could be made by the State in absence of the Select List. The State could not substitute itself for the Selection Committee.

20. Furthermore, ordinarily, the writ court should not, in absence of any legal right, act on the basis of sympathy alone.

In *Ramakrishna Kamat and others v. State of Karnataka and others* [(2003) 3 SCC 374] albeit in the light of right of regularization in service, this Court opined:

> "....It is clear from the order of the learned single Judge and looking to the very directions given a very sympathetic view was taken. We do not find it either just or proper to show any further sympathy in the given facts and circumstances of the case. While being sympathetic to the persons who come before the court the courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long (SIC) seeking employment...."

[See also *Maruti Udyod Ltd. v. Ram Lal and others,* (2005) 2 SCC 638, *State of Bihar & ors. v. Amrendra Kumar Mishra,* 2006 (9) SCALE 549, *Regional Manager, SBI v. Mahatma Mishra,* 2006 (11) SCALE 258 and *State of Karnataka v. Ameerbi & ors.* 2006 (13) SCALE 319].

21. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. However, keeping in view the peculiar facts and

circumstances of the case, we direct that the respondents shall be entitled to relaxation of age in the event they intend to take part in the next selection process. The State is also directed to pay a sum of Rs. 10,000/- each to the respondents concerned. The appeals are allowed. No costs.

I.L.R.[2007] M.P., 1488

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice D. K. Jain

24 October, 2007

DASHRATH @ CHAMPA and others ...Appellants*

Vs.

STATE OF M.P. ...Respondent

Evidence Act, Indian (I of 1872)- Section 32(1) - Dying Declaration - Deceased assaulted on 16-4-1987 by appellants - Deceased lodged F.I.R. in police station and was thereafter admitted in Hospital - He received 18 injuries and was examined by Doctor at 1 P.M. - Deceased had not gone in shock - Later on shocks started developing resulting in fall of blood pressure and vomiting as recorded in bed head ticket - On 27-4-1987 at 11.15 p.m. general condition of deceased was recorded to be satisfactory and was also conscious - Deceased breathed his last on 30-4-1987 - Held - Dying Declaration is admitted in evidence on the principle that a man will not meet his maker with a lie in his mouth- No material to show that dying declaration was result of product of imagination, tutoring or prompting - It appears to have been made voluntarily - Appellants rightly convicted by Trial Court and High Court- Appeal dismissed.

The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any Statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which

*Crl. Appeal No.1166 of 2001.

creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice.

The principle on which dying declaration is admitted in evidence is indicated in legal maxim *"nemo moriturus proesumitur mentiri* a man will not meet his maker with a lie in his mouth."

There is no material to show that dying declarations were result of product of imagination, tutoring or prompting. On the contrary, they appear to have been made by the deceased voluntarily. It is trustworthy and has credibility.

(Paras 9, 10 & 14)

Cases Referred :

R. v. Wood Cock (1789) 1 Leach 500, *Smt. Paniben Vs. State of Gujarat;* AIR 1992 SC 1817, *Munnu Raja and another Vs. The State of Madhya Pradesh;* (1976) 2 SCR 764, *Stte of Uttar Pradesh Vs. Ram Sagar Yadav and others;* AIR 1985 SC 164, *K. Ramachandra Reddy and another Vs. The Public Prosecutor;* AIR 1976 SC 1994, *Rasheed Beg Vs. State of Madhya Pradesh;* (1974) 4 SCC 264, *Kaka Singh Vs. State of M.P.;* AIR 1982 SC 1021, *Ram Manorath and others Vs. State of U.P.;* (1981) 2 SCC 654, *State of Maharashtra Vs. Krishnamurthi Laxmipati Naidu;* AIR 1981 SC 617, *Surajdeo Oza and others Vs. State of Bihar;* AIR 1979 SC 1505, *Nanahau Ram and another Vs. State of Madhya Pradesh;* AIR 1988 SC 912, *State of U.P. Vs. Madan Mohan and others;* AIR 1989 SC 1519, *Mohanlal Gangaram Gehani Vs. State of Maharashtra;* AIR 1982 SC 839, *Gangotri Singh Vs. State of U.P.;* JT 1992 (2) SC 417, *Goverdhan Raoji Ghyare Vs. State of Maharashtra;* JT 1993 (5) SC 87, *Meesala Ramakrishan Vs. State of Andhra Pradesh;* JT 1994 (3) SC 232, *State of Rajasthan Vs. Kishore;* JT 1996 (2) SC 595.

JUDGMENT

The Judgment of the Court was delivered by **Dr. Arijit Pasayat, J.** :–Challenge in this appeal is to the judgment of the Madhya Pradesh High Court at Jabalpur upholding the conviction of the appellants for offence punishable under Section 304 Part I read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and the award of sentence of 7 years rigorous imprisonment as awarded by the trial Court.

2. Prosecution version in a nutshell is as follows:

On the morning of 26th April, 1987 Ramesh (hereinafter referred to as the 'deceased') was returning from the house of Ismail Khan. He was waylaid by the

three accused persons who attacked him with knife, lathi and rod. Ramesh sustained numerous injuries on his person. Rakesh Kumar and Bittu alias Gurdeo Singh intervened. The incident was witnessed by his mother Khargi Bai (PW-1), maternal grandmother Tulasa Bai (PW-22) and others. Ramesh was taken to the Police Station where he lodged the first information report (Ex.P.10) which was recorded by Head Constable Santosh Kumar (PW-20). Ramesh was immediately taken to the District Hospital at Bina where Dr. Rajnish Shrivastava (PW-11) examined him. He found as many as 18 injuries on his body as per his report Ex.P.16. Ramesh was admitted in the hospital. On the following day he was referred to District Hospital, Sagar for X-ray and further treatment. There he breathed last on 30.4.1987. Dr. M.C. Jain (PW-16) performed the autopsy on the next day. Postmortem report is Ex.P.28.

During the course of investigation knife article 'B' was recovered from the possession of accused Dashrath alias Champa on the basis of the information supplied by him. Accused Govind also made a disclosure statement leading to recovery of lathi article 'D' and accused Satish made a statement leading to the recovery of rod article 'C'.

On completion of investigation, a challan was put up against the three accused persons for commission of offence punishable under Section 302 read with Section 34 IPC.

3. The three accused persons were tried. Seven witnesses were examined as eye-witnesses to further the prosecution version. They included the mother (PW-1) and grand mother (PW-22) of the deceased. The other five eye-witnesses produced were Laxmi Bai (PW-2), Asgari Begam (PW-4) and neighbours of the deceased and Santosh Singh (PW-17), Rakesh (PW-18) and Bittu (PW-19). But none of the witnesses admitted to having seen the incident. Therefore, the prosecution with the permission of the Court cross examined them. The trial Court was of the view that these witnesses were deliberately making false statements and concealing the truth. But the First Information Report (Ex.P10) was recorded by the Head Constable Santosh Kumar (PW-20) on the information given by the deceased. The said Head Constable had also recorded the statement of the deceased under Section 161 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.'). His statement is marked as Ex.P.32. Learned Additional Sessions Judge treated both the statements to be statements under Section 32(1) of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). Relying on those statements and the medical evidence, the trial Court found that Ramesh had died as a result of the injuries inflicted upon him by the accused persons. But since none of the injuries was found on the vital organs of the deceased it was held that the offence committed was covered under Section 304 Part I IPC. The accused persons challenged correctness of the judgment before the High Court by filing an appeal which was dismissed by the impugned order.

4. Learned counsel for the appellants submitted that there was no material evidence to connect appellants with the crime and, therefore, both the trial Court and the High

Court were not justified in finding the accused persons guilty. It is submitted that considering the nature of injuries sustained, it would have been impossible for the deceased to make any statement.

5. Learned counsel for the State on the other hand supported the judgments of the trial Court and the High Court.

6. The factual scenario as borne out from the records is that the deceased was brought to District hospital, Bina where he was admitted for observation and treatment. Dr. Rajnish Shrivastava (PW-11) found 18 injuries on his person. The doctor in cross examination stated that the deceased was examined by him at 1.00 p.m. in the afternoon on 26.4.1987. At that time the patient had not gone in shock. It was later that shocks started developing resulting in fall of blood pressure and vomiting as was recorded in bed head ticket (Ex. P.17). The observation was recorded at 5.00 p.m. on 26.4.1987. The deceased was admitted in District Hospital, Sagar. The bed head ticket (Ex.P.27) shows that he was admitted in the hospital at 11.15 p.m. on 27.4.1987 and in the bed head ticket the general condition was recorded to be satisfactory and also that he was conscious. The deceased breathed his last three days later on 30.4.1987.

7. Though PWs. 18 and 1 stated that the deceased was unconscious, PW-22 stated that he was in senses. It was also stated by this witness that the deceased had lodged the report. She also stated that the police had recorded the statement of the deceased. Though some of the witnesses resiled from the statements made during investigation, PW-19 stated that he and Ramesh's mother carried him to the police station.

8. Santosh Kumar, Head Constable (PW-20) had testified that the deceased was fully conscious when he was brought to the police chowki and it was the deceased who had lodged the complaint which was recorded by him. The statement of the deceased was marked as Ex.P.32. The trial Court and the High Court relying on the evidence of PW-20 concluded that the statement given by the deceased was to be treated as a dying declaration. The bed head ticket of District Hospital, Sagar, (Ex.P.27) shows that when the deceased was brought he was conscious and his general condition was satisfactory. These materials were sufficient to discard the stand of the accused persons that the deceased was unconscious when he was brought to the hospital. As the deceased died on 30.4.1987 the trial Court and the High Court treated the first information report (Ex. P.10) to be in the nature of the dying declaration; so was the statement of the deceased (Ex.P.32). In both these statements the three accused persons have been named as the assailants. The trial Court and the High Court analysed the evidence in great detail and found that the prosecution established its stand because of the dying declaration.

9. At this juncture, it is relevant to take note of Section 32 of the Evidence Act, which deals with cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant. The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of the

witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any Statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. These aspects have been eloquently stated by Lyre LCR in R. v. Wood Cock (1789) 1 Leach 500. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain:

> "Have I met hideous death within my view, Retaining but a quantity of life, Which bleeds away even as a form of wax, Resolveth from his figure 'gainst the fire? What is the world should make me now deceive, Since I must lose the use of all deceit? Why should I then be false since it is true That I must die here and live hence by truth?"
>
> (See King John, Act 5, Sect.4)

10. The principle on which dying declaration is admitted in evidence is indicated in legal maxim *"nemo morituras proesumitur mentiri* a man will not meet his maker with a lie in his mouth."

11. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

12. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no scope of cross-examination. Such a scope is essential for

eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Smt. Paniben v. State of Gujarat* (AIR 1992 SC 1817):

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See *Munnu Raja & Anr. v. The State of Madhya Pradesh* (1976) 2 SCR 764)]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of Uttar Pradesh v. Ram Sagar Yadav and Ors.* (AIR 1985 SC 416) and *Ramavati Devi v. State of Bihar* (AIR 1983 SC 164)]

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See *K. Ramachandra Reddy and Anr. v. The Public Prosecutor* (AIR 1976 SC 1994)]

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See *Rasheed Beg v. State of Madhya Pradesh* (1974 (4) SCC 264)]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See *Kaka Singh v State of M.P.* (AIR 1982 SC 1021)]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See *Ram Manorath and Ors. v. State of U.P.* (1981 (2) SCC 654)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [See *State of Maharashtra v. Krishnamurthi Laxmipati Naidu* (AIR 1981 SC 617)]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See *Surajdeo Oza and Ors. v. State of Bihar* (AIR 1979 SC 1505).

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See *Nanahau Ram and Anr. v. State of Madhya Pradesh* (AIR 1988 SC 912)].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See *State of U.P. v. Madan Mohan and Ors.* (AIR 1989 SC 1519)].

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See *Mohanlal Gangaram Gehani v.State of Maharashtra* (AIR 1982 SC 839)]

13. In the light of the above principles, the acceptability of alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration. [See *Gangotri Singh v. State of U.P.* (JT 1992 (2) SC 417), *Goverdhan Raoji Ghyare v. State of Maharashtra* (JT 1993 (5) SC 87), *Meesala Ramakrishan v. State of Andhra Pradesh* (JT 1994 (3) SC 232) and *State of Rajasthan v. Kishore* (JT 1996 (2) SC 595)].

14. There is no material to show that dying declarations were result of product of imagination, tutoring or prompting. On the contrary, they appear to have been made by the deceased voluntarily. It is trustworthy and has credibility.

15. In view of the factual scenario as analysed in the background and the principles set out above the inevitable conclusion is that the trial Court and the High Court were justified in finding the accused persons guilty. There is no merit in this appeal which is dismissed accordingly. The appellants who are on bail shall surrender to custody forthwith to serve remainder of sentence, if any.

I.L.R.[2007] M.P., 1495

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice Dipak Misra, Mr. Justice Abhay Gohil, Mr. Justice S. Samvatsar & Mr. Justice Rajendra Menon .

2 November, 2007

STATE OF MADHYA PRADESH and another ...Applicants*

Vs.

M/s. SHEKHAR CONSTRUCTIONS ...Non-applicant

A. Words and Phrases-Academic issue-Court should refrain and restrain itself from answering academic issues.

It is well settled in law that Court should refrain and restrain itself from answering academic issues. (Para 4)

B. Madhyastham Adhikaran Adhiniyam, M. P. (XXV of 1983), Section 19, Limitation Act, 1963, Section 5-Condonation of delay-Provisions of Limitation Act donot apply to revision preferred under Section 19 of Act, 1983.

In view of the aforesaid we have no scintilla of doubt that the opinion expressed by the Full Bench in Pandey Construction Co. (supra) with regard to precedential value of the decision rendered by the Apex Court in Nagar Palika Parishad, Morena (supra) is correct inasmuch as the Apex Court in clear cut terms has ruled that the decision of the Apex Court had been correctly followed. That being the position there is no scope for probing whether the decision rendered in Nasiruddin and others (supra) and Popular Constructions (supra) are applicable to the provisions of 1983 Act. That is not and cannot be within the domain of the High Court. Ergo, we conclude and hold that the decision rendered in Pandey Construction Co. (supra) holding that the provisions of Limitation Act do not apply to a revision preferred under Section 19 of the 1983 Act is correct. Once it is so held, the question whether the Full Bench in Pandey Construction Co. (supra) should have considered the decision rendered in Mohd. Sagir (supra) pales into insignificance. We may put it on record that the decision in Mohd. Sagir (supra) was rendered in the context of M.P. Industrial Relations Act, 1960 and the said view was in relation to the said statute will hold the field. (Para 16)

C. Madhyastham Adhikaran Adhiniyam, M. P. (XXV of 1983)-Section 19 suo moto exercise of power-High Court can exercise the power of revision suo moto-Such power can be exercised within reasonable period of time considering facts and circumstances of case and nature of order which is being revised-View taken in case of Pandey Construction is in accord with language employed under Section 19-Reference answered accordingly.

Be it placed on record in the case of Pandey Construction Co. (supra) the Full Bench has expressed the opinion that the High Court can exercise the power of revision

*Civil Revision No.142/2005 (G)

suo motu and call for the records and award from the Tribunal and a such a power can be exercised within a reasonable period of time considering the facts and circumstances of the case and the nature of the order which is being revised. The said view is in accord with the language employed under Section 19 of the 1983 Act and hence, we concur with the same. (Para 17)

Cases Referred :

M.P. State Electricity Board, Jabalpur Vs. Pandey Construction Company, 2005 (2) MPLJ 550, *Mohd. Sagir vs. BHEL,* 2004(1) MPJR 373 = 2004 (2) MPHT 179 (FB), *Nagarpalika Parishad, Morena vs. Agrawal Construction Co.,* 2004(II) MPLJR 374, *Central Areca Nut & Cocoa Marketting & Processing Cooperative Ltd. Vs. State of Karnataka and others,* (1997) 8 SCC 31, *State of Bihar V. Rai Bahadur Hurdut Roy Moti Lall Jute Mills,* AIR 1960 SC 378, *Nagar Palika Parishad, Morena vs. Agrawal Construction Co.,* 2004(II) MPJR SN 55, *Nasiruddin and others Vs. Sitaram and others,* (2003) 2 SCC 577, *Union of India Vs. Popular Construction Co.,* (2001) 8 SCC 470, *S.Shanmugavel Nadar Vs. State of T.N. and another,* (2002) 8 SCC 361, *Saurashtra Oil Mills Assn. Gujrat vs. State of Gujrat and another,* (2002) 3 SCC 202, *Collector of Customs, Bombay Vs. M/s. Elephanta Oil and Industries Ltd., Bombay,* AIR 2003 SC 1455, *Batiarani Gramiya Bank vs. Pallab Kumar and others,* (2004) 9 SCC 100, *Hari Singh vs. State of Haryana,* (1993) 3 SCC 114, *Director of Settlements, A.P. and others Vs. M.R.Apparao and another,* (2002) 4 SCC 638, *Ballabhadas Mathuradas Lakhani v. Municipal Committee, Malkapur,* AIR 1970 SC 1002, *Krishena Kumar Vs. Union of India,* (1990) 4 SCC 207, *State of U.P. Vs. Synthetics and Chemicals Ltd.,* (1991) 4 SCC 139, *Arnit Das Vs. State of Bihar,* (2000) 5 SCC 488.

Mr. S.B.Mishra, Addl.Adv. General, *Mr. Vivek Khedkar, G.A.* Mr. *M. P. S. Raghuvanshi, Mr. B.S.Bhadauriya, Mr. D.S.Raghuvanshi,* and *Mr. Gaurav Samadhiya,* for the applicant.

Mr.Ankur Mody, Mr.Vijay Sunderam, Mr.Deependra Raghuvanshi, for the non-applicant.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J:–A Division Bench hearing the Civil Revision No.142/2005 (State of Madhya Pradesh and another Vs. M/s.Shekhar Constructions) expressed its doubt with regard to the correctness of the decision rendered in Civil Revision No.1/2006 (State of Madhya Pradesh and another Vs. M/s. Shriram and sons) and referred two questions to be adjudicated by a larger Bench. The two questions framed by the Division Bench are as under:-

> "(i) Whether after amendment in section 19 of the Adhiniyam application for extending the period of limitation in filing revision can

be entertained if court is satisfied that petitioner was prevented from sufficient cause can be examined by the court in cases where cause of action for filing revision is accrued to the petitioner under the unamended provision of section 19 and period of limitation is expired before the amendment in the Adhiniyam?

(ii) Whether the application to condone the delay will be maintainable and the amended provision of section 19 of the Adhiniyam will have retrospective operation for pending petitions before the court.?"

2. The matter was placed before the Bench consisting of three Judges. The Full Bench while answering the question expressed its doubt with regard to the legal substantiality of the decisions rendered by another Full Bench in *M.P.State Electricity Board, Jabalpur Vs. Pandey Construction Company,* 2005 (2) MPLJ 550. This led to framing of the following question for consideration by a larger Bench:-

"Whether in vies of Section 29(2) of Limitation Act 1963, provisions of Sections 4 to 24 (both inclusive) will apply to the proceedings, application and revision filed under the Adhiniyam 1983, to condone delay?"

3. That is how the matter has been placed before us. Though the reference has been couched in the aforesaid manner the principal question that is required to be answered is whether the interpretation placed on Section 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 [hereinafter referred to as 'the 1983 Act'] in *Pandey Construction* (supra) is correct or the said decision requires to be reconsidered on the basis of the decision rendered in *Mohd. Sagir vs. BHEL,* 2004(1) MPJR 373 = 2004 (2) MPHT 179 (FB).

4. At the very outset we think it apt to state that in *Pandey Construction* (supra) the Full Bench had expressed the opinion that the decision rendered by the Apex Court in *Nagarpalika Parishad, Morena vs. Agrawal Construction Co.,* 2004(II) MPLJR 374 is a binding precedent. The decision rendered in Pandey Construction (supra) is restricted to the facet of limitation in respect of revision as provided under Section 19 of the 1983 Act and nothing has been said therein with regard to the applicability of the Limitation Act in respect of a proceeding or application under the 1983 Act. It is also worth noting that the said issues do not arise in the present Civil Revision, for the civil revision has been filed under Section 19 of the 1983 Act and the consideration, as is manifest from the factual matrix, is limited to limitation in respect of a revision preferred under the unamended provision. It is well settled in law that Court should refrain and restrain itself from answering academic issues. In this context, we may profitably refer to the decision rendered in *Central Areca Nut & Cocoa Marketting & Processing Cooperative Ltd. Vs. State of Karnataka and others,* (1997) 8 SCC 31 wherein the Apex Court was dealing with the contentions raised by the appellant that the High Court was not justified in dealing with the issue which was purely academic. In that context their Lordships expressed the opinion as under:-

State of Madhya Pradesh Vs. M/s. Shekhar Constructions, 2007

"6. In our view, the submissions of learned counsel for the appellant are liable to be accepted. The High Court had noticed that the matter had become academic and in fact, observed at the end of the judgment as follows:

"Mr.Dattu, learned government pleader, pointed out that 1977 notification had since been superseded by 1984 notification which extended the benefit to all and therefore, striking down 1977 notification would be academic. It may appear to be so."

But the High Court went on to observe that it was nonetheless deciding the issue, so that in future when power is exercised by the State, the State could benefit by what was stated in the judgment."

Thereafter, their Lordships proceeded to state as follows:-

"7. In our view, the High Court ought not to have gone into the question merely for the purpose of the future and, at any rate, ought to have noticed the highly inequitable consequences of its interference so far as the appellant-Society was concerned....."

Again their Lordships in paragraph 8 held as under:-

"8. In that view of the matter, we hold that the High Court ought not to have gone into the issue on merits....."

5. In this context, we may fruitfully refer to the decision rendered in the case of *State of Bihar V. Rai Bahadur Hurdut Roy Moti Lall Jute Mills,* AIR 1960 SC 378 wherein it has been ruled thus:-

"In cases where the vires of statutory provisions are challenged on constitutional grounds, it is essential that the material facts should first be clarified and ascertained with a view to determine whether the impugned statutory provisions are attracted; if they are, the constitutional challenge to their validity must be examined and decided. If, however, the facts admitted or proved do not attract the impugned provisions there is no occasion to decide the issue about the vires of the said provisions. Any decision on the said question would in such a case be purely academic. Courts are and should be reluctant to decide constitutional points merely as matters of academic importance."

6. In view of the aforesaid enunciation of law we restrict the reference only to the extent whether the decision rendered in *Pandey Construction Co.* (supra) is correct or not.

7. To appreciate the controversy in proper perspective the factual backdrop in the case of *Pandey Construction Co.* (supra) needs to be exposited. A Civil Revision was filed under Section 19 of the 1983 Act before this Court. The said revision was barred by limitation. An application was filed seeking condonation of delay. On behalf

of the respondents a preliminary objection was advanced that the delay was not condonable in view of the decision rendered in *Nagar Palika Parishad, Morena vs. Agrawal Construction Co.*, 2004(II) MPJR SN 55. It is worth-noting a Special Leave Petition was preferred against the decision of the Division Bench in *Nagarpalika Parishad Morena* (supra) and the Apex Court dismissed the Special Leave Petition. Regard being had to the preliminary objection raised, two questions were referred by the Division Bench for consideration by the Full Bench:-

> "(a) Whether the power of High Court for exercise of revisional jurisdiction under section 19 of the M.P. Madhyastyam Adhikaran Adhiniyam, 1983 is totally constricted and restricted to a period of three months of the passing of the award which is the limitation prescribed for an aggrieved party or it can exercise such power of revision *suo motu* within a reasonable period of time that can travel beyond three months ?
>
> (b) Whether the decision rendered in the case of *Nagarpalika Parishad vs. Agrawal Construction Co.*, 2004(2) MPLJR 374 would be a binding precedent ?

8. The Full Bench took note of the order passed by the Apex Court in *Nagarpalika Parishad* (supra) and expressed the opinion in paragraph 24 as under:-

> "24. In our opinion, the order passed by Supreme Court in *Nagarpalika Parishad, Morena* (supra) is a speaking order, gives reasons for refusing to grant leave, thus, statement of law contained in the order is a declaration of law by Supreme Court within the meaning of Article 141 of Constitution of India. The findings recorded by Supreme Court bind the Court in any proceeding subsequent thereto. It is what is required of judicial discipline. Further it is well settled that a High Court cannot declare that a decision of Supreme Court is *per incuriam.*"

9. Thereafter the Full Bench addressed itself with regard to the exercise of suo motu power of revisional jurisdiction. Eventually in paragraph 31 the Full Bench answered the reference in the following terms:-

> "31. We, thus, answer the questions referred thus:
>
> (i) The decision rendered in Nagarpalika Parishad, Morena vs. Agrawal Construction Co., 2004(II) MPJR 374, by the Apex Court while dismissing the special leave petition is a binding precedent. The High Court cannot condone the delay if revision is preferred by an aggrieved party beyond a period of three months under Section 19 of the Act of 1983.
>
> (ii) It is, however, open to the High Court to exercise suo motu revisional revisional under section 189 of the M.P. Madhyastham

Adhikaran Adhiniyam, 1983 even beyond period of three months of passing of award. However, such power has to be exercised within reasonable time considering the facts and circumstances of the case and the nature of the order which is being revised. While rejecting the revision petition filed by an aggrieved part as barred by limitation, if the circumstances so warrant, the High Court may decide to exercise the power of revision suo motu and call for the record and award from the Tribunal."

10. As has been indicated earlier the Full Bench hearing the present civil revision was of the view that the decision rendered in *Pandey Construction Co.* (supra) requires reconsideration as it had not considered the Full Bench decision rendered in *Mohd.Sagir* (supra) and further the Apex Court in *Nagar Palika Parishad, Morena* (supra) has placed reliance on *Nasiruddin and others Vs. Sitaram and others*, (2003) 2 SCC 577 and *Union of India Vs. Popular Construction Co.*, (2001) 8 SCC 470 though the view was different in the said two decisions inasmuch as their Lordships in the said decisions have held that the provisions of Section 29(2) of the Limitation Act would be applicable, if there is no bar and the words used "but not thereafter" which created an implied bar.

11. We have already stated that we will restrict our advertence with regard to the precedential facet and non-consideration of the Full Bench decision rendered in *Mohd.Sagir* (supra) in the backdrop of Section 19 of 1983 Act as that is the only issue which emanates in the present lis.

12. At this juncture it is condign to reproduce the order passed by the Division Bench in *Nagar Palika Parishad, Morena Vs. Agrawal Construction Co.* in Civil Revision No. 155/2003 decided on 25.8.2003:-

"Petitioner by Shri D.K.Katare, Advocate.

Respondent by Shri D.P.S. Bhadoriya and Shri Kamal Jain, Advocate.

Heard on M.C.P. No. 795/2003. This application is under section 5 of the Limitation Act. Preliminary objection has been raised by respondent that provisions under section 5 of Limitation Act are not applicable to the proceedings arising out of Madhya Pradesh Madhyastham Adhikaran Adhiniyam. In support of their contention Counsel for respondent referred a case of Nasiruddin and others vs. Sitaram and others, reported in (2003) 2 SCC 577, and submitted that this being provisions of Limitation Act are not applicable. The Act has not provided any provision for condoning delay in filing the revision.

Counsel for the petitioner submitted that since the powers under section 115 of the Code of Civil Procedure are conferred upon the High Court, therefore, provisions of Limitation Act will be applicable to the present

case. Section 19 of the Adhiniyam clearly specifies that the revision shall be filed within three months from the date of passing of the award but this section does not provide for extension of time or condoning the delay in filing the revision filed beyond the period of three months. In the absence of any specific provision for condoning delay the the delay in filing revision cannot be condoned.

The petitioner acquired knowledge of the award on 10-4-2003 after notice of execution was received. Thereafter they approached the Tribunal for certified copy on 5-5-2003 and received the certified copy on the same day and the revision is filed on 30-5-2003. Thus, the petitioner has not explained the delay between 10-4-2003 to 5-5-2003 and from 5-5-2003 till 30-5-2003. As such in the application sufficient cause has also not been shown. Even otherwise since provisions of Limitation Act are not applicable to the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, the application is dismissed.

Consequently, M.C.P. No.794/2003 is also dismissed and the Civil Revision is dismissed as barred by limitation."

13. The Division Bench had placed reliance on the decision rendered in the case of *Nasiruddin and others* (supra). The Apex Court while dismissing the Special Leave Petition has passed the following order:-

"Heard Mr. Sushil Kumar Jain, learned counsel for the petitioner at length.

In our view, there is no infirmity in the impugned judgment. The authority in the case of *Nasiruddin and others vs. Sita Ram Agrawal,* reported in (2003) 2 SCC 577 has been correctly followed. Same view has also been taken by this Court in the case of *Union of India vs. Popular Construction Co.,* reported in (2001)8 SCC 470: 2001 Arb.WLJ 600(SC). The Special Leave Petition stands dismissed with no order as to costs."

14. Thus, their Lordships have expressly held that the authority in the case of *Nasiruddin* (supra) had been correctly followed. Apart from that their Lordships have also expressed the opinion that the same view has also been taken in the case of *Popular Construction Co.* (supra). The Full Bench in *Pandey Construction Co.* (supra) after referring to the decisions rendered in *S.Shanmugavel Nadar Vs. State of T.N. and another,* (2002) 8 SCC 361, *Saurashtra Oil Mills Assn. Gujrat vs. State of Gujrat and another,* (2002) 3 SCC 202, *Collector of Customs, Bombay Vs. M/s. Elephanta Oil and Industries Ltd., Bombay,* AIR 2003 SC 1455, *Batiarani Gramiya Bank vs. Pallab Kumar and others,* (2004) 9 SCC 100 and *Hari Singh vs. State of Haryana,* (1993) 3 SCC 114 has expressed the opinion in paragraph 24 which we have reproduced above.

15. The reason for reference is that the law laid down in *Nasiruddin* (supra) and *Popular Constructions* (supra) pertain to a different field and the language employed in the enactments under consideration therein was different. The question that emanates is whether the High Court can scan or scrutinize the speaking reasons of an order of the Apex Court, more so, when their Lordships have expressly and unequivocally stated that the decision rendered by the Apex Court has been correctly applied by the Division Bench, and further their Lordships have relied upon the decision rendered in *Popular Construction* (supra) to indicate that the view expressed in *Nasiruddin* (supra) has been reiterated in the latter case. In this context, we may profitably refer to a three-Judge Bench decision in *Director of Settlements, A.P. and others Vs. M.R.Apparao and another,* (2002) 4 SCC 638 wherein their Lordships after referring to *Ballabhadas Mathuradas Lakhani v. Municipal Committee, Malkapur,* AIR 1970 SC 1002, *Krishena Kumar Vs. Union of India,* (1990) 4 SCC 207, *State of U.P. Vs. Synthetics and Chemicals Ltd.,* (1991) 4 SCC 139, *Arnit Das Vs. State of Bihar,* (2000) 5 SCC 488 in paragraph 12 have expressed the view as under:-

> "12. Mr.Rao then placed reliance on yet another decision of this Court in the case of *A-One Granites v. State of U.P.* to which one of us (Pattanaik J.) was a party. In that particular case the applicability of Rule 72 of the U.P. Minor Minerals (Concession) Rules, 1963 was one of the bones of contention before this Court, and when the earlier decision of the Court in *Prem Nath Sharma v. State of U.P.* was pressed into service, it was found out that in *Prem Nath Sharma case* the applicability of Rule 72 had never been canvassed and the only question that had been canvassed was the violation of the said Rules. It is in this context, it was held by this Court in Granite case as the question regarding applicability of Rule 72 of the Rules having not been referred to, much less considered by Supreme Court in the earlier appeals, it cannot be said that the point is concluded by the same and no longer res integra (SCC p. 544, para 14).
>
> This dictum will have no application to the case in hand on the question whether the judgment of this Court in Civil Apepal No.398 of 1972 can be held to be a law declared under Article 141."

Thereafter, their Lordships proceeded to state as follows:-

> "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. 398 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 of 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 constitutionally 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 o 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."

16. In view of the aforesaid we have no scintilla of doubt that the opinion expressed by the Full Bench in *Pandey Construction Co.* (supra) with regard to precedential value of the decision rendered by the Apex Court in *Nagar Palika Parishad, Morena* (supra) is correct inasmuch as the Apex Court in clear cut terms has ruled that the decision of the Apex Court had been correctly followed. That being the position there is no scope for probing whether the decision rendered in *Nasiruddin and others* (supra) and *Popular Constructions* (supra) are applicable to the provisions of 1983 Act. That is not and cannot be within the domain of the High Court. Ergo, we conclude and hold that the decision rendered in *Pandey Construction Co.* (supra) holding that the provisions of Limitation Act do not apply to a revision preferred under Section 19 of the 1983 Act is correct. Once it is so held, the question whether the Full Bench in *Pandey Construction Co.* (supra) should have considered the decision rendered in *Mohd. Sagir* (supra) pales into insignificance. We may put it on record that the decision in *Mohd. Sagir* (supra) was rendered in the context of M.P. Industrial Relations Act, 1960 and the said view was in relation to the said statute will hold the field.

17. Be it placed on record in the case of *Pandey Construction Co.* (supra) the Full

Bench has expressed the opinion that the High Court can exercise the power of revision suo motu and call for the records and award from the Tribunal and a such a power can be exercised within a reasonable period of time considering the facts and circumstances of the case and the nature of the order which is being revised. The said view is in accord with the language employed under Section 19 of the 1983 Act and hence, we concur with the same.

18. The reference is answered accordingly. Let the matter be listed before the appropriate Division Bench.

I.L.R.[2007] M.P., 1504

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice Dipak Misra, Mr. Justice Abhay Gohil, Mr. Justice S. Samvatsar & Mr. Justice S. K. Gangele

2 November, 2007

MANOJ KUMAR ....Appellant*

vs.

BOARD OF REVENUE and others ....Respondents

Majority View

A. Constitution of India-Articles 226,227-Writ of *Certiorari*-In issuing writ of *certiorari* High Courts acts in exercise of original jurisdiction and not in exercise of appellate or revisional jurisdiction-Power to issue writ is original jurisdiction.

The purpose of referring to the aforesaid decisions is only to show that in issuing a writ of certiorari the High Court acts in exercise of original jurisdiction and not in exercise of appellate or revisional jurisdiction. Their Lordships have made a distinction with regard to supervisory jurisdiction and appellate or revisional jurisdiction. As is evincible, the power to issue writs under Article 226 of the Constitution is original and the jurisdiction exercised is original jurisdiction. (para 31)

B. Constitution of India-Articles 226, 227-Distinction between-Proceeding under Article 226 are in exercise of original jurisdiction while proceeding under Article 227 are only supervisory.

If the analysis of law is properly understood it is clear as noon day that the High Courts exercise original jurisdiction under Article 226 of the Constitution and supervisory jurisdiction and the power of superintendence under Article 227 of the Constitution. (Para 33)

C. Constitution of India-Article 227-Power of Superintendence-Power of Superintendence conferred on High Court is power restricted to the

*W.A. No. 395/2007 (G)

Courts and tribunal in relation to which it exercise jurisdiction-Power under Article 226 is not confined to Courts or Tribunals but extends to any person or authority.

At this juncture we may fruitfully state that the word 'superintendence' has not been used in Article 226 of the Constitution. It is also evident that the term 'writs' is not referred to in Article 227. On a scrutiny of Article 227 it would be crystal clear that power of superintendence conferred on the High Courts is a power that is restricted to the courts and tribunal in relation to which it exercises jurisdiction. On the contrary the power conferred on the High Court under Article 226 is not constricted and confined to the courts and tribunals but it extends to any person or authority. (Para 34)

D. Constitution of India-Article 226-Original Jurisdiction-When a writ is issued under Article 226 of Constitution in respect of Court or Tribunals or administrative authorities it is done in exercise of original jurisdiction.

From the aforesaid enunciation of law it is quite vivid that two powers are distinct and that is why their Lordships resorted to Article 226 for one part and invoked Article 227 of the Constitution for the other facet. It is worth noting that Articles 226 and 227 of the Constitution of India are supplement to each other but that does not convey that the power exercised under them are identical in all cases. The Apex Court, time and again, has expressed the view that the power exercised under Article 226 is to be characterized as supervisory power and not power exercised in appellate or revisional jurisdiction. The consistent view of the Apex Court is that the power exercised under Article 226 is in exercise of original jurisdiction and not under 'supervisory jurisdiction'. To elaborate: whenever word 'supervisory' has been used in the context of Article 226 it is in contrast with the appellate or revisional jurisdiction. When a writ is issued under Article 226 of the Constitution in respect of Courts or tribunals it is done in exercise of original jurisdiction and the parameters are different than Article 227 of the Constitution of India. It is worth noting that the power under Article 227 was there in a different manner under the Government of India Act. Power of superintendence is distinct from the exercise of power of revisional or supervisory jurisdiction which is a facet of the power superintendence. The confusion occurs when one applies the principle of equivalence or equates the exercise of supervisory power and power of superintendence with original or supervisory jurisdiction. There is an acceptable nuance between the concept of jurisdiction and exercise of power by certain parameters. Both do come within the fundamental concept of 'judicial review' but the jurisdiction exercised is different. In *Achutananda Baidya Vs. Prafullya Kumar Gayen,* AIR 1997 SC 2077 it has been held that power of superintendence under Article 227 includes within its concept the power of judicial review. In our considered opinion when under Article 226 a writ is issued it is issued in exercise of original jurisdiction whether against a tribunal or inferior courts or administrative authorities. (Para 37)

E. **Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, M.P. 2005-Section 2(1)-Bar of appeal against order passed under Article 227-Pleadings in writ petition, nature, character and contour of order, directions issued, nomenclature given and jurisdictional prospective are to be perceived-Merely because order under challenge emerges from inferior tribunal or subordinate courts cannot be treated for all purposes to be under Article 227.**

Ergo, the order passed in the Special Leave Petition arising from *Rama & Co.* (supra) would not be a binding precedent on the High Court and the High Court is obliged to follow the earlier view expressed by the Apex Court. We may note with certitude that the order passed in *Rama & Co.* (supra) would be binding between the parties to the said lis. (Para 61)

G. **Constitution of India-Article 141-Binding Precedent-Dismissal of appeal from Rama & Co. is not binding precedent as there are earlier judgments in field and High Court bound to follow earlier decisions-View taken in Dr. Jaidev Siddha and others cannot be treated to have been impliedly overruled due to dismissal of SLP preferred against order rendered in case of Rama and Company-Law laid down in case of Dr. Jaidev Siddha holds field and principles laid down therein have full applicability.**

In view of the aforesaid premised reasons, we are of the humble view that dismissal of an appeal from *Rama & Co.* (supra) is not a binding precedent as there are earlier judgments in the field and the High Court bound to follow the earlier decisions as per the law laid down in *Raghuvir Singh (dead) byLRs. Etc.* (supra), *Indian Oil Corporation Ltd.* (supra), *N.S. Giri* (supra) *Chandra Prakash* (supra), *Jabalpur Bus Operators association & Ors.* (supra) and *S. Brahamanand and others* (supra).

(ix) The view taken by the Full Bench in *Dr. Jaidev Siddha and others* (supra) cannot be treated to have been impliedly overruled due to dismissal of the Special Leave Petition preferred against the order rendered in the case of *Rama and Company* (supra).

(x) The law laid down in the case of Dr. Jaidev Siddha (supra) holds the field and the principles laid down therein will have full applicability.

[Paras 63, 67 (ix)(x)]

Minority view

H. **Constitution of India-Article 141-Binding Precedent-Judgment passed in case of Dr. Jaidev Siddha is per incuriam-View taken by Supreme Court in SLP arising out of order rendered in case of Rama and Company is binding precedent as sole question in SLP was about maintainability of appeal after coming into force of Act, 2005.**

Thus, now only two implications arise from the order of the Apex Court and it is not open to this Court to examine the correctness of the judgment of the Division Bench in the case of Rama and Company or by the Full Bench in the case of Dr.Jaidev Siddha and only option for this Court is to hold that the judgment of the Apex Court will hold the field, because any number of Judges of the High Court cannot refuse to follow the dictum of the Apex Court which is directly on the question to hold that writ appeal challenging the judgment of the learned single Judge in a petition challenging the order of the Tribunal is maintainable. Judgment rendered by the Full Bench in the case of *Dr.Jaidev Siddha* (supra) is per incuriam as the same was passed after decision of the Apex Court in SLP No.9186/2007.

So far as this Court is concerned, the view taken by the Supreme Court in SLP No. 9186/2007 is a binding precedent as the sole question before the Supreme Court in the said SLP was about the maintainability of the appeal after coming into force of Adhiniyam of 2005 and earlier the Supreme Court had no occasion to deal with such a situation. Hence, so far at this Court is concerned, said view has attained finality and cannot be reopened in view of the aforesaid decision of the Apex Court. Therefore, judgment in SLP No.9186/2007 is a binding precedent which is to be followed by this High Court unless the view taken by the Apex Court in the said SLP is overruled.

(Paras 18 and 20)

Cases Referred :

Jamshed N. Guzdar Vs. State of Maharashtra and Others etc., AIR 2005 SC 862, *Lakhan Lal Sonkar Vs. Gun Carriage Factory*, 2007 (1) MPHT 335, *State of MP and Others Vs. M.S. Wakankar and Another*, 2007 (1) MPLJ 99, *Umaji Vs. Radhika Bai*, AIR 1986 SC 1272, *Surya Dev Rai Vs. Ram Chander Rai and Others*, AIR 2003 SC 3044, *Harivishnu Kamath Vs. Ahmad Ishaque*, AIR 1955 SC 233, *Custodian of Evacuee Property Vs. Khan Saheb Abdul Shukoor*, AIR 1961 SC 1087, *Ranjeet Singh Vs. Ravi Prakash*, AIR 2004 SC 3892, *Krishan Prasad Gupta Vs. Controller, Printing and Stationary*, AIR 1996 SC 408, *L. Chandra Kumar Vs. Union of India*, (1997) 2 SCC 261, *Smt. Shiva Dubey (Jhira) Vs. Sumit Ranjan Dubey*, (WA No.310/2006 decided on 14.8.2006), *Sushilabai laxminarayan Mudaliyar and Others Vs. Nihalchand Waghajibhai Shaha and Others*, AIR 1993 Suppl (1) SCC 11, *Ratnagiri District Central Co-operative Bank Ltd. Vs. Dinkar Kashinath Watve*, (CA No.520 of 1989 decided on 27.1.1989, *Mangalbhai and Others Vs. Radheyshyam*, AIR 1993 SC 806 *Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad*, (1999) 6 SCC 275, *Nagendra Nath Bora and Another Commissioner of Hills Division and Appeals*, AIR 1958 SC 398, *T.C. Basappa Vs. T. Nagappa and Another*, AIR 1954 SC 440, *Rupa Ashok Hurra Vs. Ashoka Hurra and Another*, AIR 2002 SC 1771, *Kishorilal Vs. Sales Officer, District Land Development Bank and Others*, (2006) 7 SCC 496, *Ramesh Vs. Gendalal Motilal Patni*, AIR 1966 SC 1445, *State of Gujrat Vs. Vora Fiddali Bardruddin Mithibarwala*, AIR 1964 SC 1043, *National Sewing Thread Co. Ltd. Vs. James*

Chadwick & Bros.Ltd., 1953 SC 357, *(Penugonda) Venkataratnam and another vs. Secy. Of State and others*, AIR 1930 Madras 896, *M. Ramayya v. The State of Madras, represented by the Secy., Home Department and another*, AIR (39) 1952 Madras 300, *State of Uttar Pradesh Vs. Vijayanand*, AIR 1963 SC 946, *Ahmedabad Mfg. & Calico Ptg. Co. Vs. Ramtahel Ramnand*, AIR 1972 SC 1598, *Achutananda Baidya Vs. Prafullya Kumar Gayen*, AIR 1997 SC 2077, *Kunhayammed and others Vs. State of Kerala and another*, (2000) 6 SCC 359, *Union of India and another Vs. Raghubir Singh (dead) by LRs. Etc.*, AIR 1989 SC 1933, *Indian Oil Corporation Ltd. Vs. Municipal Corporation and another*, AIR 1995 SC 1480, *N.S.Giri Vs. Corporation of City of Mangalore and others*, (1999) 4 SCC 697, *Chandra Prakash Vs. State of U.P. and another*, 2002 AIR SCW 1573, *Pradip Chandra Pariza and Others Vs. Pramod Chandra Patnaik And Others*, (2002) 1 SCC 1, *Jabalpur Bus Operators Association & ors. Vs. State of M.P. and another*, 2003 (1) MPJR 158, *State of M.P. Vs. Balveer Singh*, 2001 (2) MPLJ 644, *S.Brahmanand and others Vs. K.R.Muthugopal (Dead) and others*, (2005) 12 SCC 764, *Ratnagiri District Central Co-operative Bank Ltd. Vs. Dinkar Kashinath Watve* (C.A. No.520 of 1989 decided on 27.1.1989), *Mangalbhai and Others Vs. Dr. Radhyshyam*, AIR 1993 SC 806, *Hindustan Lever Limited Vs. B.N. Dongre*, (1994) 6 SCC 157, *Kanyaiyalal Agrawal and Others Vs. Factory Manager, Gwalior Sugar Co. Ltd.*, AIR 2001 SC 3645, *Kishorilal Vs. Sales Officer, District Land Development Bank and Others*, (2006) 7 SCC 496, *Director of Education (Secondary) and another Vs. Pushpendra Kumar and others*, AIR 1998 SC 2230, *Director of Settlements, AP and Others Vs. M.R. Apparao and Another*, (2002) 4 SCC 638, *State of Madhya Pradesh vs. M.P. Wakankar*, 2007 (1) MPLJ 99, *Hari Vishnu Kamath vs. Ahmad Ishaque and others*, AIR 1955 SC 233, *Anil Kumar Neotia vs. Union of India*, AIR 1988 SC 1353, *Smt. Somwanti vs. State of Punjab*, AIR 1963 SC 151, *Tirupati Balaji Developers Pvt.Ltd vs. State of Bihar*, AIR 2004 SC 2351, *Suga Ram vs. State of Rajasthan*, AIR 2006 SC 3258, *State of West Bengal vs. Ashish Kumar Roy*, AIR 2005 SC 254, *Kunhayammed and others vs. State of Kerala and another*, (2000) 6 SCC 359.

S.K.Vajpai with *Mukesh Balapura*, for the appellant

S.B.Mishra, Addl. Adv. General with *Vivek Khedkar*, G. A.for the respondent/ State

R.D.Jain, K.N.Gupta and *H.D.Gupta, Arvind Dudawat, M.P.S.Raghuvanshi, Guarav Samadhiya, D.P.S.Bhadoriya*,and *Ajay Bhargava, Amicus Curiae*

Cur.adv.vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J.:–(For himself and on behalf of Hon'ble the Chief Justice, Abhay Gohil and S.K.Gangele,JJ.)-

INTRODUCTORY BACKDROP

Questioning the assailability and substantiality of the order passed by the learned single Judge in Writ Petition No.5731/2006 the present writ appeal was preferred under Section 2 of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for short 'the 2005 Adhiniyam'). When the same was placed before a Division Bench for the purpose of admission on 20.8.2007 the Bench hearing the appeal took note of the decision rendered in the case of *Rama and Company Vs. State of Madhya Pradesh and Another,* 2007 (II) MPJR 229 wherein a view was expressed to the effect that an order passed by the learned single Judge while dealing with the sustainability of the order passed by the Board of Revenue is delineation under supervisory jurisdiction under Article 226 or 227 of the Constitution of India and not in exercise of original jurisdiction under Article 226 of the Constitution and the dictum propounded in *Dr. Jaidev Siddha and Others Vs. Jaiprakash Siddha and Others,* 2007 (2) MPJR (FB) 361= 2007 (3) MPLJ 595 whereby the view expressed in *Rama and Co.* (supra) was overruled, and further noticed the order passed by the Apex Court in the Special Leave Petition affirming the order passed in Rama and Co. (supra) and directed the matter to be listed on 23.8.2007. Thereafter the Division Bench hearing the appeal on admission on the subsequent date thought it condign and seemly to refer the matter to a larger Bench regard being had to the far reaching effect and impact of the controversy involved because of the order passed by the Apex Court in the Special Leave Petition and the effect of the Full Bench decision in the said context. That is how the matter has travelled to the larger Bench to be dwelled upon with regard to the scope of maintainability of the Writ Appeal under the 2005 Adhiniyam.

PRELUDE IN PARTICULARITY

2. M.P. Uchcha Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981 was passed by the State Legislature which received assent of the President on 21.6.1981. In *Balkrishna Das and Others Vs. Perfect Pottery Co. Ltd., Jabalpur and Others,* AIR 1985 MP 42 (FB) 1981 Adhiniyam was declared *ultra vires* and it was further held that the said Act does not extinguish the right of appeal under Clause 10 of the Letters Patent. The decision rendered in the case of *Balkrishna Das* (supra) and other decisions from the Bombay High Court travelled to the Apex Court. The Constitution Bench of the Apex Court in *Jamshed N. Guzdar Vs. State of Maharashtra and Others etc.,* AIR 2005 SC 862 upheld the validity of 1981 Adhiniyam.

3. After the constitutional validity of the 1981 Adhiniyam was sustained the Letters Patent Appeals pending in this High Court, being not maintainable, were dismissed. At that juncture the State Legislature enacted the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhinyam, 2005 (Act No.14 of 2006). The said Act was brought into existence to provide for an appeal from a judgment or order passed

by one judge of the High Court in exercise of the original jurisdiction to a Division Bench of the same High Court. Section 2 of the Act, to which we shall advert to in detail at a later stage, postulates 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. It has also been provided therein 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.

4. Keeping in view the language employed under the 2005 Adhiniyam in *Lakhan Lal Sonkar Vs. Gun Carriage Factory,* 2007 (1) MPHT 335 wherein the legal propriety of the order passed by the learned single Judge in a writ petition arising out of the award passed by the Labour Court was called in question, an objection was raised with regard to the maintainability of the appeal on the foundation that the order passed by the learned single Judge is one under Article 227 of the Constitution of India. The Division Bench of this Court repelled the stand and opined that the law is now well settled by the Apex Court that where the learned single Judge does not mention the provision under which the order has been passed and from the pleadings in the writ petition and the reliefs claimed in the writ petition, the Court can infer that the same is not only under Article 227 but also under Article 226 of the Constitution of India.

5. In *State of MP and Others Vs. M.S. Wakankar and Another,* 2007 (1) MPLJ 99 a similar objection was taken and the Division Bench dealing with the same reiterated the view expressed in *Lakhan Lal Sonkar* (supra).

6. When the matter stood thus, an order passed in a writ petition assailing the order passed by the Board of Revenue was challenged in a writ appeal *(Rama & Company Vs. State of M.P. and anr.,* 2007 (II) MPJR 229) under Section 2 of the 2005 Adhiniyam. The Division Bench referred to Clause 10 of the Letters Patent and the language employed under Section 2 of the 2005 Adhiniyam and expressed the opinion that for exercising powers under the said provision it was sine qua non that the judgment must have been delivered in exercise of original jurisdiction of the High Court. The Division Bench proceeded to express the view thus:-

> "....Exercise of original jurisdiction is not a condition precedent for exercising the jurisdiction by Division Bench under LPA. While, as per Section 2 of the Adhiniyam, 2005, a judgment or order passed by one Judge of the High Court must be in exercise of original jurisdiction under Article 226 of the Constitution of India and there is a specific bar for exercise of appellate jurisdiction against the appellate orders and orders passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.
>
> 13. From comparative reading of Clause 10 of the Letters Patent and Section 2 of the Adhiniyam, 2005, it is clear that the scope of both

the privisons are not parimateria and the scope of appeal under the Adhiniyam, 2005 is much narrower than the power under clause 10 of the letters Patent. The bar of exercising appellate jurisdiction under Article 227 of the Constitution of India is not specifically mentioned in the Letters Patent. Similarly there was no specific bar for exercising jurisdiction against an interlocutory order passed by the Division Bench, but these two bars are specifically inserted in the Adhiniyam, 2005, which makes the difference in the two provisions."

7. After so stating the Division Bench referred to the decisions rendered in *Umaji Vs. Radhika Bai,* AIR 1986 SC 1272, *Surya Dev Rai Vs. Ram Chander Rai and Others,* AIR 2003 SC 3044, *Harivishnu Kamath Vs. Ahmad Ishaque,* AIR 1955 SC 233, *Custodian of Evacuee Property Vs. Khan Saheb Abdul Shukoor,* AIR 1961 SC 1087, *Ranjeet Singh Vs. Ravi Prakash,* AIR 2004 SC 3892, *Krishan Prasad Gupta Vs. Controller, Printing and Stationary,* AIR 1996 SC 408 and *L. Chandra Kumar Vs. Union of India,* (1997) 2 SCC 261 and expressed the view as under:-

"20....Section 2 of the Adhiniyam, 2005 specifically lays down that an appeal shall lie from the order passed by one Judge of the High Court in exercise of original jurisdiction.

21. Thus, the condition precedent for exercising powers of the appellate Court under the Adhiniyam, 2005 is that the learned Single Jdge must be invoke in its original jurisdiction. Thus, it is clear that merely because the High Court has exercise its jurisdiction under Article 226 of the Constitution of India while issuing a writ of certiorari, even then an appeal shall not lie, because the High Court while issuing a writ of certiorari under Article 226 of the Constitution of India is in fact exercising supervisory jurisdiction and not original jurisdiction."

(underlining is ours)

8. Thereafter the Division Bench referred to the decisions in *State of MP Vs. M.S. Wakankar,* 2007 (1) MPLJ 99 and *Smt. Shiva Dubey (Jhira) Vs. Sumit Ranjan Dubey* (WA No.310/2006 decided on 14.8.2006) and in paragraphs 24 and 25 expressed thus:-

"24. The argument raised by the learned counsel for the appellant that the appeal is maintainable against every order passed by the learned Single Judge in exercise of powers under Article 226 of the Constitution of India is not supported by the language of Section 2 of the Adhiniyam, because if the said interpretation is made, the exercise of original jurisdiction will become redundant. The legislature by use of the words "in exercise of its original jurisdiction" has made its intention clear that an appeal shall lie only if the learned single Judge has exercised its original jurisdiction. The words "in exercise of its original

jurisdiction" qualifies for the words "Article 226 of the Constitution of India"."

25. Thus, it is clear that even though an appeal against an order passed by the learned Single Judge in exercise of jurisdiction under Article 226 will lie only if the learned Single Judge has exercise power as an original jurisdiction and not under supervisory jurisdiction. The supervisory jurisdiction of the High Court cannot be equated with original jurisdiction. In such circumstances, even if the learned Single Judge has exercised its jurisdiction under article 226 of the Constitution of India and issued a writ of certiorari against an order passed by any Tribunal or a court, then an appeal will not lie."

(Emphasis added)

9. After rendering of the decision in *Rama and Co.* (supra), another Division Bench of this Court perceiving two conflicting views regarding maintainability referred the matter to a larger Bench. The larger Bench discerned the decisions rendered in the cases of *Smt. Shiva Dubey (Jheera)* (supra), *Lakhan Lal Sonkar* (supra), *MS. Vakankar* (supra), *Rama and Co.* (supra) *Hari Vishnu Kamath* (supra), *Umaji Keshao Meshram* (supra), *Sushilabai laxminarayan Mudaliyar and Others Vs. Nihalchand Waghajibhai Shaha and Others,* AIR 1993 Suppl (1) SCC 11, *Ratnagiri District Central Co-operative Bank Ltd. Vs. Dinkar Kashinath Watve,* (CA No.520 of 1989 decided on 27.1.1989, *Mangalbhai and Others Vs. Radheyshyam,* AIR 1993 SC 806 *Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad,* (1999) 6 SCC 275, *Surya Dev Rai* (supra), *Custodian of Evacuee Property, Bangalore* (supra), *Nagendra Nath Bora and Another Commissioner of Hills Division and Appeals,* AIR 1958 SC 398, *T.C. Basappa Vs. T. Nagappa and Another,* AIR 1954 SC 440, *Rupa Ashok Hurra Vs. Ashoka Hurra and Another,* AIR 2002 SC 1771, *Kishorilal Vs. Sales Officer, District Land Development Bank and Others,* (2006) 7 SCC 496, *Balkishan Das (supra), Jamshed N. Guzdar (supra), Ramesh Vs. Gendalal Motilal Patni,* AIR 1966 SC 1445. Thereafer one of us (Dipak Misra,J.) speaking on behalf of Hon'ble the Chief Justice and for himself expressed thus:

"17. From the aforesaid enunciation of law it is quite vivid and luminescent that the pleadings in the writ petition, nature of the order passed by the learned Single Judge, character and the contour of the order, directions issued, nomenclature given, the jurisdictional prospective in the constitutional context are to be perceived. It cannot be said in a hyper technical manner that an order passed in a writ petition, if there is assail to the order emerging from the inferior tribunal or subordinate courts has to be treated all the time for all purposes to be under Article 227 of the Constitution of India. Phraseology used in exercise of original jurisdiction under Article 226 of the Constitution in

Section 2 of the Act cannot be given a restricted and constricted meaning because an order passed in a writ petition can tantamount to an order under Articles 226 or 227 of the Constitution of India and it would depend upon the real nature of the order passed by the learned Single Judge. To elaborate: whether the learned Single Judge has exercised his jurisdiction under Article 226 or under Article 227 or both would depend upon various aspects and many a facet as has been emphasized in the aforequoted decisions of the Apex Court. The pleadings, as has been indicated hereinabove, also assume immense significance. As has been held in the case of Surya Dev Rai (supra) a writ of certiorari can be issued under Article 226 of the Constitution against an order of a tribunal or an order passed by the subordinate court. In quintessentiality, it cannot be put in a straitjacket formula that any order of the learned Single Judge that deals with an order arising from an inferior tribunal or the subordinate court is an order under Article 227 of the Constitution of India and not an order under Article 226 of the Constitution. It would not be an overemphasis to state that an order in a writ petition can fit into the subtle contour of Articles 226 and 227 of the Constitution in a composite manner and they can co-inside, co-exit, overlap or imbricate. In this context it is apt to note that there may be cases where the learned single Judge may feel disposed or inclined to issue a writ to do full and complete justice because it is to be borne in mind that Article 226 of the Constitution is fundamentally a repository and reservoir of justice based on equity and good conscience. It will depend upon factual matrix of the case.

18. In view of our aforesaid analysis we are disposed to hold that the law laid down in the cases of *Lakhan Lal Sonkar* (supra), *M/s. Wakankar* (supra) and *Smt.Shiva Dubey (Jheera)* (supra) lay down the law correctly being in consonance and accord of the decisions of the Apex Court and the decision rendered in *M/s. Ram and Co.* (supra) does not lay down the law soundly and accordingly the same is hereby overruled."

10. At this juncture, it is apposite to note that prior to delivery of the decision by the Full Bench, the order passed in *Rama & Company* (supra) was assailed before the Apex Court in S.L.P. (Civil) No.9186/2007). The Apex Court in the said case on 9.7.2007 had passed the following order: -

"Delay condoned.

There is no ground to interfere with the order of the High Court as the

question of law had already been decided by this Court and if any Writ Petition is filed before the High Court, against the order of the Board of Revenue and against that order of the High Court no L.P.A. Is maintainable as this is not the original order. The Special Leave Petition is therefore, dismissed."

11. After the said order was passed, as has been indicated earlier, the Division Bench keeping in view the effect and impact of the order of the Apex Court on the Full Bench decision and the far reaching effect referred the matter to the larger Bench.

12. Be it noted, the Division Bench looking to the principles of ratio decidendi, stare decisis, per incuriaum and rule of sub silentio and the law of binding precedent framed the following question:-

"What is the effect of the order of the Supreme Court passed in S.L.P in the matter of Rama & Company (supra) on the status and effect of the decision of the Full Bench as discussed above and what should be the correct position under the law which should be followed by the Division Bench?"

13. We have heard learned counsel for the appellant, learned counsel for the respondent State and learned counsel who have appeared as *amicus curiae.*

LETTERS PATENT AND SECTION 2 OF THE 2005 ADHINIYAM

14. By virtue of Clause 1 of the Letters Patent the High Court of Nagpur was established. The said clause also declared the Nagpur High Court to be a Court of Record. Clause 10 of the Letters Patent reads as under:

"10. Appeal to the High Court from Judges of the Courts- And we do further ordain that an appeal shall lie to the said High Court of Judicature at Nagpur from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of the appellate jurisdiction by a court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the powers of superintendence under the provisions of section one hundred and seven of the Government of India Act, or in the exercise of criminal jurisdiction of one Judge of the said High Court or one Judge of any Division Court, pursuant to section one hundred and eight of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a Judgment of one of the said High Court or one Judge of any Division Court, pursuant to section one hundred and eight of the Government of India Act, made in the exercise of appellate jurisdiction in respect

> of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgment of Judge of the said High Court or of such Division Court shall be to Us, Our Heirs and Successors in Our or Their Privy Council, as hereinafter provided."

15. In *Umaji Keshao Meshram* (supra) a two-Judge Bench of the Apex Court was dealing with Clause 15 of the Letters Patent of the Chartered High Courts. The Apex Court traced the history of Letters Patent, scrutinised the powers conferred on the Chartered High Courts under the Government of India Act, 1935 and the various provisions therein, adverted to the speech of Dr. Ambedkar in the Constituent Assembly with regard to Draft Constitution, referred to the decision rendered in *State of Gujrat Vs. Vora Fiddali Bardruddin Mithibarwala,* AIR 1964 SC 1043 and thereafter in paragraph 80 expressed the opinion as under:

> "80. What has been stated above would show that it is erroneous to characterize the Government of India Acts as ordinary laws and not as constitutional laws. It is true that these Constitution Acts were given to a subject country by a foreign constituent and legislative body but then we must remember that it was this very foreign constituent and legislative body which brought into being the Constituent Assembly, freed it of all limitations and made it possible for it to give to India its Constitution."

16. In paragraph 88 their Lordships referred to the decision rendered in the case of *National Sewing Thread Co. Ltd. Vs. James Chadwick & Bros.Ltd.,* 1953 SC 357 wherein it had been opined that the Bombay High Court possessed all the jurisdiction that it had at the time of commencement of 1915 Act and could also exercise all such jurisdictions that would be conferred upon it from time to time by the legislative powers conferred by that Act and, therefore, unless the right of appeal was otherwise excluded, an intra-court appeal lay under clause 15 of the Letters Patent of the Bombay High Court. It was also reiterated therein that the same would apply to the Letters Patent of Calcutta and Madras High Courts. It was also stated that the Letters Patent establishing the Lahore High Court constitute the Charter of the Punjab High Court. Clause 10 of the Letters Patent is in pari materia with Clause 15 of the Letters Patent of the Chartered High Courts. After so holding in paragraph 101 their Lordships proceeded to state as follows:

> "101. Consequently, where a petition filed under Article 226 of the Constitution is according to the rules of a particular High Court heard by a single Judge, an intra-Court appeal will lie from that judgment if such a right of appeal is provided in the charter of that High Court, whether such Charter be Letters Patent or a Statute....."

17. Thus, it is quite clear that the clause 10 of the Letters Patent is pari materia with Clause 15 of the Letters Patent of the Chartered High Courts. The said clause was interpreted to convey that if the appeal is not excluded under the Letters Patent, an appeal did lie to a Division Bench from the order of a single Judge. Keeping in view the language employed "order passed or made in the exercise of the power of superintendence under the provisions of section one hundred seven of the Government of India Act" it has been held in many a decision that an appeal from such an order did not lie. Similarly, unnecessary to emphasise, would be the position where there is a statutory embargo or interdict.

18. At this juncture we may aptly refer to the object and reasons of 2005 Adhiniyam. The relevant part of it is reproduced below:-

> "Statement of objects and reasons.- At present there is no provision of law to file an against 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 by virtue of the Madhya Pradesh Uchcha Nyayalaya (Letters Patent Appeal Sampati) Adhiniyam, 1918 (No.29 of 1981). (Emphasis added)

19. Section 2 of the Adhiniyam is relevant for the present purpose. The necessitous part is reproduced below:-

> "2. Appeal to the Division Bench of the High Court from a Judgment or order of one Judge of the High Court made in exercise of original jurisdiction-(1) An appeal shall lie from a Judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India to a Division Bench Comprising of two judges of the same High Court:
>
> Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.
>
> (2) An appeal under sub-section (1) shall be filed within 45 days from the date of order passed by a single Judge:
>
> Provided that any appeal may be admitted after the prescribed period of 45 days if the petitioner satisfies the Division Bench that he had sufficient cause of not preferring the appeal within such period."

20. In the case of *Rama & Co* (supra) it has been held that appeal under the Letters Patent and appeal under the 2005 Adhiniyam is different. Under the Letters Patent an appeal did lie from decision passed under Article 226 of the Constitution. What has been expressed in *Rama & Co.* (supra) is that when Section 2 uses the words "in exercise of its original jurisdiction" the said words

qualify the words "Article 226 of the Constitution of India" and even if the learned single Judge exercises the jurisdiction under Article 226 of the Constitution of India and issues a writ of *certiorari* against a court or tribunal an appeal would not lie against such an order passed by the learned single Judge as it is an order in exercise of supervisory jurisdiction.

21. The question that falls for consideration is whether an appeal provided under Letters Patent, especially arising from the writ petition is different than that emerges and emanates under Section 2 of the Adhiniyam. As has been noticed in *Rama & Co.* (supra) the Division Bench laid emphasis on the terms "in exercise of its original jurisdiction" and expressed the view that even if the writ of certiorari is issued under Article 226 not in exercise of its original jurisdiction, no writ appeal would lie. It is manifest that for issue of writ under Article 226 two compartments have been carved out: first, "in exercise of original jurisdiction" and second, "supervisory jurisdiction". To appreciate the same it is imperative to understand certain concepts to which, presently we proceed to advert.

WRIT OF *CERTIORARI*, THE ORIGINAL JURISDICTION, SUPERVISORY JURISDICTION AND POWER OF SUPERINTENDENCE

22. At this juncture, it is necessary to notice few decisions in the field which relate to issue of writ of *certiorari* and the jurisdictional canvass. In *(Penugonda) Venkataratnam and another vs. Secy. of State and others*, AIR 1930 Madras 896 a Division Bench of Madras High Court after referring to the Indian High Courts Act, 1861, the Letters Patent of 1867 and Section 110 of the Government of India Act, 1919 dealt with the fundamental concept of original jurisdiction and held as under:-

> ".....The fact remains, that Governors and Ministers are declared not amenable to the original jurisdiction of the High Court in respect of their official acts. Then is the jurisdiction in certiorari original ? I think the question must be answered in the affirmative. By S. 34, Judicature Act of 1873 (corresponding to S.55 of the present Act of 1925), to the Queen's Bench Division of the High Court were assigned:
>
> "All causes and matters .... .. which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction."
>
> This is explained thus in the "Supreme Court Practice:"
>
> "Matters within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction at the commencement of this Act included the supervision of decisions of inferior tribunals generally by *certiorari:* see the Supreme Court Practice 1928, P.1610."
>
> (Emphasis added)

23. In *M. Ramayya v. The State of Madras, represented by the Secy., Home Department and another,* AIR (39) 1952 Madras 300 the Division Bench was considering maintainability of an appeal under Clause 15 of the Letters Patent. A preliminary objection was advanced by the respondents therein that no appeal did lie against an order of a Single Judge while issuing or refusing to issue a writ of *certiorari*. The Bench referred to inherent of power of jurisdiction from the King's Bench of England under the Charter of 1866 whereby it could issue prerogative writs within ordinary original jurisdiction of the High Court. After analysing various provisions the Bench expressed the view in paragraph 8 which reads as under:-

> "....These authorities make it plain that the power to issue the writ is original and the jurisdiction exercised is original jurisdiction."
>
> (Emphasis supplied)

24. The aforesaid decisions were considered in *State of Uttar Pradesh Vs. Vijayanand,* AIR 1963 SC 946. Their Lordships in paragraph 9 have expressed the view as under:-

> "(9) Article 226 confers a power on a High Court to issue the writs, orders, or directions mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. This is neither an appellate nor a revisional jurisdiction of the High Court. Though the power is not confined to the prerogative writs issued by the English Courts, it is modelled on the said writs mainly to enable the High Courts to keep the subordinate tribunals within bounds. Before the Constitution, the chartered High Courts, that is, the High Courts at Bombay Calcutta and Madras, were issuing prerogative writs similar to those issued by the King's Bench Division, subject to the same limitations imposed on the said writs. In *Venkataratnam v. Secretary of State,* ILR 53 Mad 979: (AIR 1930 Mad 896), a division Bench of the Madras High Court, consisting of Venkatasubba Rao and Madhavan Nair, JJ, held that the jurisdiction to issue a writ of certiorari was original jurisdiction. In *Ryots of Garabandha v. Zamindar of Parlakimedi,* ILR 1938 Mad 816: (AIR 1938 Mad 722), another division Bench of the same High Court, consisting of Leach, C.J., and Madhavan nair, J., considered the question again incidentally and came to the same conclusion and held that a writ of certiorari is issued only in exercise of the original jurisdiction of the High Court. In *Ramayya v. State of Madras*, AIR 1952 Mad 300, a division Bench, consisting of Govinda Menon and Ramaswami Gounder, JJ., considered the question whether the proceedings under Art. 226 of the Constitution are in exercise of the original jurisdiction or revisional jurisdiction of

the High Court; and the learned Judges held that the power to issue writs under Art. 226 of the Constitution is original and the jurisdiction exercised is original jurisdiction. In *Hamid Hassan v. Banwarilal Roy,* 1947-2 Mad LJ 32 at p. 35: (AIR 1947 PC 90 at p.93), the Privy Council was considering the question whether the original civil jurisdiction which the Supreme Court of Calcutta possessed over certain classes of persons outside the territorial limits of that jurisdiction has been inherited by the High Court. In that context the Judicial Committee observed:

"It cannot be disputed that the issue of such writs is a matter of original jurisdiction."

The Calcutta High Court, in Budge Budge Municipality v. Mangru, 57 Cal WN 25: (AIR 1953 Cal 433) (SB), came to the same conclusion, namely, that the jurisdiction exercised under Art. 226 of the Constitution is original as distinguished from appellate or reivisonal jurisdiction, though original, is a special jurisdiction and should not be confused with ordinary civil jurisdiction, but the High Court pointed out that the jurisdiction; under the Letters Patent. The Andhra High Court in Satyanarayanamurthi v. I.T. Appellate Tribunal Madras Bench, (S) AIR 1957 Andh Pra 123 described it as an extraordinary original jurisdiction. It is, therefore, clear from the nature of the power conferred under Art. 226 of the Constitution and the decisions on the subject that the High Court in exercise of its power under Art. 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which its exercises jurisdiction and may, for convenience, be described as extra-ordinary original jurisdiction. If that be so, it cannot be contended that a petition under Art. 226 of the Constitution is a continuation of the proceedings under the Act."

25. In *Nagendra Nath Bora* (supra) their Lordships have held as under:-

"The jurisdiction under Art. 226 of the Constitution is limited to seeing that the judicial or quasijudicial tribunals or administrative bodies exercising quasi-judicial powers, do not exercise their powers in excess of their statutory jurisdiction, but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them..."

26. In *Ahmedabad Mfg. & Calico Ptg. Co. Vs. Ramtahel Ramnand,* AIR 1972 SC 1598 it has been held as under:

"...Under Art. 226 of the Constitution it may in this connection be pointed out the High Court does not hear an appeal or a revision: that Court is moved to interfere after bringing before itself the record of a case decided by or pending before a Court, a Tribunal or an authority, within its jurisdiction."

27. In this context we may refer with profit to the distinction drawn by the Apex Court in the case of *Surya Dev Rai* (supra) between Article 226 and Article 227 of the Constitution of India. Their Lordships have specially drawn the distinction between the writ of certiorari under Article 226 and supervisory jurisdiction under Article 227 of the Constitution. It has been thus characterised:

"24. The difference between Articles 226 and 227 of the Constitution was well brought out in *Umaji Keshao Meshram and others v. Smt. Radhikabai and another,* (1986) Supp SCC 401. Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this Article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.

Thereafter, in paragraph 25 it has been further elaborated:

"Firstly, the writ of *certiorari* is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate revisional or corrective jurisdiction. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and

circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised *suo motu* as well." (Emphasis supplied)

28. In paragraph 38 of the said decision the Apex Court summed up its conclusions. Sub-paragraphs (3), (4) and (9) being relevant are reproduced:-

(3) *Certiorari,* under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

xxx xxx xxx

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate Court as to the manner in which it would act or proceed thereafter or afresh, the High Court

may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

(Empahsis added)

29. At this juncture, it is apposite to reproduce the relevant portion from paragraph 39:-

"39. Though we have tried to lay down broad principles and working rules the fact remains that the parameters for exercise of jurisdiction under Article-226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma....."

(Underlining is ours)

30. From the aforesaid pronouncements of law it is luminescent that the issue of a writ is original and the jurisdiction exercised is original jurisdiction. For this reason in *Hari Vishnu Kamath* (supra), (which has been referred to in *Surya Dev Rai* (supra)), the following four propositions were laid down:-

"(1) *Certiorari* will be issued for correcting errors of jurisdiction;

(2) *Certiorari* will also be issued when the Court or Tribunal acts illegally in the exercise of it undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;

(3) The Court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision.".

(Emphasis added)

31. The purpose of referring to the aforesaid decisions is only to show that in issuing a writ of certiorari the High Court acts in exercise of original jurisdiction and not in exercise of appellate or revisional jurisdiction. Their Lordships have made a distinction with regard to supervisory jurisdiction and appellate or revisional jurisdiction. As is evincible, the power to issue writs under Article 226 of the Constitution is original and the jurisdiction exercised is original jurisdiction. We may also note that in *Surya Dev Rai* (supra) the Apex Court while referring to *Umaji Keshao Meshram* (supra) has opined that the proceedings under Article 226 are in exercise of original

jurisdiction of the High Court while the proceedings under Article 227 of the Constitution are not original but only supervisory. It is worth noting that Article 227 is not restricted to administrative superintendence. It also encompasses judicial superintendence. Their Lordships have held that though the powers under Article 227 is akin to that of appellate or revisional power yet to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunal within the bounds of their authority and not for correcting mere errors. The Apex Court has further held that exercise of supervisory jurisdiction is not an original jurisdiction and in that sense it is akin to appellate, revisional or corrective jurisdiction. The powers exercised under Article 226 and Article 227 of the Constitution, as has been held in *Surya Dev Rai* (supra) are distinct. In paragraph 19 of the said decision it has been held as under:-

> "19. Thus, there is no manner of doubt that the orders and proceedings of a judicial Court subordinate to High Court are amenable to writ jurisdiction of High Court under Art. 226 of the Constitution."

32. Their Lordships have held that though they have laid broad parameters for exercise of jurisdiction under Articles 226 and 227 of the Constitution, it cannot be tied down in straitjacket formula or rigid rules.

33. If the analysis of law is properly understood it is clear as noon day that the High Courts exercise original jurisdiction under Article 226 of the Constitution and supervisory jurisdiction and the power of superintendence under Article 227 of the Constitution. But, an eloquent and fertile one, a writ of certiorari is issued in exercise of original jurisdiction. We may repeat at the cost of repetition that in the case of *Vijay Anand* (supra) the matter had travelled from the lower forums and their Lordships have repelled the contention that the petition under Article 226 of the Constitution of India is a continuation of the proceeding initiated under the statutory enactment. Their Lordships have regarded it as extraordinary original jurisdiction. It has been sometimes stated to be a special equitable jurisdiction.. In *Ramayya* (supra) it has been held that the power to issue writ is original and the jurisdiction exercised is original jurisdiction. The said view has been approved in *Vijay Anand* (supra). In *Surya Dev Rai* (supra) distinction has been made between the original jurisdiction and the supervisory jurisdiction. The same principles have been stated in *Hari Vishnu Kamath* (supra) and *Smt. Sudha Patil* (supra).

34. At this juncture we may fruitfully state that the word 'superintendence' has not been used in Article 226 of the Constitution. It is also evident that the term 'writs' is not referred to in Article 227. On a scrutiny of Article 227 it would be crystal clear that power of superintendence conferred on the High Courts is a power that is restricted to the courts and tribunal in relation to which it exercises jurisdiction. On the contrary the power conferred on the High Court under Article 226 is not constricted and confined to the courts and tribunals but it extends to any person or authority. Be it noted,

Article 226 as has been engrafted in the Constitution covers entirely a new area, a broader one in a larger spectrum.

35. In *Hari Vishnu Kamath* (supra) in paragraph 20 it has been held as under:-

> "20. We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under Article 227 of the Constitution, and that superintendence is both judicial and administrative. That was held by this Court in *'Waryam Singh v. Amarnath'*, AIR 1954 SC 215 (K), where it was observed that in this respect Article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restored the position under section 107 of the Government of India Act, 1915. It may also be noted that while in a 'certiorari' under Article 226 the High Court can only annul the decision of the Tribunal, it can, under Article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of 'certiorari' and for other reliefs was maintainable under Articles 226 and 227 of the Constitution."

36. Thereafter their Lordships proceeded to pass the following directions:

> " .....Under the circumstances, the proper order to pass is to quash the decision of the Tribunal and remove it out of the way by 'certiorari' under Article 226, and to set, aside the election of the first respondent in exercise of the powers conferred by Article 227....."
>
> (Emphasis supplied)

37. From the aforesaid enunciation of law it is quite vivid that two powers are distinct and that is why their Lordships resorted to Article 226 for one part and invoked Article 227 of the Constitution for the other facet. It is worth noting that Articles 226 and 227 of the Constitution of India are supplement to each other but that does not convey that the power exercised under them are identical in all cases. The Apex Court, time and again, has expressed the view that the power exercised under Article 226 is to be characterized as supervisory power and not power exercised in appellate or revisional jurisdiction. The consistent view of the Apex Court is that the power exercised under Article 226 is in exercise of original jurisdiction and not under 'supervisory jurisdiction'. To elaborate: whenever word 'supervisory' has been used in the context of Article 226 it is in contrast with the appellate or revisional jurisdiction. When a writ is issued under Article 226 of the Constitution in respect of Courts or tribunals it is done in exercise of original jurisdiction and the parameters are different than Article 227 of the Constitution of India. It is worth noting that the power under Article 227 was there in a different manner under the Government of India Act. Power of superintendence is distinct from the exercise of power of revisional or supervisory jurisdiction which is a facet of the power superintendence. The confusion occurs when

one applies the principle of equivalence or equates the exercise of supervisory power and power of superintendence with original or supervisory jurisdiction. There is an acceptable nuance between the concept of jurisdiction and exercise of power by certain parameters. Both do come within the fundamental concept of 'judicial review' but the jurisdiction exercised is different. In *Achutananda Baidya Vs. Prafullya Kumar Gayen,* AIR 1997 SC 2077 it has been held that power of superintendence under Article 227 includes within its concept the power of judicial review. In our considered opinion when under Article 226 a writ is issued it is issued in exercise of original jurisdiction whether against a tribunal or inferior courts or administrative authorities.

38. In this context we may profitably refer to the decision rendered in L. Chandra Kumar (supra) wherein it has been held as under:

> "99. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under articles 226/227 and 32 of the Constitution, are unconstitutional....."

We have referred to the aforesaid decision only to indicate that their Lordships have used both the Articles because of the amalgam of jurisdiction which may be required while dealing with the lis arising from the Tribunal as the dividing line has become extremely thin – almost a vanishing point.

39. In *Rama and Co.* (supra) the Division Bench opined that an appeal against an order of the learned single Judge in exercise of jurisdiction under Article 226 of the Constitution of India will only be maintainable if he has exercised the power under original jurisdiction and not under supervisory jurisdiction. The Division Bench has further expressed the opinion that supervisory jurisdiction of the High Court cannot be equated with the original jurisdiction and, therefore, even if single Judge has exercised jurisdiction under Article 226 of the Constitution of India and issued a writ of certiorari against an order passed by a tribunal or a court then an appeal would not lie.

THE EFFECT OF DISMISSAL OF SPECIAL LEAVE PETITION ARISING FROM THE DECISION RENDERED IN RAMA AND CO. (SUPRA)

40. Regard being had to the basic term of reference presently we shall advert to the issue whether the order passed in Special Leave Petition (Civil) No.9186/2007 being a declaration of law under Article 141 of the Constitution of India and is a binding precedent regard being had to the earlier decisions of the Apex Court. In this context we think it apposite to refer to certain decisions in the field some of which have been brought to our notice at the Bar.

41. In *Kunhayammed and others Vs. State of Kerala and another,* (2000) 6 SCC 359 a three Judge Bench of the Apex Court has expressed the opinion as under:-

"27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared....."

Thereafter their Lordships have proceeded to sum up the conclusions as under:

"(i) Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives

reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C."

42. In view of the aforesaid analysis and regard being had to the language and speech employed by their Lordships while dismissing the Special Leave Petition, it is difficult to accept the contention that it is not a declaration of law under Article 141 of the Constitution.

43. The next aspect, the centroidal and seminal one that is imperative to deal with, the impact of the dismissal of the S.L.P. on the Full Bench decision rendered in *Dr. Jaidev Siddha and others* (supra). At this juncture, it is to be borne in mind that it is the obligation of the High Court to find out the binding precedent keeping in view the law of precedents. There can be many a decision of the superior court on a particular aspect but the High Court bound by law of precedents has a sacrosanct duty to follow that precedent which as per the law is the binding precedent. To give an example, an obiter dicta of the Supreme Court is binding on the High Court but if there is a decision in the said field or on the said point that dictum is to be followed. There are also two other factors, namely, the date of decision and the Bench strength. We may restate that the point involved has to be the same. Keeping the aforesaid principles in view, we proceed to refer to certain decisions in the field.

44. In *Union of India and another Vs. Raghubir Singh (dead) by LRs. Etc.*, AIR 1989 SC 1933 it has been held as under:-

"29. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. We would, however, like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of at least three Judges unless, for compelling reasons, that is not conveniently possible."

45. In *Indian Oil Corporation Ltd. Vs. Municipal Corporation and another,* AIR 1995 SC 1480 the Apex Court has ruled thus:-

"8.....The Division Bench of the High Court in 1989 MPLJ 20 was clearly in error in taking the view that the decision of this Court in *Ratna Prabha* (AIR 1977 SC 308) (Supra) was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co-equal bench of this Court did not and could not do. The view taken by the Division Bench of High Court in 1989 MPLJ 20 proceeds on a total misunderstanding of the law of precedents and Article 141 of the Constitution of India, to which it referred. But for the fact that the view of the Division Bench of the High Court proceeds on a misapprehensions of the law of precedents and Article 141 of the Constitution, it would be exposed to the criticism of an aberration in judicial discipline....."

46. In *N.S.Giri Vs. Corporation of City of Mangalore and others,* (1999) 4 SCC 697 the Apex Court has observed as follows:-

"12.....A decision by the Constitution Bench and a decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of a binding authority; more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available....."

47. In *Chandra Prakash Vs. State of U.P. and another,* 2002 AIR SCW 1573 the Apex Court approved the law laid down in the cases of *Raghubir Singh* (supra) and *Pradip Chandra Pariza and Others Vs. Pramod Chandra Patnaik And Others,* (2002) 1 SCC 1. Be it noted in Raghubir Singh (supra) it was held that the pronouncement of law by a Division Bench of the Apex Court is binding on a Division Bench of the same or similar number of Judges of the same Court.

48. In this context we may refer with profit to the Full Bench decision of this Court in *Jabalpur Bus Operators Association & ors. Vs. State of M.P. and another,* 2003 (1) MPJR 158 wherein a Full Bench consisting of five Judges overruled the decision rendered by a Full Bench consisting of three Judges in *State of M.P. Vs.*

Balveer Singh, 2001 (2) MPLJ 644 and expressed the opinion in paragraph 10 as under:-

> "10. 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 biding 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."

49. In *S.Brahmanand and others Vs. K.R.Muthugopal (Dead) and others,* (2005) 12 SCC 764 a two Judge Bench of the Apex Court expressed the view that a co-ordinate Bench of the Apex Court is bound by the judgment delivered by another co-ordinate Bench.

50. From the aforesaid enunciation of law it is crystal clear that the High Court is bound by the earlier decisions rendered by the Co-ordinate Bench unless earlier decision has been dealt with by the later Bench of equal strength. The Apex Court has dismissed the SLP by stating that as the question of law had already been decided by the Apex Court that if any Writ Petition is filed before the High Court, against the order of the Board of Revenue against that order of the writ Court no L.P.A. is maintainable the same being not an original order. From the aforesaid order a singular aspect is discernible that the order passed by the Board of Revenue is not an original order and hence, no LPA is maintainable. This Court at this juncture, is required to see whether there are earlier decisions in this spectrum/field. We have already referred to the language of Class 10 of the Letters Patent and Section 2 of the 2005 Adhiniyam. We have scanned the anatomy of both the provisions and also seen how the Apex Court has cleared the maze of original jurisdiction and supervisory jurisdiction. In *Vijayanand* (supra), *Surya Dev Rai* (supra), *Hari Vishnu Kamath* (supra) and *Umaji Keshao Meshram* (supra) the distinction between exercise of jurisdiction under Articles 226 and 227 of the Constitution have been spelt out. It has been stated in categorical and unequivocal terms that exercise of jurisdiction under Article 226 is original and the exercise of the same under Article 227 is supervisory. The Apex Court on many an occasion has laid down that there can be overlapping in exercise of jurisdiction as a consequence of which an order may fall under the compartment of Articles 226 and 227 of the Constitution of India. Their Lordships have also opined that a litigant may seek relief under Article 226 of the Constitution read with Article 227 of the Constitution. Their Lordships while dismissing the Special Leave Petition have stated that against an order of Board of Revenue no LPA is maintainable as the order passed by the Board of Revenue is not an original order. In our humble view the said decision has not taken note of the law laid down in *Vijayanand* (supra), *Surya*

Dev Rai (supra), *Hari Vishnu Kamath* (supra) and *Umaji Keshao Meshram* (supra). We may hasten to clarify here by virtue of a statutory provision the power of Letters Patent can be annihilated or abridged. If the history of Letters Patent is scrutinised it is evincible that no appeal under Letters Patent was maintainable against the order passed or made in exercise of the powers of superintendence under the provisions of Section 107 of the Government of India Act, 1935. The said power of superintendence has been engrafted along with certain other concepts under Article 227 of the Constitution. For this simon pure reason in *Umaji Keshao Meshram* (supra) the Apex Court has made a distinction and laid down the law that no appeal would lie against an order passed under Article 227 of the Constitution. However, their Lordships carved out certain distinctions which werer followed later on in number of decisions. We think it apt to refer to certain decisions in this regard.

51. In *Umaji Keshao Meshram* (supra) the Apex Court has ruled thus:-

> "106...In our opinion, where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Such was the view taken by the Allahabad High Court in *Aidal Singh v. Karan Singh*, AIR 1957 All 414 (FB) and by the Punjab High Court in *Raj Kishan Jain v. Tulsi Dass*, AIR 1959 Punjab 291 and *Barham Dutt v. Peoples' Co-operative Transport Society Ltd., New Delhi*, AIR 1961 Punj 24 and we are in agreement with it."

52. In *Sushilabai Laxminarayan Mudliayar and Others Vs. Nihalchand Waghajibhai Shaha and Others;* AIR 1993 Suppl (1) SCC 11 the Apex Court referred to an unreported judgment passed in *Ratnagiri District Central Co-operative Bank Ltd. Vs. Dinkar Kashinath Watve* (C.A. No.520 of 1989 decided on 27.1.1989) wherein it has been held as under:-

> "Even when in the cause title of an application both Article 226 and Article 227 of the Constitution have been mentioned, the learned single Judge is at liberty to decide, according to facts of each particular case, whether the said application ought to be dealt with only under Article 226 of the Constitution. For determining the question of maintainability of an appeal against such a judgment of the Single Judge the Division Bench has to find out whether in substance the judgment has been

passed by the learned Single Judge in exercise of the jurisdiction under Article 226 of the Constitution. In the event in passing his judgment on an application which had mentioned in its cause title both Articles 226 and 227, the Single Judge has in fact invoked only his supervisory powers under Article 227, the appeal under clause 15 would not lie. The clause 15 of the Letters Patent expressly bars appeals against orders of Single Judges passed under revisional or supervisory powers. Even when the learned Single Judge's order has been passed under both the articles, for deciding the maintainability against such an order what would be relevant is the principal or main relief granted by the judgment passed by learned Single Judge and not the ancillary directions given by him. The expression 'ancillary' means, in the context, incidental or consequential to the main part of the order.

Thus, the determining factor is the real nature of the principal order passed by the Single Judge which is appealed against and neither the mentioning in the cause title of the application of both the articles nor the granting of ancillary orders thereupon made by learned Single Judge would be relevant. Thus, in each case, the Division Bench may consider the substance of the judgment under appeal to ascertain whether the Single Judge has mainly or principally exercised in the matter his jurisdiction under Article 226 or under Article 227. In the event in his judgment the learned Single Judge himself had mentioned the particular article of the Constitution under which he was passing his judgment, in an appeal under clause 15 against such a judgment it may not be necessary for the appellate bench to elaborately examine the question of its maintainability. When without mentioning the particular article the learned Single Judge decided on merits the application, in order to decide the question of maintainability of an appeal, against such a judgment, the Division Bench might examine the relief granted by the learned Single Judge, for maintainability of an appeal, the determinatioin would be the main and not the ancillary relief. When a combined application under Articles 226 and 227 of the Constitution is summarily dismissed without reasons, the appeal court may consider whether the facts alleged warranted filing of the application under Article 226 or under Article 227 of the Constitution."

53. Thereafter their Lordships explained the ratio laid down in the case of *Umaji Keshao Meshram and others* (supra) and expressed thus:

"...In Umaji case it was clearly held that where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution of India and the party chooses to file his application under

both these articles in fairness of justice to party and in order not to deprive him of valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Rule 18 of the Bombay High Court Appellate Side Rules read with clause 15 of the Letters Patent provides for appeal to the Division Bench of the High Court from a judgment of the learned Single Judge passed on a writ petition under Article 226 of the Constitution. In the present case the Division Bench was clearly wrong in holding that the appeal was not maintainable against the order of the learned Single Judge."

54. In *Mangalbhai and Others Vs. Dr. Radhyshyam,* AIR 1993 SC 806 a two Judge-Bench of the Apex Court after reproducing certain paragraphs from *Umaji Keshao Meshram* (supra) proceeded to state as under:-

"6. The learned single Judge in his impugned judgment dated 11.12.1987 nowhere mentioned that he was exercising the powers under Art. 227 of the Constitution. The learned single Judge examining the matter on merit and set aside the orders of the Rent Controller as well as the Resident Deputy Collector on the ground that the aforesaid judgments were perverse. The findings of the Rent Controller and Resident Deputy Collector were set aside on the question of habitual defaulter as well as on the ground of bona fide need. Thus in the totality of the facts and circumstances of the case, the pleadings of the parties in the writ petition and the Judgment of the learned single Judge leaves no manner of doubt that it was an order passed under Art. 226 of the Constitution and in that view of the matter the Letters Patent Appeal was maintainable before the High Court....."

55. In *Lokmat Newspapers Pvt. Ltd Vs. Shankarprasad,* (1999) 6 SCC 275 the Apex Court took note of the fact situation where an order passed by the Labour Court under Section 28 of the Maharashtra (Recognition of Trade Unions and Prevention of Unfair Labour Practices) Act, 1971 was confirmed by the Industrial Tribunal under Section 44 of the said enactment. Both the Courts held that retrenchment of the respondent did not amount to any 'unfair labour practice' on the part of the appellant. The said orders were challenged by the respondent by filing a writ petition under Articles 226 and 227 of the Constitution of India before the High Court of Judicature at Bombay, Nagpur Bench and the learned single Judge dismissed the writ petition. Their Lordships took note of the fact that the order passed by the learned single Judge

showed that he was considering the writ petition of the respondents which was moved before him invoking jurisdiction under Articles 226 and 227 of the Constitution of India and thereafter their Lordships adverted to the averments made in the writ petition and eventually expressed the view thus:

> "16. It is, therefore, obvious that the writ petition invoking jurisdiction of the High Court both under Articles 226 and 227 of the Constitution had tried to make out a case for the High Court's interference seeking issuance of an appropriate writ of certiorari under Article 226 of the Constitution of India. Basic averments for invoking such a jurisdiction were already pleaded in the writ petition for the High Court's consideration. It is true, as submitted by learned counsel for the appellant, that the order of the learned Single Judge nowhere stated that the Court was considering the writ petition under Article 226 of the Constitution of India. It is equally true that the learned Single Judge dismissed the writ petition by observing that the courts below had appreciated the contentions and rejected the complaint. But the said observation of the learned Single Judge did not necessarily mean that the learned Judge was not inclined to interfere under Article 227 of the Constitution of India only. The said observation equally supports the conclusion that the learned Judge was not inclined to interfere under Articles 226 and 227. As seen earlier, he was considering the aforesaid writ petition moved under Article 226 as well as Article 227 of the Constitution of India. Under these circumstances, it is not possible to agree with the contention of learned counsel for the appellant that the learned Single Judge had refused to interfere only under Article 227 of the Constitution of India when he dismissed the writ petition of the respondent....."

56. In *Hindustan Lever Limited Vs. B.N. Dongre*, (1994) 6 SCC 157 it has been held that the decision of Industrial Tribunal under the Industrial Disputes Act would be subject to review by the High Court under Article 226/227 of the Constitution of India and letters patent appeal will lie against the judgment.

57. In *Kanyaiyalal Agrawal and Others Vs. Factory Manager, Gwalior Sugar Co. Ltd.*, AIR 2001 SC 3645 the Apex Court after referring to the decision rendered in the case of *Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad*, AIR 1999 SC 2423 proceeded to state as under:-

> "But with an explanation that if the single Judge of the High Court in considering the petition under Art. 226 or Art 227 does not state under which provision he has decided the matter and where the facts justify filing of petition both under Art. 226 and Art 227 and a petition so filed is dismissed by the single Judge on merits, the matter may be

considered in its proper perspective in an appeal. This Court held as aforesaid in view of the decisions of this in *Umaji Keshao Meshram v. Radhikabai,* 1986 Supp SCC 401; *Ratnagiri District Central Co-operative Bank Ltd. v. Dinkar Kashinath Watve,* 1993 Supp (1) SCC 9 and Sushilabai Laxminarayan *Mudliyar v. Nihalchand Waghajibhai Shaha,* 1993 Suppl (1) SCC 11.

6. Hence, we are of the view that it is wholly unnecessary for us to examine this aspect of the matter in view of the declaration of law made by this Court in *Lokmat Newspapers Pvt. Ltd. v. Shankarprasad* (1999 AIR SCW 2565 : AIR 1999 SC 2423 : 1999 Lab IC 2826) (supra) after adverting to all the decisions on the point."

58. In *Kishorilal Vs. Sales Officer, District Land Development Bank and Others,* (2006) 7 SCC 496 the Apex Court was dealing with an order whereby the learned single Judge had reversed the finding of the Board of Revenue. An LPA was preferred and the Division Bench dismissed the same holding that it was not maintainable on the premises that the learned single Judge had exercised the jurisdiction under Article 227 of the Constitution of India. Their Lordships while dealing with the maintainability of the appeal before the Division Bench have opined thus:

"13. The learned Single Judge of the High Court, in our opinion committed an error in interfering with the findings of fact arrived at by the Board of Revenue. The Division Bench of the High Court also wrongly dismissed the LPA without noticing that an appeal would be maintainable if the writ petition was filed under Articles 226 and 227 of the Constitution of India as was held by this Court in Sushilabai Laxminarayan Mudliyar Vs. Nihalchand Waghajibhai Shaha."

(Emphasis supplied)

59. At this juncture we would like to pause for a while, for it is condign as well as imperative. In *Kishorilal* (supra) the Apex Court had expressly stated that an LPA would be maintainable if the writ petition is filed under Articles 226 and 227 of the Constitution of India, as has been held by the Apex Court in *Sushilabai Laxminarayan Mudaliyar and others* (supra). We have specifically referred to this aspect to highlight that the SLP that arose from *Rama and Co.* (supra) this Court has dealt with an order passed by the Board of Revenue.

60. The labyrinthine the crosses the mind because one feels that the term 'original jurisdiction' being absent in the Clause 10 of the Letters Patent creates a statutory proscription and prohibition to entertain a writ appeal if the learned Single Judge has dealt with the same in exercise of supervisory power under Article 226 of the Constitution. We have repeated at the cost of repetition that there can be no scintilla of doubt that an appeal provision can always be curtailed and an appeal under the Letters Patent is subject to statutory provision. That has been so stated *Jamshed N.*

Guzdar (supra), but, a significant one, whether there is such prohibition, an obstruction, an embargo. In Clause 10 of the Letters Patent or for that matter in Clause 15 of the Letters Patent of the Chartered High Courts Articles 226 and 227 were not used and could not have used but the Apex Court while interpreting the said phraseology has used Articles 226 and 227 of the Constitution in number of decisions. Their Lordships, we may humbly state, have drawn the distinction between the original jurisdiction and supervisory jurisdiction, exercise of power under Articles 226 and 227 and many other facets which are to be taken into consideration while entertaining an appeal under the Letters Patent. Therefore, it would be an anathema to the precedential concept to express an opinion that the said decisions would not be applicable to the 2005 Adhiniyam.

61. Ergo, the order passed in the Special Leave Petition arising from *Rama & Co.* (supra) would not be a binding precedent on the High Court and the High Court is obliged to follow the earlier view expressed by the Apex Court. We may note with certitude that the order passed in *Rama & Co.* (supra) would be binding between the parties to the said lis.

62. From the aforesaid it is quite vivid that the maintainability of a writ appeal from an order of the learned single Judge would depend upon many an aspect and cannot be put into a straitjacket formula. It cannot be stated with mathematical exactitude. It would depend upon the pleadings in the writ petition, nature of the order passed by the learned Single Judge, character and the contour of the order, directions issued, nomenclature given and the jurisdictional prospective in the constitutional context are to be perceived. It cannot be said in a hyper technical manner that an order passed in a writ petition, if there is assail to the order emerging from the inferior tribunal or subordinate courts has to be treated all the time for all purposes to be under Article 227 of the Constitution of India. It would depend upon the real nature of the order passed by the learned Single Judge. To elaborate: whether the learned Single Judge has exercised his jurisdiction under Article 226 or under Article 227 or both would depend upon various aspects and many a facet as has been emphasized in the aforequoted decisions of the Apex Court. The pleadings, as has been indicated hereinabove, also assume immense significance. It would not be an overemphasis to state that an order in a writ petition can fit into the subtle contour of Articles 226 and 227 of the Constitution in a composite manner and they can co-inside, co-exit, overlap or imbricate. In this context it is apt to note that there may be cases where the learned single Judge may feel disposed or inclined to issue a writ to do full and complete justice because it is to be borne in mind that Article 226 of the Constitution is fundamentally a repository and reservoir of justice based on equity and good conscience. It will depend upon factual matrix of each case.

63. In view of the aforesaid premised reasons, we are of the humble view that dismissal of an appeal from *Rama & Co.* (supra) is not a binding precedent as there are earlier judgments in the field and the High Court bound to follow the earlier decisions as per the law laid down in *Raghuvir Singh (dead) byLRs. Etc.*

(supra), *Indian Oil Corporation Ltd.* (supra), *N.S. Giri* (supra) *Chandra Prakash* (supra), *Jabalpur Bus Operators association & Ors.* (supra) and *S. Brahamanand and others* (supra).

64. In *Director of Education (Secondary) and another Vs. Pushpendra Kumar and others,* AIR 1998 SC 2230 the Apex Court has ruled thus:-

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

65. We have already analysed the distinction between the original and supervisory jurisdiction. If the entire provision is scrutinised in a purposive manner it is clear that the Legislature has intended to make a distinction between an order passed in exercise of original jurisdiction under Article 226 of the Constitution and an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution. It has to be borne in mind that the power of the High Court under Article 226 of the Constitution are not confined to prerogative writs inasmuch as it can issue directions, orders, writs and can mould the relief to meet the peculiar requirements. The powers conferred on the High Court under the said Article is of wide expanse'. In *Director of Settlements, AP and Others Vs. M.R. Apparao and Another,* (2002) 4 SCC 638 it has been held that the power under Article 226 is essentially a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression 'for any other purposes'. The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion they must be exercised along the recognized lines and subject to certain self-imposed restrictions. It is a constitutional power conferred on the High Court to see no man is subject to injustice by violation of law. In exercise of this Article the High Court is expected to erase injustice and not to make justice a by-product.

66. When the provision has made two distinctions and the legislative intendment is clear, such intention is to be undestood in accord with the view expressed by the Apex Court. When the Legislature has used the terms 'in exercise of original jurisdiction' and 'supervisory jurisdiction' it has to be understood that they are used in contradistinction in the constitutional context as has been interpreted by the Apex Court. The words of the Section have to be understood to mean exercise of powers under Article 226 of the Constitution of India which is always original. That is the purpose of the said provision and if the Section is understood in entirety it is clear as day.

CONCLUSIONS:

67. In view of our aforesaid analysis we proceed to record our conclusions in seriatim:

(i) A power to issue the writ is original and the jurisdiction exercised is original jurisdiction.

(ii) Proceedings under Article 226 of the Constitution are in exercise of original jurisdiction of the High Court whereas the proceedings initiated under Article 227 of the Constitution are supervisory in nature.

(iii) When a writ is issued under Article 226 of the Constitution it is issued in exercise of original jurisdiction whether against a Tribunal or an inferior Court or administrative authorities.

(iv) The power exercised under Article 226 of the Constitution is in exercise of original jurisdiction and not supervisory jurisdiction.

(v) Exercise of supervisory power and power of superintendence is not to be equated with the original or supervisory jurisdiction. (Emphasis supplied)

(vi) The order passed in SLP(Civil) No.9186/2007 is a declaration of law under Article 141 of the Constitution but the High Court is bound to follow the earlier decisions in the field regard being had to the concept of precedents as per law laid down by the Apex Court and the five-Judge Bench decision in Jabalpur Motor Association (supra).

(vii) The decision rendered in *Rama and Company* (supra) is binding upon the parties inter se.

(viii) The decisions rendered by the Apex Court in the context of appeal under Letters Patent as regards maintainability of an appeal would govern the field pertaining to maintainability of appeal preferred under Section 2 of the 2005 Adhiniyam.

(ix) The view taken by the Full Bench in *Dr. Jaidev Siddha and others* (supra) cannot be treated to have been impliedly overruled due to dismissal of the Special Leave Petition preferred against the order rendered in the case of *Rama and Company* (supra).

(x) The law laid down in the case of Dr. Jaidev Siddha (supra) holds the field and the principles laid down therein will have full applicability.

68. The reference is answered accordingly. Let the matter be listed before the appropriate Division Bench.

S. Samvatsar, J. -I have a privilege to go through the order of Brother Judge on.Shri Justice Dipak Misra. The question involved in this case is about the maintainability of writ appeal against the order passed by single Judge in exercise of writ jurisdiction against the order passed by Tribunal. Brother Misra, J. is of the opinion that the order passed by the Apex Court in S.L.P.No.9186/2007 is a declaration of law under Article 141 of the Constitution, but the High Court is bound to follow the earlier decisions in

the field regard being had to the concept of precedents as per law laid down by the Apex Court and the Five-Judge Bench decision in Jabalpur Motor Association (supra). After going through the order passed by Brother Misra, J., I am, with due respect, unable to agree with the view expressed by brother Misra,J., hence, I am giving my own reasonings in the matter.

2. Division Bench of this Court in the case of Rama and *Company Vs. State of M.P. and another,* 2007 (2) MPJR 229 has taken a view that the condition precedent for exercising powers of an appellate court under the M.P.Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 (hereinafter, referred to as the "Adhiniyam") is that the learned Judge must exercise its original jurisdiction under Article 226 of the Constitution of India. Since, the High Court has exercised its jurisdiction under Article 226 of the Constitution of India while issuing writ of certiorari against the order passed by the Tribunal or court, hence, writ appeal will not lie as the single Bench has not exercised its original jurisdiction but has, in fact, exercised its supervisory jurisdiction. The view taken by the Division Bench in Rama and Company (supra) was referred to a Larger Bench as there was a conflict of opinion amongst the decisions in the cases of *Rama and Company* (supra), *State of Madhya Pradesh vs. M.P.Wakankar,* 2007 (1) MPLJ 99 and, *Shrimati Shiva Dubey (Jhira) Vs. Sumit Ranjan Dubey* (W.A.No.310/2006 decided on 14/8/2006).

3. Full Bench in the case of *Dr.Jaidev Siddha vs. Jaiprakash Siddha and other,* 2007 (3) MPJR 595 has overruled the judgment of Division Bench of this Court in the case of *Rama and Company* (supra) and held that even if the single Judge hearing a petition under Article 226 of the Constitution against the order passed by the Court or Tribunal, a writ appeal lies.

4. Before the Full Bench could deliver the aforesaid judgment, the judgment of Division Bench in case of *Rama and Company* (supra) was challenged before the Supreme Court in SLP(C) No. 9186/07. Said SLP was dismissed by the Apex Court by holding as follows :

> There is no ground to interfere with the order of the High Court as the question of law had already been decided by this Court that if any writ petition is filed before the High Court, against the order of the Board of Revenue and against that order of the High Court no LPA is maintainable as this is not the original order. The Special Leave Petition is, therefore, dismissed.

Thus, the Apex Court dismissed the appeal in the case of Rama and Company by holding that no appeal lies before the Division Bench if a writ petition is filed before the High Court against the order of Board of Revenue as the said order is not an original order.

5. Again the question about maintainability of appeal was raised before the Division Bench and the Division Bench deemed it fit to refer the matter to the Larger Bench by framing following question :

"What is the effect of the order of the Supreme Court passed in SLP in the matter of Rama and Company (supra) on the status and effect of the decision of the Full Bench as discussed above and what should be the correct position under the law which should be followed by the Division Bench ?'

6. The principle behind Article 141 of the Constitution of India is to maintain consistency in the judgment delivery system. Apex Court, being the highest Court of law in the hierarchical system of courts in the country, as a matter of discipline, it is expected that all the lower courts including the High Courts should consistently follow the dictum laid down by the Apex Court as a matter of judicial discipline which will give uniformity and consistency to the judgment delivery system.

7. Division Bench of this Court in the case of *Rama and Company* (supra) has considered the maintainability of writ appeal against order passed by learned single Judge in exercise of its writ jurisdiction under Article 226 of the Constitution of India and held that as the High Court is not exercising its original jurisdiction and is exercising only its supervisory jurisdiction, writ appeal is not maintainable. For arriving at the said conclusion, the Division Bench has relied upon a judgment of the Apex Court in the case of *Hari Vishnu Kamath vs. Ahmad Ishaque and others,* AIR 1955 SC 233 wherein the Apex Court in para 10 of its judgment had dealt with the powers of certiorari and held as under :-

> According to the common law of England, 'certiorari' is a high prerogative writ issued by the Court of the King's Bench or Chancery to inferior courts or tribunals in the exercise of supervisory jurisdiction with a view to ensure that they acted within the bounds of their jurisdiction. To this end, they were commanded to transmit the records of a cause or matter pending with them to the superior court to be dealt with there, and if the order was found to be without jurisdiction, it was quashed. The court issuing 'certiorari' to quash, however, could not substitute its own decision on the merits, or give directions to be complied with by the court or the tribunal. Its work was destructive; it simply wiped out the order passed without jurisdiction, and left the matter there. (Emphasis supplied)

The Apex Court in para 21 of its judgment has laid down that the following principles may be taken as established :

> (1) *'Certiorari'* will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) 'Certiorari' will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The

> Court issuing a writ of 'certiorari' acts in exercise of a supervisory and not appellate jurisdiction.

8. Question before this Bench is not to find out the correctness of the decision either in the case of *Rama and Company* (supra) or the correctness of the judgment delivered by the Full Bench in the case of *Dr.Jaidev Siddha* (supra) wherein the Full Bench has held that as the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India always exercises its original jurisdiction, hence, the writ appeal is maintainable. Question about the correctness of both the views is not open before this Bench and only question which is to be decided is whether the judgment of the Apex Court in the SLP in the matter of Rama and Company is binding or not.

9. Division Bench had dismissed the appeal filed by Rama and Company only on the ground that the appeal is not maintainable. Said judgment was challenged before the Apex Court by filing a SLP and, the Apex Court has dismissed the SLP by giving a short reasoning. Thus, the only question involved before the Apex Court was directly in relation to the maintainability of the writ appeal and once the Apex Court has held that the writ appeal is not maintainable, even though by short reasoning, whether this Court can hold that said judgment is not bind on the High Court.

10. The Apex Court in the case of *Anil Kumar Neotia vs. Union of India,* AIR 1988 SC 1353 has laid down that in the hierarchy of judicial system, the Apex Court is the highest Court in the country and all other courts are bound to follow the law laid down by the Apex Court and they cannot assign any reason whatsoever to hold that the judgment of the Apex Court is not a binding precedent. The High Court can not find any reason whatsoever to hold that the judgment of the Apex court is not binding. The High Court cannot say that certain points are not urged before the High Court and therefore, the said judgment is not binding. The Apex Court in para 18 of its judgment for the said purpose, has relied upon the observations of the Apex Court in the case of *Smt. Somwanti vs. State of Punjab,* AIR 1963 SC 151 which reads as under :

> "The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided.

11. The Apex Court in the case of *Tirupati Balaji Developers Pvt.Ltd vs. State of Bihar,* AIR 2004 SC 2351 while considering the relationship between the Apex Court and the High Court has laid down in paragraphs 8 and 9 as under :

> 8. Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are Courts of record. The High Court is not a Court 'subordinate' to the Supreme Court. In a way the canvass of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative

writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose while the original jurisdiction of Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters, such as Presidential election or inter-State disputes which the Constitution does not envisage being heard and determined by High Courts. The High Court exercises power of superintendence under article 227 of the Constitution over all subordinate Courts and tribunals; the Supreme Court has not been conferred with any power of superintendence. If the Supreme Court and the High Courts both were to be thought of as brothers in the administration of justice, the High Court has larger jurisdiction but the Supreme Court still remains the elder brother. There are a few provisions which give an edge, and assign a superior place in the hierarchy, to Supreme Court over High Courts. So far as the appellate jurisdiction is concerned, in all civil and criminal matters, the Supreme Court is the highest and the ultimate Court of appeal. It is the final interpreter of the law. Under Article 139-A, the Supreme Court may transfer any case pending before one High Court to another High Court or may withdraw the case to itself. Under Article 141 the law declared by the Supreme Court shall be binding on all Courts, including High Courts, within the territory of India. Under Article 144 all authorities, civil and judicial, in the territory of India -and that would include High Court as well -shall act in aid of the Supreme Court.

9. In a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Courts. The very fact that the Constitution confers an appellate power on the Supreme Court over the High Courts, certain consequences naturally flow and follow. Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior Court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior Court or tribunal. The superior forum shall have jurisdiction to reverse, confirm annul or modify the decree or order of the forum appealed against and in the event of a remand the lower forum shall have to re-hear the matter and comply with such directions as may accompany the order of remand. The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of latter to carry out such directions or show disrespect to or to question the propriety of such directions would -it is obvious-be

destructive of the hierarchical system in administration of justice. The seekers of justice and the society would lose faith in both.

Thus, it is clear that the Apex Court in the aforesaid judgment has held that the High Courts have no jurisdiction or powers to criticise the judgments of the Apex Court.

12. Another case on the point is *Suga Ram vs. State of Rajasthan,* AIR 2006 SC 3258 wherein in para 6, the Apex Court has held that the judicial discipline to abide by declaration of law by this Court, cannot be forsaken, under any pretext by any authority or Court, be it even the highest Court in a State.

13. In a case of *State of West Bengal vs. Ashish Kumar Roy,* AIR 2005 SC 254, the Apex Court has held that it is not open to any party, or Authority, or Tribunal or Court including the High Court to reopen the issue which is already decided by the Apex Court as decision by the Apex Court on the said issue is the law declared within the meaning of Article 141 of the Constitution of India.

14. It is, thus, clear that the High Court is bound to obey the law declared by the Apex Court and cannot take any pretext to hold that the said law is not binding and should not be followed and reopen the issue decided by the Apex Court.

15. In the present case, the Apex Court while dismissing **SLP No.9186/2007** has held that the writ appeal filed by the Rama and Company is not maintainable. In the present case, the Division Bench had dismissed writ appeal filed by Rama and Company as not maintainable and the said judgment is upheld by the Apex Court by giving similar reasoning. Sole question before the Apex Court in the aforesaid SLP was whether the appeal was maintainable or not and now the question is whether the said decision is a precedent.

16. The Apex Court in the case of *Kunhayammed and others vs. State of Kerala and another,* (2000) 6 SCC 359 has held as under :-

> "(i) Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.
>
> (ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.
>
> (iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid

or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C."

17. In the case of *Rama and Company,* the Apex Court has dismissed the SLP by a speaking order though giving short reasoning, hence, it will be covered

in category No. (v) mentioned by the Apex Court in the aforesaid decision, i.e. if the order refusing leave to appeal is a speaking order, i.e. giving reasons for refusing the grant of leave. In such circumstances, there are only two implications, firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution of India and, secondly other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country.

18. Thus, now only two implications arise from the order of the Apex Court and it is not open to this Court to examine the correctness of the judgment of the Division Bench in the case of Rama and Company or by the Full Bench in the case of Dr.Jaidev Siddha and only option for this Court is to hold that the judgment of the Apex Court will hold the field, because any number of Judges of the High Court cannot refuse to follow the dictum of the Apex Court which is directly on the question to hold that writ appeal challenging the judgment of the learned single Judge in a petition challenging the order of the Tribunal is maintainable. Judgment rendered by the Full Bench in the case of *Dr.Jaidev Siddha* (supra) is per incuriam as the same was passed after decision of the Apex Court in SLP No.9186/2007.

19. The object for which the reference was made appears to be that the Division Bench could not declare a judgment rendered by the Three-Judge Bench as per incuriam and, hence the matter was referred to the Larger Bench. This Court now cannot say that the judgment rendered by the Apex Court is not applicable on any reason particularly when the judgment in the SLP is the solitary judgment of the Apex Court on the provisions of the Adhiniyam. Earlier, there was no occasion for the Apex Court to examine the question of maintainability in the light of the provisions of the Adhiniyam which came into force with effect from 05th April, 2006. The Apex Court dismissed the SLP after considering the fact that the judgment of the learned single Judge hearing writ petition against the Board of Revenue was not in original jurisdiction, hence, writ appeal is not maintainable.

20. So far as this Court is concerned, the view taken by the Supreme Court in SLP No. 9186/2007 is a binding precedent as the sole question before the Supreme Court in the said SLP was about the maintainability of the appeal after coming into force of Adhiniyam of 2005 and earlier the Supreme Court had no occasion to deal with such a situation. Hence, so far at this Court is concerned, said view has attained finality and cannot be reopened in view of the aforesaid decision of the Apex Court. Therefore, judgment in SLP No.9186/2007 is a binding precedent which is to be followed by this High Court unless the view taken by the Apex Court in the said SLP is overruled.

I.L.R.[2007] M.P., 1545

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S. Samvatsar & Mr. Justice Ajit Singh

2 November, 2007

STATE OF MADHYA PRADESH and others ...Appellants*

Vs.

CHANDRA SHEKHAR AZAD SHIKSHA PRASAD SAMITI, BHIND ...Respondent

Societies Registrikaran Adhiniyam, M. P. (XLIV of 1973) - Section 3(f) 33 - Govt. aided Society - Question whether State aided Society would mean society which receives or received aid, grant or loan in the current year or would also mean society which has received aid, grant or loan in previous year referred to full bench - Respondent Society not being paid any grant-in-aid since 2001 - Govt. superseded governing body of Society and appointed administrator - Writ Petition allowed holding that the society was not a State aided society - Held - State aided society mean which not only receives aid, grant or loan for the present but also has received aid, grant or loan in past and financial interest of Central Govt., State Govt. or statutory body in society subsists - Would not cover Society which has received aid, grant or loan in past but in which Central Govt. or State Govt. or any Statutory Body which had granted aid, grant or loan does not continue to have any financial interest - Reference answered accordingly.

The meaning of "State aided society" has to be understood in this context of Section 33 of the Act, as amended by the amendments made in the Act and would mean a Society which not only receives aid, grant or loan for the present but also has received aid, grant or loan in the past and the financial interest of the Central Government, State Government or the statutory body in the society subsists. For illustration, if an aid or grant or loan is given to create a durable asset, the State aided society will continue to be a State aided society even after the year in which such aid or grant or loan was given by the State Government but if aid or grant or loan had been given by the Central Government, State Government or any statutory body to a society for a particular event or for salary of staff etc for a particular year, after the event is over or after the year was over or after the loan was recovered the society will not continue to be a State aided society.

Viewed from any angle, the State aided society for the purpose of Section 33 of the Act would be a Society which receives or has received aid, grant or loan in which the Central Government, State Government or the Statutory Body granting the aid, grant or loan continues to have financial interest and would not cover a Society which has received aid, grant or loan in the past but in which the Central Government or State

*W.A. No. 138/2006 (G)

Government or any Statutory Body which had granted the aid, grant or loan does not continue to have any financial interest. We accordingly answer the reference.

(Paras 13 & 17)

Cases Referred :

Adarsha Vidya Mandir Vs. State of Madhya Pradesh and others; 1982 MPLJ 762, *State of Maharashtra and others Vs. Nanded - Parbhani Z.L.B.M.V. Operator Sangh;* AIR 2000 SC 725, *Union of India and others Vs. Braj Nandan Singh;* AIR 2005 SC 4403, *Mohan Kumar Singhania and others Vs. Union of India and others;* AIR 1992 SC 1, *State of Bombay and others Vs. The Hospital Mazdoor Sabha and others;* AIR 1960 SC 610.

S.B.Mishra, Addl. Adv. General with *Mrs. Ami Prabal, Dty.* Adv. General for the appellants.

P. S.Bhadoriya,B.S.Bhadoriya,M.P.S.Raghuvanshi, and *Shailendra Singh Kushwah,* for the respondents.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A. K. Patnaik, C. J.** :–This is a reference made to the Full Bench by an order dated 27.10.2006 passed by the Division Bench in W.A. No.138/2006.

2. The facts leading to the reference are that the respondent is a Society registered under the Madhya Pradesh Society Registrikaran Adhiniyam, 1973 (for short '**the Act**'). By an order dated 30.10.2003, the State Government in exercise of its powers under Section 33 of the Act superseded the governing body of the respondent society and appointed an administrator of the Society for a period of one year or till the conduct of the election whichever was earlier. The respondent society challenged the order dated 30.10.2003 of the State Government in W.P. No.478/2004 before this Court contending that the respondent society has not been paid any grant-in-aid since 2001 and the respondent society cannot be superseded under Section 33 of the Act which provided that only a State aided society can be superseded. The appellants in their return filed in the writ petition, on the other hand, stated that a block grant was paid to the respondent society by the State Government and a grant of Rs.3,38,977/- for the year 2001-2002 was deposited in a joint account of the respondent society but has not been disbursed for payment because of non-fulfillment of eligible criteria by the respondent society. The appellants contended that the respondent society was therefore a State aided society as defined in Section 3(f) of the Act and the State Government in exercise of its power under Section 33 of the Act can supersede the respondent society. The learned Single Judge hearing the writ petition did not accept the contention of the appellant and held that the order passed by the State Government superseding the respondent society was illegal inasmuch as the respondent society was not a State

aided society and by order dated 19.10.2005 allowed the writ petition and quashed the order of supersession. Aggrieved, the appellants have filed this appeal under Section 2(i) of the Madhya Pradesh Uchcha Nyayalaya (Khand Peeth Ko Appeal) Adhiniyam, 2005 before the Division Bench.

3. When the appeal was heard on 27.10.2006 by the Division Bench, an unreported decision of the Division Bench dated 16.4.1979 in *Adarsha Shiksha Samiti vs. State of Madhya Pradesh* as well as the decision of the Division Bench of this Court in *Adarsha Vidya Mandir vs. State of Madhya Pradesh and others,* 1982 MPLJ 762 were cited by Mr. P.S. Bhadoriya, learned counsel for the appellant in which a view had been taken that a Society which was receiving aid in the past but was not receiving aid in the present did not come within the definition of "State aided society" for taking action under Section 33(1) of the Act. Before the Division Bench, Mrs. Ami Prabal, learned Deputy Advocate General, on the other hand, very strongly contended that the definition of "State aided society" was wide enough to include not only a Society which receives aid, grant or loan but also a Society which has received aid, grant or loan or has received land or building or both on concessional rates and other facilities from the Central Government or State Government or any Statutory Body and therefore the two decisions of the Division Bench of this Court in *Adarsha Shiksha Samiti vs. State of Madhya Pradesh* and *Adarsha Vidya Mandir vs. State of Madhya Pradesh and others* (supra) require reconsideration by a Full Bench. The Division Bench found force in the aforesaid submission of Mrs. Prabal and accordingly referred the following question of law to the Full Bench:

> "Whether the 'State aided society' would mean a Society which receives or received aid, grant or loan in the current year or would also mean a Society which has received aid, grant or loan in any previous year the purpose of action under Section 33(1) of the Madhya Pradesh Society Registrikaran Adhiniyam, 1973 ?"

4. Before we consider the submissions made by the learned counsel for the parties on the aforesaid question of law, we would like to notice the changes made in the provisions of the Act after the two decisions of the Division Bench of this Court in *Adarsha Shiksha Samiti vs. State of Madhya Pradesh* and *Adarsha Vidya Mandir vs. State of Madhya Pradesh and others* (supra). When these decisions were rendered by the Division Bench in the respective two cases, the definition of "State aided society" in Section 3(f) of the Act was as follows :

> 3(f) "State aided society" means a society which receives or has received aid or grant or loan from Central Government or State Government or any other statutory body."

But after these decisions of the Division Bench, the Madhya Pradesh Society Registrikaran (Sanshodhan) Adhiniyam, 1998 was enacted by which a new definition

of State aided society was substituted in Clause (f) of Section 3 of the Act which reads as follows :

> "(f) "State aided society" means a society which receives or has received aid, grant or loan or has received land or building or both on concessional rates and other facilities from the Central Government or State Government or any Statutory Body."

5. Mr. S.B. Mishra, learned Additional Advocate General and Mrs. Ami Prabal, learned Deputy Advocate General submitted that the definition of "State aided society" as it existed prior to the amendment in the Act was wide enough to include not only a Society which receives aid, grant or loan but has received aid, grant or loan from the Central Government or State Government or any statutory body. They submitted that the view taken in the two decisions of the Division Bench in *Adarsha Shiksha Samiti vs. State of Madhya Pradesh* and *Adarsha Vidya Mandir vs. State of Madhya Pradesh and others* (supra) that a society which has received aid or grant in the past but is not receiving such aid or grant in the present was not covered within the definition of "State aided society" as it existed prior to the amendment in the year 1998 was therefore not correct. They further submitted that after the amendment in the year 1998 to the definition of "State aided society", the legislature has made it clear that it includes not only a Society which receives aid in the present but also has received aid, grant or loan in the past. They referred to the statement of objects and reasons appended to the Madhya Pradesh Society Registrikaran (Sanshodhan) Bill which was introduced in the legislature to show that the object of the amendment was to ensure that grants given by the Central Government, State Government or any statutory body were not misused by the society.

6. Mr. Mishra cited the decisions of the Supreme Court in *State of Maharashtra and others vs. Nanded-Parbhani Z.L.B.M.V. Operator Sangh,* AIR 2000 SC 725 and *Union of India and others vs. Braj Nandan Singh,* AIR 2005 SC 4403 for the proposition that the intention of the legislature is required to be gathered from the language used by the legislature in the Act and therefore a construction which requires for its support addition or substitution of words used in the Statute or which results in rejection of words used in the Statute has to be avoided. He submitted that the language of Section 3(f) of the Act, without any addition of words or omission of words, is clear that not only a Society which receives aid in the present but also has received aid or grant in the past comes within the definition of State aided society.

7. Mr. Bhadoriya, learned counsel for the respondent, on the other hand, cited the decision of the Supreme Court in *Mohan Kumar Singhania and others and others vs. Union of India and others,* AIR 1992 SC 1 and submitted that the Court has to ascertain the intention of legislature in the backdrop of the dominant purpose and the underlying intendment of the Statute. He submitted that since the dominant purpose of

the Act as well as the amendment of 1998 is to ensure that the aid granted by the State is not misused, "State aided society" for the purpose of action under Section 33 of the Act will not cover a Society to which some aid was given in the past but to which aid is not presently given.

8. We have considered the submissions of the learned counsel for the parties and we find that Section 3 of the Act starts with the expression "In this Act unless the context otherwise requires" and then goes on to define the various expressions used in the Act in Clauses (a), (b), (c), (d), (e) and (f). Thus, the definition of "State aided society" is subject to the context in which the expression "State aided society" has been used. On a reading of all the provisions of the Act we find that the expression "State aided society" has been used only in sub-section (1) of Section 33 of the Act.

9. Sub-section (1) of Section 33 of the Act is quoted herein below:

> **Section 33 Supersession of governing body.-** (1) If in the opinion of the State Government, governing body of any State aided society-
>
> (a) persistently makes default or is negligent in the performance of the duties imposed on it by or under this Act, regulations or byelaws of the society or by any lawful order passed by the State Government or Registrar, or is un-willing to perform such duties; or
>
> [(a) Persistently makes default or is negligent in the performance of the duties imposed on it by or under this Act, regulation or bye-laws of the society or by or under any other enactment for the time being in force or by any lawful order passed by the State Government or Registrar or is unwilling to perform such duties: or]
>
> (b) commits acts which are prejudicial to the interest or society or its members; or
>
> (c) is otherwise not functioning properly;
>
> the State Government may, by order in writing, remove the governing body and appoint a person or persons to manage the affairs of the society for a specified period not exceeding two years in the first instance:
>
> Provided that where it is proposed to remove the governing body of the society exclusively on the ground that election to the governing body were not held in accordance with the provisions of this Act or the regulations or byelaws made thereunder, no action shall be taken under this sub-section unless the Registrar or an officer authorised by him in this behalf has convened a meeting of the general body for conducting the election thereto in accordance with the provisions of this Act, or the Regulations or byelaws made thereunder but has failed to get the new governing body elected.

> Provided further that the Registrar or the Officer authorised by him shall, for the purpose of conducting election have all the necessary powers under the Act or the regulations or byelaws made thereunder.

10. By sub-section (1) of Section 33 of the Act quoted above power has been vested in the State Government to remove a governing body and appoint a person or persons to manage the affairs of the society for specified periods mentioned therein only in the case of a State aided society. There is no other provision in the Act for removal of the governing body of a society by the State Government and for appointing a person or persons to manage the affairs of the society. We find that in Section 32 of the Act elaborate provisions have been made for enquiry into the constitution, working and financial conditions of any society and in Section 32 in sub-section (4) it is provided that when an enquiry is made under Section 32 the Registrar shall communicate the result of the enquiry to the society and the decision of the Registrar shall be binding on all parties concerned. Thus, in respect of the societies other than State aided societies, the Registrar may cause an enquiry and also render a decision which will be binding on all the parties concerned, but the governing body of such societies other than State aided societies cannot be superseded. The intention of the legislature is therefore clear that it is only in a case of State aided society in which the Central Government, State Government or statutory body has financial interest that the State Government may remove the governing body and appoint a person or persons to manage the society under Section 33 of the Act.

11. The object of amending the Act in 1998 by the Madhya Pradesh Society Registrikaran (Sanshodhan) Adhiniyam, 1998 as indicated in the statement of objects and reasons appended to the Bill are inter alia that grants given by the Central Government, State Government or Statutory Bodies are not misused. By this amending Act, the definition of "State aided society" was changed and the amended definition of "State aided society" was widened to include society which receives or has received not only aid or grant but also loan, land or building or both on concessional rates and other facilities from the Central Government or State Government or any statutory body.

12. The Madhya Pradesh Society Registrikaran(Sanshodhan) Adhiniyam, 1998 also inserted sub-section (2) in Section 36 of the Act which is quoted hereinbelow:

> "(2) In the event of cancellation of the Registration of Society under sub-section (3) of Section 34 the movable and immovable assets of the society or its institution or centres shall vest in the State Government to the extent of assistance, grant, aid or donation that the society may lave received from Central or State Government or any of the Statutory bodies. It shall the duty of the Collector of the District where the property is situated to take charge of the same on intimation of cancellation by the Registrar."

Thus, a new provision was inserted in the Act that in the event of cancellation of a Registration of Society, the movable and immovable assets shall vest in the State Government to the extent of assistance, grant, aid or donation that the society may receive from the Central Government or State Government or any of the statutory bodies.

13. The meaning of "State aided society" has to be understood in this context of Section 33 of the Act, as amended by the amendments made in the Act and would mean a Society which not only receives aid, grant or loan for the present but also has received aid, grant or loan in the past and the financial interest of the Central Government, State Government or the statutory body in the society subsists. For illustration, if an aid or grant or loan is given to create a durable asset, the State aided society will continue to be a State aided society even after the year in which such aid or grant or loan was given by the State Government but if aid or grant or loan had been given by the Central Government, State Government or any statutory body to a society for a particular event or for salary of staff etc for a particular year, after the event is over or after the year was over or after the loan was recovered the society will not continue to be a State aided society. In the former case, the financial interest of the Central Government, State Government or any statutory body which has given the aid or grant or loan to the society for creation of the durable asset continues even after the aid or grant or loan is spent for creation of the asset, but in later case as soon as the aid or grant is spent on a particular event or on payment of salary of a particular year or the loan is recovered, the financial interest of the Central Government or State Government or any statutory body ceases.

14. Hence even if the definition of State aided society is wide, the context in which the expression "State aided society" is used in the Act gives a limited meaning to State aided society. In Principles of Statutory Interpretation by Justice G.P. Singh X Edition at page 181, it is stated :

> "Wide words used in an interpretation clause may thus be given a limited meaning having regard to the context as a whole for a word in a statute whether it be in the body of the statute or in the interpretation clause is not to be construed without reference to the context in which it appears."

15. In *State of Bombay and others vs. The Hospital Mazdoor Sabha and others*, AIR 1960 SC 610, the Supreme Court while interpreting the word "industry" as defined in Section 2(j) of the Industrial Disputes Act, 1947 held that though Section 2(j) uses words of very wide denotation a line would have to be drawn in a fair and just manner so as to exclude some callings, services or undertakings. Para 12 of the judgment of the Supreme Court at page 614 as reported in the AIR is quoted hereinbelow:

> "12. It is clear, however, that though S. 2(j) uses words of every wide denotation, a line would have to be drawn in a fair and jut manner so as to exclude some callings, services or undertakings. If all the words

used are given their widest meaning, all services and all callings would come within the purview of the definition; even service rendered by a servant purely in a personal or domestic matter or even in a casual way would fall within the definition. It is not and cannot be suggested that in its wide sweep the word "service" is intended to include service howsoever rendered in whatsoever capacity and for whatsoever reason. We must, therefore, consider where the line should be drawn and what limitations can and should be reasonably implied in interpreting the whole words used in S. 2(j); and that no doubt is a somewhat difficult problem to decide."

16. In *Adarsha Shiksha Samiti vs. State of Madhya Pradesh* (supra), an aid was given in 1977 which was relevant for the academic year 1977 and it had no relevance for the academic year 1978-79 when the action was taken against the society under Section 33 of the Act and it was held that the power under Section 33 of the Act could not be exercised by the State Government as the Society ceased to be a State aided society in the year 1978-79. In *Adarsha Vidya Mandir vs. State of Madhya Pradesh and others* (supra), Rs.500/- was paid to a Society for Mahila Rally on 2nd December, 1975, Rs.1,000/- was paid for purchase of sewing machine on 7th January, 1976 and Rs.500/- was paid for Mahila Rally in February, 1976 by the State Government and action under Section 33 of the Act was sought to be taken against the society in May, 1979 and it was held that the society was not a State aided society and the action taken against the society was unauthorised. Hence, if a society has received aid or grant or loan in respect of which the financial interest of the Central Government, State Government or the Statutory Body giving aid or grant or loan persisted, powers under Section 33 of the Act by the State Government could be exercised to protect such interest of the Central Government, State Government or the Statutory Body, but if the society has received an aid or grant or loan in the past and such aid or grant has already been utilized or the loan has been recovered and the Central Government, State Government or the Statutory Body does not have any further financial interest in the society, the State Government cannot exercise power under Section 33 of the Act to supersede the governing body of the society.

17. Viewed from any angle, the State aided society for the purpose of Section 33 of the Act would be a Society which receives or has received aid, grant or loan in which the Central Government, State Government or the Statutory Body granting the aid, grant or loan continues to have financial interest and would not cover a Society which has received aid, grant or loan in the past but in which the Central Government or State Government or any Statutory Body which had granted the aid, grant or loan does not continue to have any financial interest. We accordingly answer the reference.

The appeal will now be listed before the appropriate Bench for hearing on merits.

I.L.R. [2007] M.P., 1553
WRIT APPEAL

Before Mr. Justice R. S. Garg & Mr. Justice R. S. Jha.

19 September, 2007

SMT. LATA PATLE ... Appellant*

vs.

SMT. KAMLESH ...Respondents

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995 - Rule 3, 8, 9 - Attested copy of Election Petition - Appellant and Respondent contested the election for the post of Sarpanch - Respondent was declared elected - Appellant filed election petition - Notices were issued - Summons issued to respondent came back with endorsement by process server that summons were served along with copy - Respondent did not appear - Presiding Officer observed that it appears from record that summons were not served and directed for issuance of fresh summons - Husband of respondent appeared and obtained copy of election petition and other documents - Written Statement was filed - Objection regarding non-deposit of security amount and non-verification of copy of petition was taken subsequently by filing separate application - Election Tribunal without considering the objections directed for re-count and appellant was declared elected - Petition filed by respondent was allowed and matter was remitted back to decide the objections - Election Tribunal did not cast issues on the question of maintainability and directed for recount - Matter was again remanded back by High Court - Election Tribunal rejected the objection regarding non deposit of security amount but dismissed the election petition on the ground of non supply of verified copy of election petition - Held - Rule 3 requires filing of as many copies attested by petitioner looking to the number of respondents - Presiding Officer did not find violation of rule 3 when he made the scrutiny - Copy of election petition was sent along with summons which was issued for the first time - Another copy of petition was supplied to the husband of respondent when he appeared - It is mystery that who supplied the additional copy to Presiding Officer - Verified copy was sent along with first notice and assuming an ordinary copy was served upon respondent there would be no violation of rule 3 because necessary and required copies were once supplied with election petition - Findings recorded by Election Tribunal upholding the objection regarding non supply of verified copy are perverse and bad - Appeal Allowed - Matter remanded back.

In the present matter the present petitioner had stated on oath that along with

*W.A. No. 979/2007 (J)

the election petition she had filed the required copies. After receiving the petition along with the necessary documents when the Sub Divisional Officer made the scrutiny he did not find violation of Rule 3.

From the summons dated 26.2.2005 it would clearly appear that the summons were issued along with a copy of the election petition. It is nobody's case that some other copy was supplied for issuing notices. We would be justified in holding that the copy which was filed by the election petitioner along with the election petition was sent along with the summons dated 26.2.2005. We are not ready and willing to hold that the endorsement made on the back of summons dated 26.2.2005 are wrong or bad. The present respondent does not say that the bailiff who had submitted the report had an axe to grind against the present respondent.

Even if such an allegation was made then too it was not to benefit the present election petitioner because fresh notices were directed to be issued and after the present respondent appeared in the Court copy were supplied to him by the Presiding officer.

Supply of the copy to the respondent is to be found in Rule 9. Rule 9 simply says that the specified officer shall, as soon as may be, cause a copy of petition to be served on each respondent. Rule 9 does nowhere say that the copy required to be verified under Rule 3 is only to be served upon the respondent. If we take such a strict view of Rule 9 then the objection raised by the respondent must fail. However a juxtapose reading of Rule 9 with Rule 3 we must observe that the copies submitted under Rule 3(2) must only be supplied to the party/respondent after they put in their appearance in the Court . In the present matter if along with the summons dated 26.2.2005 the verified copy was sent for service upon the respondents and later on assuming an ordinary copy was served upon the present respondent there would be no violation of Rule 3 because the necessary and required copies were once supplied along with the election petition. (Paras 15,16 & 17)

P.C. Paliwal, for the appellant.
Vipin Yadav, for the respondent no.1.
Alok Pathak, for the respondent no.2.

Cur.adv.vult.

ORDER

The appellant/petitioner being aggrieved by the order dated 10.5.2007 passed by the learned single Judge in Writ Petition No.15573/2006 whereby the writ application filed by the petitioner was dismissed, is before this Court with a submission that the learned single Judge without appreciating the facts has wrongly rejected the writ petition.

2. The short facts necessary for the disposal of the present appeal are that the petitioner Smt. Lata Patle and the contesting respondent Smt. Kamlesh Gautam contested the election to the office of the Sarpanch, Gram Panchayat, Chimnakhari. The respondent was declared returned candidate, the petitioner being aggrieved by the

result of the election challenged the result of the declaration by filing election petition under Section 122 of the M.P Panchayat and Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as the 'Act') on various grounds. In that writ petition Smt. Lata Patle made an application for re-counting of the votes. It is to be noticed that the election petition was filed on 10.2.2005, the Presiding Officer after going through the election petition and the documents annexed with it directed that notices be issued to the returned candidate. Notices were accordingly issued. The summons which were issued to the present respondent came back with the endorsement made by the process server that the summons were served along with the copy. The summons issued by the concerned Tribunal directed that the matter would be taken up for hearing on 7.3.2005. The matter was taken up on 7.3.2005 but however, as the Presiding Officer was not available the matter was adjourned. The matter was again taken up on 28.3.2005 and 11.4.2005 but as the Presiding Officer was not available the matter was adjourned. On 13.4.2005 the learned Presiding Officer recorded that despite service of the notice there was no representation from the side of the respondent. He accordingly ordered that the matter be proceeded exparte. In the same proceedings he again observed that it appeared from the records that summons were not served upon the respondent. He accordingly ordered that summons be issued afresh. Notices were issued for 18.4.2005. As 18.4.2005 was declared a holiday the matter was taken up on 20.4.2005. The respondent did not appear in the Court but however her husband appeared and obtained copy of the election petition and other documents. The written statement came to be filed on 25.4.2005. It is to be noted that in the written statement dated 25.4.2005 any objection in relation to non-deposit of the security cost or non-verification of the copy of the petition served upon the present respondent were not raised. On 26.5.2005 under an independent application objections relating to non-deposit of security cost and non-verification of the copies served on the respondents were raised. It appears that the learned Election Tribunal without taking into consideration the objections raised by the parties and even without casting issues directed that the ballot papers be re-counted. It is not in dispute before us that before the respondent could file Writ Petition No.4237/2005 the ballot papers were re-counted and the result of recounting of the votes were declared in favour of the present petitioner. Writ Petition No.4237/2005 filed by Smt. Kamlesh Gupta (present respondent) was allowed by this Court on 20.7.2005 observing that the order passed by the Election Tribunal could not be allowed to stand. The Court after setting aside the order remanded the matter back to the Election Tribunal with a further direction that if objection with regard to non-compliance of the mandatory provisions were raised then issue be framed in that regard. It appears that after remand, the Election Tribunal did not cast the issues on the question of maintainability of the election petition. It also appears that the parties probably did not crave indulgence of the Election Tribunal to the fact that under the directions of the High Court it was required to cast such issues. The parties joined the issue and proceeded with the evidence. The learned trial Court after recording the evidence

and hearing the parties held that present was a fit case for recounting. It accordingly allowed the writ application and held that the declaration of the result in favour of the present respondent was illegal. The respondent again being aggrieved by the order dated 31.10.2005 passed by the Sub Divisional Officer, Revenue, Barghat, District Seoni, came to this Court in Writ Petition No.14243/2005. The matter was heard and finally disposed of on 16.5.2006. After discussing the entire material available on the record this Court observed that the Election Tribunal was unjustified in not casting necessary issues which related to non-compliance of Rule 3(2) and Rule 7 of the Election Petition Rules. The Court accordingly framed the following two issues and remanded the matter back to the Election Tribunal for decision afresh after recording further evidence of the parties.

Issue No.1 :

Whether, the copy of the election petition supplied to Smt. Kamlesh was in accordance with Rule 3(2) of Election Petition Rules ?

Issue No.2:

Whether, the election petitioner Smt. Lalita Patle deposited the security amount as required under Rule 7 of the Election Petition Rules ?

3. The learned Court below, in accordance with the directions of this Court granted appropriate opportunity to the parties to lead evidence. The respondent besides examining her own self examined her husband in support of the objections. The present petitioner Smt. Lata Patle in addition to her examination examined one Sitaram Thakur working in the office of the Sub Divisional Officer, Revenue, Barghat. After hearing the parties the learned Election Tribunal rejected the objections raised by the respondent in relation to non-deposit of the security cost and non-compliance of Rule 7 of the Election Petition Rules. It however held that the copy of the election petition supplied to the present respondent was not in accordance with Rule 3(2) of the Election Petition Rules. As a consequence of the findings it dismissed the election petition. The election petitioner being aggrieved by the order dismissing the election petition filed W.P. No.15573/2006, after rejection of the same, is now before this Court.

4. Shri P.C. Paliwal, learned counsel for the petitioner after taking us through Rules 3, 4, 7 of the Election Petition Rules and the proceeding dated 10.2.2005 recorded by the Presiding Officer of the Election Tribunal submitted that even before directing issue of notices to the present respondent the Presiding Officer did not find any defect and under these circumstances nobody can say that the petition was suffering with fatal defects under Rule 3 or Rule 7 of the Election Petition Rules. It is also submitted by Shri Paliwal that in accordance with Rule 3, copies were filed and it appears that the said copies were sent to the respondent along with summons which were issued on 26.2.2005. Placing reliance upon the endorsement made on the summons which reads "Yachika Prati Sanlagn Hai" (copy of the petition is enclosed). He submitted that if these summons were served upon the respondent and such is the endorsement

made by the bailiff/process server then there is no good reason to hold that authenticated verified copy was not filed with the election petition. In relation to non-deposit of the security cost it was submitted that the security cost was deposited on 10.2.2005 but the clerk of the S.D.O. being under some confusion did not issue necessary receipts and after receiving the instructions from the S.D.O. if he had issued the receipt on 26.2.2005 then the same would not come in the way of the election petitioner. He submitted that from the statements of Clerk of the S.D.O. it would clearly appear that a sum of Rs.500/- in cash was deposited with the S.D.O. but the receipt was issued on 26.2.2005. He submits that even otherwise the Election Tribunal has held that there was no violation of Rules.

5. Shri Vipin Yadav, learned counsel for the respondent on the other hand submitted that the summons issued on 26.2.2005 were never served upon the present respondent. He also submitted that in absence of the signatures of the present respondent under the caption 'copy of notice received or served' it cannot be held that summons were served. He also submitted that from the observations made by learned Presiding Officer it would clearly appear that the summons issued on 26.2.2005 were not served on the respondent. He also submitted that in accordance with Rule 3 if copies with authentication or verification are not supplied along with the election petition the election petition is to be rejected at the threshold. It is also contended by him that if the security cost was deposited on 10.2.2005 then there was no reason for the officer or clerk of the office not to issue the receipts. He submitted that to remove the defects the security was deposited at a later stage.

6. We have heard the parties at length and have gone through the provisions of law, the objections raised by the parties and the findings recorded by the Tribunal and the order passed by the learned single Judge.

7. The M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 were framed by the State Government under Section 95(1) read with sub-section 1 and 3 of Section 122 of the Act. Rule 3, 7 and 8 which are relevant for this writ appeal read as under :

3. Presentation of election petition -

(1) An election Petition shall be presented to the specified Officer during the office hours by the person making the petition, or by a person authorized in writing in this behalf by the person making the petition.

(2) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

7. Deposit of security -

At the time of presentation of an election petition, the petitioner shall deposit with the specified officer a sum of Rs.five Hundred as security. Where the election of more than one candidate is called in question, a separate deposit of an equivalent amount shall be required in respect of each such returned candidates .

8. Procedure on receiving petition -

If the provisions of rule 3 or rule 4 or rule 7 have not been complied with, the petition, shall be dismissed by the specified officers:

Provided that the petition shall not be dismissed under this rule without giving the petitioner an opportunity of being heard.

Sub-rule 2 to rule 3 provides that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. Rule 7 provides that at the time of presentation of an election petition, the petitioner shall deposit a sum of Rs.five hundred as security and if there are more than one respondent/candidate then a separate deposit of an equivalent amount shall be made in respect of each such returned candidates. Rule 8 provides that if provisions of Rule 3, Rule 4 or Rule 7 of the Election Petition Rules are not complied with, the petition, shall be dismissed by the specified officers. The proviso appended to the rule however provides that the petition shall not be dismissed under the rules without giving petitioner an opportunity of being heard. Undisputedly this Court has held that observance of Rule 3, Rule 4 and Rule 7 is mandatory otherwise consequences as provided under Rule 8 would ensue.

8. In the present matter it is to be seen that on 10.2.2005 the Presiding Officer did not find any defect in the election petition. He did not say that the security was not deposited or the necessary verified copies were not filed. Instead he observed that along with the election petition necessary documents and affidavits were filed.

9. If under the scrutiny which was required to be made by the Presiding Officer no wrong was found and there was no report of non-compliance of Rule 3 or Rule 7 of the Election Petition Rules then the burden would be extra heavy on the other side to prove that the proceedings recorded on 10.2.2005 were not in accordance with law or were recording incorrect facts.

10. In the present matter the parties were allowed to lead evidence in support of their contention. Smt. Kamlesh Gautam the respondent stated before the Court that the copy of the petition received by her was not properly verified. However, in cross-examination she submitted that the copy was not received by her but her husband had received the copy. Firstly she said that when the copy was received by her husband Adhar Singh Gautam she was present but immediately thereafter she said that when the copy was supplied to her husband she was not present. She even stated in her statement that in her written statement dated 25.4.2005 she had already taken the plea

that the verified copy of the election petition was not received. She was suggested that after the recounting when the results were declared and she lost, her husband changed the copy and filed a forged copy in evidence. Adhar Singh Gautam the husband of the respondent was also examined. He had filed the copy of the petition which was received by him. In the cross-examination he clearly admitted that on 20.4.2005 he informed his wife that the copy of the petition supplied to them was not properly verified and that along with the election petition the security cost was not deposited.

11. Sitaram Thakur, Assistant Grade III of Sub Divisional Officer, Barghat, appeared before the Court as a witness and submitted that the receipt was issued on 26.2.2005 and the entry in the ledger were made on 26.2.2005. If this was the sum total of the evidence then this would have been a different matter. In the cross-examination when he was put certain questions he started narrating facts which were not asked to him in examination-in-chief. He stated that the proceedings dated 10.2.2005 were recorded under the directions of the Presiding Officer. He also stated that it was correct to say that a sum of Rs.500/- was deposited in cash with the Tribunal. He also stated that the proceedings dated 10.2.2005 were not recorded by him under any pressure or force. He also stated that Rs.500/- was deposited in cash and as he was not knowing under which head the amount was to be deposited, the receipt could not be issued. Apart from that he also stated that prior to filing of this election petition some other election petitions were also filed and in the said petitions security cost was deposited in cash under the orders of the Presiding Officer. In each case the receipts were issued on 26.2.2005. If this was the statement of the witnesses in the cross-examination then one cannot be allowed to say that the cross-examination be ignored and the examination-in-chief only be relied upon. Cross-examination of a witness is an integral part of the statement of the witness. Any statement is to be read as a whole. One cannot be allowed to say that if the witness does not support the case and cause of the party in the examination-in-chief, then the statements made in the cross-examination should at all not been seen.

12. From the statement of Sitaram Thakur it would clearly appear that security cost was deposited in the case on 10.2.2005 and in accordance with the practice observed by the S.D.O. money was received in cash and the receipts to all election petitioners were issued on 26.2.2005. Rule 7 referred to above simply provides that at the time of presentation of an election petition, the petitioner shall deposit with the specified officer a sum of Rs.500/- as security. The rule does not say that such an election petitioner is bound and obliged to file a copy of the receipt along with the election petition. In a given case if the Presiding Officer receives the security cost in cash and does not issue the receipt immediately thereafter, then for such a lapse or inaction on the part of the Presiding Officer or his office, election petitioner cannot be allowed to suffer. The question of deposit or non-deposit of the security cost is being discussed by us in detail because, Shri Vipin Yadav, learned counsel for the respondent submitted

that the findings recorded by the learned Election Tribunal in relation to non-compliance of Rule 7 were perverse and bad.

13. For the reasons stated aforesaid we must hold that the Court below was absolutely justified in holding that there was no violation of the Rule 7.

14. So far as violation of rule 3 is concerned the Court below has in a very cursory and casual manner observed that the copy served upon the respondent was not duly verified, therefore, Rule 3 was not complied with. Rule 3(2) referred to above, provides that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. Requirement of the rule is that as many copies looking to the number of the respondents should be filed, every such copy shall be attested by the petitioner and the attestation shall be under the signature of the election petitioner with a clear say that the copy of the election petition is true copy of the original.

15. In the present matter the present petitioner had stated on oath that along with the election petition she had filed the required copies. After receiving the petition along with the necessary documents when the Sub Divisional Officer made the scrutiny he did not find violation of Rule 3.

16. From the summons dated 26.2.2005 it would clearly appear that the summons were issued along with a copy of the election petition. It is nobody's case that some other copy was supplied for issuing notices. We would be justified in holding that the copy which was filed by the election petitioner along with the election petition was sent along with the summons dated 26.2.2005. We are not ready and willing to hold that the endorsement made on the back of summons dated 26.2.2005 are wrong or bad. The present respondent does not say that the bailiff who had submitted the report had an axe to grind against the present respondent. There is a presumption of validity in favour of the official action taken by the public officers. Presumption is rebuttable but unfortunately in the present case the present respondent did not say that the bailiff, helped and assisted the present election petitioner to make such an endorsement. Even if such an allegation was made then too it was not to benefit the present election petitioner because fresh notices were directed to be issued and after the present respondent appeared in the Court copy were supplied to him by the Presiding officer. It is still a mystery who supplied additional copy to the Presiding Officer so that it could be supplied to the present respondent. It is however not in dispute before us that copy of the election petition was supplied by the Presiding Officer to the present respondent. The dispute still is that Ex.B2 (somewhere referred to as Ex.D2) was the copy supplied to the respondent or a copy of Ex.B2-C was supplied to the respondent. From the records it would be clear that the two copies are different, one bears the necessary endorsement and verification and the other does not.

17. Shri Vipin Yadav, learned counsel for the respondent submitted that a comparison

of the original election petition with Annexure B2-C would make it clear that Annexure B2-C is not photocopy of the original election petition. He submits that Annexure B2-C was later on concocted to suit the case and cause of the election petitioner. The submission made by the learned counsel for the respondent is without any foundation. Smt. Lata Patle the election petitioner never stated before the Court the Ex.B2-C was true photo copy of the election petition which was filed in the Court. She had stated that a true photo copy of Ex.B2-C was supplied by the election petitioner to the present respondent. Supply of the copy to the respondent is to be found in Rule 9. Rule 9 simply says that the specified officer shall, as soon as may be, cause a copy of petition to be served on each respondent. Rule 9 does nowhere say that the copy required to be verified under Rule 3 is only to be served upon the respondent. If we take such a strict view of Rule 9 then the objection raised by the respondent must fail. However a juxtapose reading of Rule 9 with Rule 3 we must observe that the copies submitted under Rule 3(2) must only be supplied to the party/respondent after they put in their appearance in the Court . In the present matter if along with the summons dated 26.2.2005 the verified copy was sent for service upon the respondents and later on assuming an ordinary copy was served upon the present respondent there would be no violation of Rule 3 because the necessary and required copies were once supplied along with the election petition.

18. Even otherwise from the facts it would clearly appear that the election petitioner had served a photo copy of Ex.B2-C and not a copy on which the respondent was placing reliance. The findings recorded by the Election Tribunal are contrary to record, bad and can be condemned as perverse. In view of discussion aforesaid we must quash the findings. We accordingly hold that the Tribunal was not justified in holding that the election petition was liable to be dismissed for non-compliance of Rule 3 of the Election Petition Rules.

19. For the reasons stated aforesaid the writ appeal is allowed. The order passed by the learned single Judge is set aside and the order passed by the learned Election Tribunal is quashed. The parties present before this Court shall appear before the learned Tribunal on 8.10.2007. It shall be the duty of the election petitioner to file a copy of this order to inform the Election Tribunal that it is required to decide the matter in accordance with the earlier directions given by this Court. The Election Tribunal shall decide the matter finally within 8 weeks from the date of appearance of the parties.

20. The learned counsel for the State shall see that the original records are immediately dispatched so as to reach the learned Tribunal before the date fixed.

21. The appeal is allowed. There shall be no order as to costs.

I.L.R. [2007] M.P., 1562

WRIT APPEAL

Before Mr. Justice R. S. Garg & Mr. Justice R. S. Jha.

24 September, 2007

SANTOSH ... Appellant*

vs.

STATE ...Respondents

Cooperative Societies Act, M.P., 1960 (XVII of 1961)-Section 8, M.P. Cooperative Societies Rules, 1962, Rules 14, 23 - Power of Registrar to decide certain questions and Admission of Members - Appellant wanted to become member of a Co-operative Society - He was not given the membership form - Consequently his name was not included in the voter list - Appellant filed writ petition challenging the voters list, election/election process as he comes under clause any person - Held - If appellant was aggrieved by non supply of membership form, then he should have approached Registrar under Section 8 of Act - Word any person cannot be interpreted in wild expression - Any Person means who is entitled to be included in the list of members on the date when the list is prepared - Person who does not apply under Rule 14 to become member cannot be allowed to challenge the elections of the Society - Any Person would not mean any person who has no interest in Society but would mean a person who is a member of the said Society- Appeal dismissed.

In the opinion of this Court the words 'any person' are not to be appreciated or interpreted in such a wild expression. The words 'any person' would always refer to such a person who is entitled to be included in the list of members on the date when the list is to be prepared under rule 23(3)(a) of 1962 Rules. If the interpretation put forth by the learned counsel for the appellant is accepted then in fact it would lead to a chaotic situation. Any person who is not interested in the society, its Governing Body or its working may come to the Court and challenge the voters list and the election. The scheme of the Act is to create cooperative society for betterment and upkeep of the interest of the members of the society. A person who does not apply under rule 14 to become a member of the particular society cannot be allowed to challenge the elections of that society. It is also to be seen from rule 23 that society is required to maintain a register of members and enter therein the names and details of the members of the society in the manner as prescribed. Every society is required to maintain the register of membership and is required to prepare a list of members, only thereafter such list is required to be published by exhibiting it at the office of the society and on the notice board of Deputy Registrar/Assistant Registrar, in-charge of the district etc. A person who is yet not a member of the society would not be entitled to challenge the voters list because such right is available only to a member of the society. The words

*W.A. No. 54/06 (NM)

'any person' would not mean any person who has no interest in the society but on a harmonious construction, we must hold that any person would mean a person who is a member of the said society. (Para 12)

Amalpushp Shroti, for the appellant.
R.P.Agrawal, with *Ravindra Dave, Amicus Curiae.*
Vijay Pandey, for respondent No.3.
Samdarshi Tiwari, for respondents No.1, 2 and 4.

Cur.adv.vult.

ORDER

Parties are heard.

1. The appellant being aggrieved by the order dated 7-12-2006 is before this Court with a submission that the learned single Judge was not justified in dismissing the petition.

2. The short facts necessary for disposal of this writ appeal are that the appellant wanted to become member of Jai Durga Prathamik Upbhokta Sahkari Bhandar, Maryadit but he was not supplied the membership form and as such he was denied membership. It is also the case of the appellant that he made a representation to the Society for granting him the membership but in the meanwhile the election process started and as his name was not included in the voters list, he had to come to this Court in the writ application challenging the voters list.

3. Learned counsel for the appellant submits that though the appellant was denied membership and his name was not included in the voters list, he had a right to challenge the voters list, election/election process and as he comes under the clause 'any person', the writ petition at his instance was maintainable.

4. On being asked that on what particular date he applied for supply of the form, learned counsel for the appellant submitted that he does not have such instructions. On being asked that whether against non-admission as a member of the Society any action was taken by the appellant, learned counsel for the appellant submitted that but for submitting his representations on 27-5-2006, 14-11-2006 and 25-11-2006 he did not take any action.

5. Shri R.P.Agrawal, as *Amicus Curiae,* submitted to the Court that non-admission of any person, who is otherwise entitled to become a member of the Society, would provide a cause of action in favour of such person to approach to the Registrar of the Societies under Section 8 of M.P. Cooperative Societies Act, 1960. His further submission is that rule 23 of the Rules would not clothe each and every person to come to the Court or raise an objection against voters list. He submits that the word 'any person' if would mean any Tom, Dick or Harry who is not interested in the Society, then the misinterpretation of the words 'any person' would lead to a chaotic condition.

6. Shri Pandey, learned counsel for respondent No.3 supported the argument of Shri R.P.Agrawal and submitted that the learned single Judge for justified reasons refused to interfere in the matter.

Section 8 of the Act reads as under :

> **"8. Power of Registrar to decide certain questions.** –Where in connection with the formation, registration or continuance of a society or the admission of a person as a member of a society any question arises whether a person is an agriculturist or not or whether any person resides in a particular area or not or whether any person belongs to any particular class or occupation or not or such other question pertaining to the eligibility of any person to become a member of a society, such question shall be decided by the Registrar and his decision shall be final."

7. From perusal of Section 8 it would clearly appear that where in connection with the admission of a person as a member of a society any question arises whether a person is entitled to become a member then such question shall be decided by the Registrar and his decision shall be final. In the present case, if the appellant was aggrieved because of non-supply of the admission/membership form then he was required to refer the matter to the Registrar under Section 8. Unfortunately, the appellant did not approach the competent forum but made certain representations.

8. Rule 14 of the 1962 Rules clearly provides that no person shall be admitted as a member of a society unless he has applied in writing in the form laid down by the society or in the form specified by the Registrar, if any, for membership. Such a person would have to purchase at least one share and pay the value thereof in full or in part. His application should be approved by the committee or the General Body of the Society and he should also fulfill other conditions laid down in the Act, Rules or bye-laws. If a person does not apply on the form as prescribed by the society to admit somebody as a member then such a person would not be taken on the roll of the society nor would have any right as a member. Such a person has to approach the Registrar under Section 8 of the Act.

9. It is to be seen from the scheme of the Act and Rules that an election is to be conducted by the competent authority for constitution of the Governing Body from amongst members of the society. A person who is not a member cannot take part in the election nor his name can be included in the voters list.

10. Rule 23 on which strong reliance is placed, states that every society shall keep a register of members and enter therein the names of the members as prescribed under sub-rule (1) of Rule 23. Rule 3(d), which has been referred to in the arguments, provides that the list to be made available shall be published by exhibiting it at the office of the society. It is to be noted, at this stage, that sub-rule (3)(a) of Rule 23 provides that every society shall prepare a list of members, delegates and representatives of member societies as on the last day of each cooperative year. Such list is to be published by exhibiting it at the office of the society.

11. Shri Shroti, learned counsel for the appellant, placing reliance upon sub-clause (ii) of clause (d) of sub-rule (3) of rule 23, submitted that any person whose name is

not entered in the list or is not properly entered in the list or any person whose name is entered in the list and who objects to the inclusion of his name or name of any person in the list may prefer a claim or an objection to the Returning Officer or person authorized by him in writing within six days from the publication of the list under the said sub-clause. His submission is that a person who does not have any interest in the society or who is not even a member of the society can always challenge voters list and the elections if those are being conducted in an illegal manner.

In the opinion of this Court the words 'any person' are not to be appreciated or interpreted in such a wild expression. The words 'any person' would always refer to such a person who is entitled to be included in the list of members on the date when the list is to be prepared under rule 23(3)(a) of 1962 Rules. If the interpretation put forth by the learned counsel for the appellant is accepted then in fact it would lead to a chaotic situation. Any person who is not interested in the society, its Governing Body or its working may come to the Court and challenge the voters list and the election. The scheme of the Act is to create cooperative society for betterment and upkeep of the interest of the members of the society. A person who does not apply under rule 14 to become a member of the particular society cannot be allowed to challenge the elections of that society. It is also to be seen from rule 23 that society is required to maintain a register of members and enter therein the names and details of the members of the society in the manner as prescribed. Every society is required to maintain the register of membership and is required to prepare a list of members, only thereafter such list is required to be published by exhibiting it at the office of the society and on the notice board of Deputy Registrar/Assistant Registrar, in-charge of the district etc. A person who is yet not a member of the society would not be entitled to challenge the voters list because such right is available only to a member of the society. The words 'any person' would not mean any person who has no interest in the society but on a harmonious construction, we must hold that any person would mean a person who is a member of the said society.

The learned single Judge, in our opinion was absolutely justified in not interfering in the matter. The appeal deserves to and is accordingly dismissed.

Consequently, the I.A.No. 321/2007, an application seeking stay of further election proceedings is also rejected.

No costs.

I.L.R. [2007] M.P., 1566

WRIT APPEAL

Before Mr. A.K.Patnaik, Chief Justice & Mr. Justice A.K. Shrivastava,

4 October, 2007

PARASNATH SINGH ... Appellant*

vs.

G.C. KEWALREMANI and others ...Respondents

State Re-Organization Act, M.P. (XX of 2000) - Section 68 - Provisions relating to services in M.P. and Chhatisgarh - Allocation - 8 posts of Joint Registrar, 14 posts of Dy. Registrar Co-Operative Department allotted to State of Chhatisgarh - State of Chhatisgarh informed that only 6 posts of Joint Registrar and 18 posts of Dy. Registrar required - Six officers already given their option for State of Chhatisgarh - Allocation of respondent no. 1 quashed by Learned Single Judge - Held - Successor States can agree to number of posts in a cadre to be allotted to a State - If two States have agreed to number of particular posts which will be divided between States, the same cannot be held to be violative of Section 68.

It may be, however, necessary to work out the number of posts to be divided between the two successor States before allocation of the government employees to the two States but Section 68 does not put restrictions on the two successor States to agree to the number of posts in a cadre to be allotted to a State. Thus, if the two States have agreed with regard to the number of particular posts which will be divided between the States of Madhya Pradesh and Chhattisgarh, the same cannot be held to be in violation of Section 68 of the Act. (Para 8)

Mrs. Shobha Menon, with *Ms.P.S.Chuckal,* for the appellant.

Rajneesh Gupta, for the respondent No.1.

Dharmendra Sharma, Asstt. Solicitor General for the respondent No.2-Union of India.

P.N.Dubey, Dy. Advocate General for the respondent No.3-State of M. P.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by

A. K. PATNAIK, C. J. :– This is an appeal against the orders dated 11/12/2006 and 8/1/2007 passed by learned Single Judge in W.P. No.10342/2005(S) and MCC No.4/2007.

2. The facts briefly are that respondent No.1 was working as a Joint Registrar, Co-operative Societies, in the State of Madhya Pradesh when the State of Madhya Pradesh was bifurcated to Madhya Pradesh and Chhattisgarh by the Madhya Pradesh Re-organisation Act, 2000 (for short 'the Act'). Under Section 68 of the Act, every

*W.A. No. 100 of 2007 (J)

person who immediately before the appointed day was serving in connection with the affairs of the existing State of Madhya Pradesh was to continue to serve in connection with the affairs of the State of Madhya Pradesh unless by general or special order of the Central Government he was finally allotted to the State of Madhya Pradesh or to the State of Chhattisgarh. Respondent No.1 was allotted to the State of Chhattisgarh and was relieved to join in the State of Chhattisgarh as Joint Registrar, Firms and Societies by memo dated 22/12/2004. Respondent No.1 filed a Writ Petition No.10342/2005 (S) contending, *inter-alia*, that the State of Chhattisgarh had informed the Government of Madhya Pradesh, Cooperative Department that as against 8 posts of Joint Registrar and 14 posts of Dy. Registrar, it requires 6 posts of Joint Registrar and 18 posts of Dy. Registrar and that in the six posts of Joint Registrar, six officers have already given their option for the State of Chhattisgarh and, therefore, steps should be taken by the Lohani Committee and the Central Government for allocation of two Joint Registrars including respondent No.1 to the State of Madhya Pradesh. The contention of petitioner before the learned Single Judge in the writ petition is that since the requirement of Chhattisgarh State was only six Joint Registrars and six Joint Registrars had already been allotted to the State of Chhattisgarh on the basis of their option given for the State of Chhattisgarh, the order allotting respondent No.1 to the State of Madhya Pradesh should be quashed and respondent No.1 should be allowed to continue in the State of Madhya Pradesh.

3. The learned Single Judge upheld the aforesaid contention of respondent No.1 and further held that when both the States have agreed that respondent No.1 be retained in the State of Madhya Pradesh and was also seeking cancellation of allocation of respondent No.1 to the State of Chhattisgarh for the reason that the post for which respondent No.1 was sought to be allocated has already been filled up, the allocation order of respondent No.1 deserves to be quashed and, accordingly, quashed the order dated 5/9/2002 allocated respondent No.1 to the State of Chhattisgarh and directed that respondent No.1 shall be allowed to continue in the State of Madhya Pradesh by the impugned order dated 11/12/2006.

4. Aggrieved by the impugned order dated 11/12/2006 passed by the learned Single Judge in W.P. No.10342/2005(S) the appellant, who was not a party in the writ petition, has filed this appeal. Mrs. Menon, learned senior counsel for the appellant, submitted that the appellant is also serving as a Joint Registrar in the Cooperative Department in the State of Madhya Pradesh but was junior to respondent No.1 in service and by the impugned order dated 11/12/2006 passed by learned Single Judge quashing the order allotting the services of respondent No.1 to the State of Chhattisgarh and directing that respondent No.1 shall continue in the State of Madhya Pradesh, the appellant is affected inasmuch as he will have less chances of promotion to the higher posts in the Cooperative Department. She submitted that the learned Single Judge has taken a view in the impugned order that allocation of Government employees to the State of Madhya Pradesh and to the State of Chhattisgarh can not be made on the basis of the consent

of the two States because the language of Section 68 of the Act will show that the allocation has to be done as per general or special orders passed by the Central Government.

5. Mr.Rajneesh Gupta, learned counsel appearing for respondent No.1, on the other hand, submitted that when the State of Chhattisgarh required only six posts of Joint Registrars and six Joint Registrars have already given their option for the State of Chhattisgarh and had been allotted to the State of Chhattisgarh, the order passed by learned Single Judge cannot be said to be bad in law.

6. Mr. Dharmendra Sharma, Assistant Solicitor General appearing for Union of India and Mr. P.N. Dubey, learned Dy. Advocate General, appearing for the State of Madhya Pradesh, submited that the Union of India and the State of Madhya Pradesh have not filed any appeal against the impugned order passed by learned Single Judge and they accepted the same.

7. Section 68 of the Act on which Mrs. Menon has placed reliance is quoted hereunder :

> **"68. Provisions relating to services in Madhya Pradesh and Chhattisgarh.-** (1) Every person who immediately before the appointed day is serving in connection with the affairs of the existing State of Madhya Pradesh shall, on and from that day provisionally continue to serve in connection with the affairs of the State of Madhya Pradesh unless he is required, by general or special order of the Central Government to serve provisionally in connection with the affairs of the State of Chhattisgarh.
>
> Provided that no direction shall be issued under this section after the expiry of a period of one year from the appointed day.
>
> (2) As soon as may be after the appointed day, the Central Government shall, by general or special order, determine the successor State to which every person referred to in sub-section (1) shall be finally allotted for service and the date with effect from which such allotment shall take effect or be deemed to have taken effect.
>
> (3) Every person who is finally allotted under the provisions of sub-section (2) of a successor State shall, if he is not already serving therein be made available for serving in the successor State from such date as may be agreed upon between the Governments concerned or in default of such agreement, as may be determined by the Central Government.

8. It is clear from the language of Section 68 of the Act that the employees serving in connection with the affairs of the State of Madhya Pradesh at the time when the reorganisation took place on the appointed day by bifurcation of the State of Madhya

Pradesh to Madhya Pradesh and Chhattisgarh, haave to be allocated either to the State of Madhya Pradesh or to the State of Chhattisgarh as per determination made by the Central Government in a general or special order. Section 68 does not state in what manner the posts in which the government employees were working in the State of Madhya Pradesh on the appointed day when the reorganisation took place were to be divided between the two successor States, Madhya Pradesh and Chhattisgarh, for making allocation of government employees within the two successor States, Madhya Pradesh and Chhattisgarh. It may be, however, necessary to work out the number of posts to be divided between the two successor States before allocation of the government employees to the two States but Section 68 does not put restrictions on the two successor States to agree to the number of posts in a cadre to be allotted to a State. Thus, if the two States have agreed with regard to the number of particular posts which will be divided between the States of Madhya Pradesh and Chhattisgarh, the same cannot be held to be in violation of Section 68 of the Act.

9. While, however, agreeing to the number of posts to be allotted to the two States, the Governments of the two States cannot deviate from the principles determined by the Central Government in its general or special order under Section 68 of the Act, because such deviation will affect the rights of the government employees. Mrs. Menon, learned senior counsel, is, therefore, right in her submission that allocation of government employees working in the erstwhile State of Madhya Pradesh to the successor State of Chhattisgarh will have to be on the basis of principles laid down by the Central Government in its orders issued from time to time under Section 68 of the Act.

10. As we find from the record of this case that by communication dated 17/11/2001, the Government of Chhattisgarh, Co-operative Department informed the Secretary, Government of Madhya Pradesh, Co-operative Department that the State of Chhattisgarh has been given total of 08 Joint Registrars and 14 Dy. Registrars, but the requirement of the Chhattisgarh Government is 06 Joint Registrars and 18 Dy. Registrars. In the communication dated 17/11/2001, the Government of Chhattisgarh, Co-operative Department, also intimated the Government of Madhya Pradesh, Co-operative Department that six Joint Registrars and 18 Dy. Registrars had already been given their option for the State of Chhattisgarh. In the communication dated 17/11/2001 the Government of Chhattisgarh, Co-operative Department also requested the Madhya Pradesh Government to take necessary steps before Lohani Committee and Central Government for allocation of two Joint Registrars including respondent No.1 who were willing to serve in the Madhya Pradesh State Service. It further appears from the record that by communication dated 11/12/2001 made by the Secretary, Government of Madhya Pradesh, Co-operative Department to the Principal Secretary of General Administration Department, State Reorganisation Cell and Shri Lohani Committee, informing the authorities that the requirement of the State of Chhattisgarh is six Joint Registrars and 18 Dy. Registrars and these required number of officers

have already given their option for allocation to the State of Chhattisgarh. In the communication dated 11/12/2001, the Secretary, M.P. Government, Co-operative Department also informed the aforesaid authorities that the two Joint Registrars including respondent No.1 were willing to serve in the State of Madhya Pradesh. By the communication dated 11/12/2001 the Secretary, Government of Madhya Pradesh, Co-operative Department also intimated the aforesaid authorities that the Madhya Pradesh Government and Government of Chhattisgarh were willing for allocation of the service personnel as mentioned in the communication and, therefore, State Allocation can be done and concurrence of Central Government may be obtained. The English translation of the communication dated 11/12/2001 of the Government of Madhya Pradesh, Co-operative Department being relevant for disposal of this writ appeal is quoted hereunder :

"GOVERNMENT OF MADHYA PRADESH
CO-OPERATIVE DEPARTMENT
MINISTRY

No.4050/3483/15-2 Bhopal, dated 11/12/2001

To,

The Principal Secretary,
General Administration Deptt.,
State Re-organisation Cell,
Shri Lohani Committee
Vallabh Bhawan, BHOPAL

Subject- PROPOSED ALLOCATION OF FOUR DEPUTY REGISTRARS STATE SERVICE PERSONNEL OF MP TO STATE SERVICE PERSONNEL OF STATE OF CHHATTISGARH AND PROPOSED ALLOCATION OF TWO JOINT REGISTRARS OF CHHATTISGARH STATE SERVICE PERSONNEL WILLING TO SERVE AS MP STATE SERVICE PERSONNEL, RELATING TO.

Presently, State of Chhattisgarh has been allocated with 08 Joint Registrars and 14 Deputy Registrars. As per the requirement of State of Chhattisgarh, 06 Joint Registrar and 18 Deputy Registrars are needed. The required numbers of such officers have given their option for allocation to State of Chhattisgarh.

The four Deputy Registrar, benafide resident of State of Chhattisgarh, whose names are given as hereunder have opted for their allocation to Chhattisgarh :-

(1) Shri Sunil Tiwari, Deputy Registrar

(2) Shri NN Tandon, Deputy Registrar
(3) Shri PS Sarparaj, Deputy Registrar
(4) Shri SR Bhagat, Deputy Registrars

The two Joint Registrars willing to serve in State of MP are as hereunder :-

(1) Shri G.C.Kewalramani, Jt.Registrar, *bonafide* resident of Kanker (Bastar)

(2) Shri SN Gupta, Jt. Registrar, Distt. Raigarh

Both the above officers have opted to serve State of MP.

MP Government and Government of Chhattisgarh are willing for allocation of aforesaid service personnel. Therefore, State Allocation (Service Personnel Allocation) may be done and obtaining of concurrence of Central Government is requested.

Sd/-xxx
(OP Rawat)
Secretary,
MP Government-
Co-operative Deptt.

No.4051/3403/15-2 Bhopal, dated 11/10/2001

Copy to :-

Shri RR Prabandh Sanchalak (RS) Government of India, Personnal & Pension Department, Third Floor Loknayak Bhavan Khan Market, New Delhi- for information & necessary action."

11. It further appears that the Government of Madhya Pradesh, Co-operative Department addressed letter dated 8/10/2002 to Director (S.R.), Govt. of India, Department of Personnel & Training, New Delhi in which it was stated that Government of India issued Order No.70/2 dated 5/9/2002 acceding to the request of the State of Chhattisgarh for allotment of four Deputy Registrars and all the four Deputy Registrars have been allotted to the State of Chhattisgarh whereas instead of allotting to the State of Madhya Pradesh Cadre the two Joint Registrars who had requested for allotment to the State of Madhya Pradesh cadre, the two Joint Registrars have been allotted to the State of Chhattisgarh. In the communication dated 8/10/2002 Secretary, Govt. of Madhya Pradesh, Co-operative Department also intimated the Director (S.R.), Govt. of India, Deptt. of Personnel and Training, New Delhi that only half of the proposal was implemented which was sent after the consent of the parties and there is no decision on the other part of the proposal. Accordingly, the Secretary, Government of Madhya Pradesh made a request in the communication dated 8/10/2002 that two Joint Registrars including respondent No.1 be allotted to the State of Madhya Pradesh instead of State of Chhattisgarh.

12. The aforesaid discussion would show that the Central Government considered the proposal of the Government of Chhattisgarh and the Government of Madhya Pradesh for allotting 06 Joint Registrars and 18 Dy. Registrars instead of 08 Joint Registrars and 14 Deputy Registrars to the State of Chhattisgarh but finally allotted 08 Joint Registrars and 18 Dy. Registrars. When the proposal of the State of Chhattisgarh as well as of the State of Madhya Pradesh was that as against 08 Joint Registrars and 14 Dy. Registrars, 06 Joint Registrars and 18 Dy. Registrars should be allotted to the State of Chhattisgarh, we fail to appreciate why the Central Government had accepted part of the proposal and allotted 18 Dy. Registrars to the State of Chhattisgarh but did not accept the other part of the proposal and allotted 08 Joint Registrars instead of 06 Joint Registrars to the State of Chhattisgarh particularly when the State Governments of Madhya Pradesh and Chhattisgarh had agreed between themselves for allotment of 06 Joint Registrars and 18 Dy. Registrars in place of 08 Joint Registrars and 14 Dy. Registrars in the State of Chhattisgarh.

13. It is not disputed that as per the principles laid down by the Central Government in its order issued under Section 68 of the Act, out of every cadre, firstly willing employees were to be allocated to the State of Chhattisgarh and it is also not disputed before us that there were 06 Joint Registrars who were willing to serve in the State of Chhattisgarh and we were accordingly allotted to the State of Chhattisgarh. Thus, so far as the allocation of the 06 employees to 06 posts of Joint Registrars to the State of Chhattisgarh is concerned, the same was in accordance with the order issued by the Central Government under Section 68 of the Act and was not contrary to Section 68 of the Act.

14. The aforesaid analysis would show that the agreement between the State of Madhya Pradesh and the State of Chhattisgarh was with regard to number of posts of the Joint Registrars and Dy. Registrars in the Co-operative Department to be allotted to the State of Chhattisgarh and not with regard to the allocation of government employees in such posts. The aforesaid analysis would further show that the allocation of the Joint Registrars and Dy. Registrars was made on the basis of the orders passed by the Central Government and in particular the principles determined in the orders issued by the Central Government that allocation of officers belonging to any cadre shall be made first on the basis of their willingness to serve the State of Chhattisgarh.

15. For the aforesaid reasons we do not find any merit in the submission that the learned Single Judge erred in quashing the order of allocation of respondent No.1 and in directing that respondent No.1 will continue in the State of Madhya Pradesh. The writ appeal is, accordingly, dismissed.

I.L.R. [2007] M.P., 1573

WRIT APPEAL

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

9 October, 2007

Y. YOHANNAN ... Appellant*

vs.

STATE OF M.P. and others ...Respondents

Service Law - Back Wages - Quantum of - Petitioner compulsorily retired after holding departmental enquiry - Learned Single Judge set aside order of dismissal and directed for reinstatement and payment of 50% backwages from the date of order passed in writ petition - Held - Principle with regard to backwages has gone sea-change - It would depend upon many a factor - Pragmatic view has to be taken - Petitioner stood dismissed in 1989 - Grant of 25% backwages would meet ends of justice - Writ Appeal allowed in part.

We are conscious, some of the judgments were delivered in the context of Industrial Disputes Act, 1947 and some directly in exercise of writ jurisdiction. The principle with regard to backwages, as is manifest, has gone a sea-change. The earlier view was that with the quashment of the order of termination consequent grant of full backwages were a logical corollary. Presently, as the law has been enunciated, it would depend upon many a factor. A pragmatic view has to be taken. The petitioner stood dismissed in the year 1989. Regard being had to the facts and the circumstances in totality, the law in the field, the financial crunch suffered by the State and keeping in view the concept of a pragmatic approach, we are of the considered opinion that grant of 25% backwages would meet the ends of justice. (Para 14)

Cases Referred :

M.N. Binjolkar Vs. State of M.P.; (2005) 6 SCC 224, *General Manager, Vijaya Bank and another Vs. Pramod Kumar Gupta;* (2006) 7 SCC 379, *A.P.S.R.T.C. and another Vs. B.S. David Paul;* (2006) 2 SCC 282, *State of U.P. Vs. Brijpal Singh;* (2005) 8 SCC 58, *Rajasthan SRTC Vs. Shyam Biharilal Gupta;* (2005) 7 SCC 406, *A.P.SRTC Vs. Abdul Kareem;* (2005) 6 SCC 36, *A.P. SRTC Vs. S. Narsagoud;* (2003) 2 SCC 212, *State Bank Of India Vs. Ram Chandra Dubey;* (2001) 1 SCC 73, *U.P. State Brassware Corpn. Ltd. and another Vs. Uday Narain Pandey;* (2006) 1 SCC 479, *Allahabad Jal Sansthan Vs. Daya Shankar Rai and another;* (2005) 5 SCC 124.

Udyan Tiwari, for the appellant

T.S.Ruprah, Addl. Adv. General for the respondents

Cur.adv.vult.

ORDER

The Order of the Court was delivered by

*W.A. No. 173/2006 (J)

DIPAK MISRA, J:–In this intra-court appeal preferred under Section 2(1) of the M.P.Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 the appellant has called in question the sustainability of the order dated 10.11.2005 passed by the learned Single Judge in W.P.No.6002/2003.

2. The appellant entered the services in the Police Department as an L.D.C. on 5.5.1964 and was promoted to the post of U.D.C. with effect from 30.9.1983. He was posted in Central Police Motor Transport (for short 'CPMT') as UDC which is also known as Contingent Clerk. Three clerks, namely, Ravindra Kumar, Om Prakash Shakya and Ms.Asha Manekar were working under him during the period August, 1985 to March, 1986 whereas he was only entitled to one LDC. However, whenever there was heavy work more hands were provided. Such L.D.Cs were required to pass the bills. Contingency section was a part of Accounts Branch and the Accountant was the In-charge of the same having the supervisory control over the appellant and other clerks. The appellant was never declared the Incharge of contingency section at any point of time. While working the appellant learnt that some mischief was being done by O.P.Shakya in respect of passing of bills and, therefore, to satisfy himself he made an enquiry and thereafter moved a note-sheet on 17.7.86 which was supported by the Head Clerk and forwarded to the higher authorities by the Superintendent of Police of CPMT Workshop. However, an enquiry was initiated against the appellant, O.P.Shakya and Ms.Asha Manekar by issuing a chage-sheet dated 07.5.1987. The appellant submitted his reply to the aforesaid charge-sheet on 18.5.1987. It is worth noting that Ravindra Kumar was already dismissed in another case. The appellant faced enquiry for the charge "Inspite of being in-charge of the contingency section, the appellant seriously neglected his duties and responsibilities as a result of which, between the period August'85 and March'86, bogus bills were forwarded to the treasury, amount was drawn thereunder and payments were made." Thus, the only charge against the appellant is failure to discharge the duties of supervisory control. The enquiry officer submitted his report holding the carelessness of the appellant towards his duties and responsibilities. The Deputy Inspector General of Police issued a show-cause notice dated 25.5.1989 to which the appellant submitted his reply on 02.6.1989. However, the respondent No.4 passed the final order dated 08.9.1989 dismissing the appellant from service. Feeling aggrieved the appellant preferred an appeal before the respondent No.2 on 23.9.1989 who modified the punishment from dismissal from service to compulsory retirement with effect from 08.9.1989.

3. It is averred that four persons were charge-sheeted, namely, the appellant, O.P.Shakya, Asha Manekar and Ravindra Kumar Singh and, therefore, joint enquiry ought to have been conducted against all of them in terms of Rule 18 of M.P. Civil Services (Classification, Control and Appeal) Rules inasmuch as Police Regulation are silent in this regard. The result was that all the aforesaid three persons whose bills were dubious have been allowed to go scot free and the appellant has been compulsorily retired. It is putforth that the appellant was never negligent towards his duties and

responsibilities and even otherwise Upper Division Clerks never remain Incharge of a section. It is also putforth that the appellant demanded inspection of documents and supply of copies which were never supplied and the same were also not produced before the Enquiry Officer and hence, the defence of the appellant was highly prejudiced. It is also submitted that serial numbers were changed and interpolation were made by the aforesaid three persons and not by the appellant. The appellant also took objection with regard to conducting of enquiry by an officer subordinate to the Deputy Inspector General of Police.

4. Being aggrieved by the orders dated 08.9.89 and 18.11.89 the appellant filed Original Application No.97/1990 which on abolition of the M.P. Administrative Tribunal, stood transferred to this Court and formed the subject-matter of W.P.No.6002/2003. The learned Single Judge partly allowed the aforesaid writ petition on 10.11.2005 and quashed the Disciplinary proceedings and further quashed the punishment orders and directed the respondents therein to take the appellant in service forthwith. As is manifest, the learned Single Judge granted 50% backwages from the date of the order passed in the aforesaid writ petition.

5. We have heard Mr. Udyan Tiwari, learned counsel for the appellant and Mr. T.S. Ruprah, learned Additional Advocate General for the respondents.

6. It is submitted by Mr. Tiwari that the learned Single Judge while granting 50% backwages has stated that backwages should be granted from the date i.e. the date of passing of the order which is contradiction in terms. It is urged by him that the learned Single Judge ought to have indicated that 50% backwages would mean the backwages from the date of dismissal from service.

7. Mr. T.S. Ruprah, learned Additional Advocate General for the Sate fairly stated that though the direction is not correct but the appellant cannot claim backwages as a matter of right and, therefore, what the learned Single Judge really meant is that the salary shall be due from the date of the order.

8. The singular question that emerges for consideration in this writ appeal is whether the appellant should be entitled to backwages. It is not disputed at the Bar that the appellant, during the pendency of the writ petition, has attained the age of superannuation. Hence, the question of his reinstatement does not arise. After setting aside the order of dismissal, he would only be entitled to pension as per rules. As far as backwages is concerned, without entering into the debate, what the learned Single Judge has meant, we think it appropriate to deal with the said facet indpendently. What would be the just percentage as regards grant of backwages in the case at hand is the fulcrum of the lis.

9. In this context it is appropriate to notice few decisions in the field. In *M.L. Binjolkar vs. State of M.P.*, (2005) 6 SCC 224 it has been held as under:

> "6. We find that so far as the back wages issue is concerned, there are two periods involved. The first was from 1-10-1997 up to the

High Court's order dismissing the writ petitions filed by the State while permitting fresh action. As noted above, the Tribunal had directed that the employees concerned were to be paid full back wages. The High Court had not interfered with that part of the order. Therefore, so far as this period is concerned, the High Court's direction in the impugned judgment for payment of 50% of the back wages does not appear to be correct. So far as the rest of the period is concerned, obviously that relates to the period up to the High Court's order i.e. 1-3-2002. Though the High Court has not specifically dealt with the question as to what would be the appropriate quantum, keeping in view the law laid down by this Court in various cases e.g. *Hindustan Motors Ltd. v. Japan Kumar Bhattacharya*((2002) 6 SCC 41 : 2002 SCC (L&S) 818), *Rajendra Prasad Arya v. State of Bihar*((2000) 9 SCC 514 : 2001 SCC (Cri) 639), *Sonepat Coop. Sugar Mills Ltd. v. Ajit Singh* ((2005) 3 SCC 232: 2005 SCC (L&S) 387), *Haryana State Coop. Land Development Bank v. Neelam* ((2005) 5 SCC 91: 2005 SCC (L&S) 601), *Manager, Reseme Bank of India v. S. Mani* ((2005) 5 SCC 100: 2005 SCC (L&S) 609) *and Allahabad Jal Sansthan v. Daya Shankar Rai* ((2005) 5 SCC 124: 2005 SCC (L&S) 631) we do not find any scope for interference. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view. That being so, we do not think it appropriate to interfere with the quantum of 50% fixed by the High Court. "

10. In *General Manager, Vijaya Bank and another vs. Pramod Kumar Gupta,* (2006) 7 SCC 379 their Lordships in paragraphs 6 and 11 held as under:

"6. We have carefully perused the order passed by the High Court. A perusal of the order passed by the High Court would show that the High Court has not considered the question as to whether the respondent was gainfully employed or not during the relevant period in question. The High Court has also not adverted to the categorical finding recorded by the Tribunal on this aspect. The High Court directed the appellant bank to reinstate the respondent on the post held by him with continuity in service and that the respondent shall also be entitled to other consequential benefits to which he is entitled to in accordance with law. The High Court, in our opinion, without considering the relevant issue has ordered full back wages with all other consequential benefits which, in our opinion, is not correct. It is argued by Mr. K.T.S.

Tulsi, learned senior counsel for the appellants that the respondent-workman has not discharged his burden by adducing any evidence that he was not gainfully employed. He has also now shown any acceptable material that he was not gainfully employed and, under these circumstances, ordering full back wages to the respondent by the High Court without considering the merits of the claim by the bank is not correct and that the approach made by the High Court in ordering full back wages cannot, at all, be countenanced in the facts and circumstances of this case.

11. We, therefore, remit the matter to the High Court to consider the question of payment of back wages for the period in question. We request the High Court to consider the matter afresh on the question of back wages only. The appellant bank is also free to hold any departmental enquiry against the respondent-workman for his absence from duty during the relevant period. Since the matter is remitted to the High Court on the question of back wages only, the respondent will not be entitled for payment of any back wages during the period in question which will depend upon the ultimate order that may be passed by the High Court. The order passed by the High Court ordering reinstatement shall stand."

11. In *A.P. SRTC and another vs. B.S. David Paul,* (2006) 2 SCC 282 their Lordships referring to the decisions rendered in *State of U.P. vs. Brijpal Singh,* (2005) 8 SCC 58; *Rajasthan SRTC vs. Shyam Bihari Lal Gupta,* (2005) 7 SCC; *A.P. SRTC vs. Abdul Kareem,* (2005) 6 SCC 36; *A.P. SRTC vs. S. Narsagoud,* (2003) 2 SCC 212; and *State Bank of India vs. Ram Chandra Dubey,* (2001) 1 SCC 73 expressed the view that back-wages cannot be granted as a natural consequence under the provisions of Industrial Disputes Act, 1947.

12. In *U.P. State Brassware Corpn. Ltd.and another vs. Uday Narain Pandey,* (2006)1 SCC 479 a two-Judge Bench of the Apex Court opined as under:

"17. Before adverting to the decisions relied upon by the learned counsel for the parties, we may observe that although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is being taken by the court realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/ or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched.

43. The changes brought about by the subsequent decisions of this

Court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalization, privatization and outsourcing is evident

64. The judgments and orders of the Labour Court and the High Court are set aside and it is directed that the Respondent herein shall be entitled to 25% back wages of the total back wages payable during the aforesaid period and compensation payable in terms of Section 6-N of the U.P. Industrial Disputes Act.-If, however, any sum has been paid by the Appellant herein, the same shall be adjusted from the amount payable in terms of this judgment."

13. In *Allahabad Jal Sansthan vs. Daya Shankar Rai and another,* (2005) 5 SCC 124 their Lordships have expressed thus :

"6. A law in absolute term cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/or Industrial Tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. It is not in dispute that the Respondent No. 1 herein was appointed on an ad hoc basis; his services were terminated on the ground of a policy decision, as far back as on 24.1.1987. The Respondent No. 1 had filed a written statement wherein he had not raised any plea that he had been sitting idle or had not obtained any other employment in the interregnum. The learned counsel for the Appellant, in our opinion, is correct in submitting that a pleading to that effect in the written statement by the workman was necessary. Not only no such pleading was raised, even in his evidence, the workman did not say that he continued to remain unemployed. In the instant case, the Respondent herein had been reinstated from 27.2.2001.

16. We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.

19. In view of the fact that the Respondent had been reinstated in service and keeping in view the fact that he had not raised any plea or adduced any evidence to the effect that he was remained unemployed throughout from 24.1.1987 to 27.2.2001, we are of the opinion that the interest of justice would be sub-served if the Respondent is directed to be paid 50% of the back wages."

14. We are conscious, some of the judgments were delivered in the context of Industrial Disputes Act, 1947 and some directly in exercise of writ jurisdiction. The principle with regard to backwages, as is manifest, has gone a sea-change. The earlier view was that with the quashment of the order of termination consequent grant of full backwages were a logical corollary. Presently, as the law has been enunciated, it would depend upon many a factor. A pragmatic view has to be taken. The petitioner stood dismissed in the year 1989. Regard being had to the facts and the circumstances in totality, the law in the field, the financial crunch suffered by the State and keeping in view the concept of a pragmatic approach, we are of the considered opinion that grant of 25% backwages would meet the ends of justice.

15. In the result, the writ appeal is allowed in part. We direct that the appellant would be entitled to 25% of the backwages. The same shall be paid to him within a period of three months hence. There shall be no order as to costs.

I.L.R. [2007] M.P., 1579
WRIT PETITION
Before Mr. Justice Rajendra Menon
9 August, 2007

KEDARNATH SHARMA ....Petitioner*
Vs.
U.O.I. and others .....Respondents

Constitution of India - Articles 21, 226 - Direction of CBI enquiry - Direction to CBI to register a case against intervener/Superintendent of Police cannot be granted - Direction to investigate the entire case so as to bring accused after investigation to book can be issued - Such direction can be issued only if Court is satisfied that prima facie enquiry conducted in the matter by police authorities is not proper and inquiry by independent agency like CBI is necessary.

A complete reading of the principles laid down by the Supreme Court in both the aforesaid cases indicates that even though direction as prayed for by the petitioner for directing CBI to register a case against the intervener and conduct inquiry cannot be granted but a direction to investigate the entire case properly so as to bring the accused after such investigation to book can be issued by this Court as held by the Supreme

*W.P. No. 163/2007 (G)

Court in the case of *Secretary, Mining Irrigation & Rural Engineering Services, U.P., and others,* (supra). However, this direction also can be issued only if this Court is satisfied that *prima facie* inquiry conducted in the matter by the police authorities and the CID is not proper, and therefore, inquiry by a independent agency like the CBI is necessary. (Para 19)

Constitution of India - Article 226 - Daughter of petitioner who was working as Sub-Inspector was found dead in her official residence - Complaints were made by deceased during her life time against Superintendent of Police - Body of deceased was removed from spot in the presence of Superintendent of Police inspite of request by relative of deceased not to do so unless he arrives - Panchnama, Inquest Report, and various other procedures in the course of investigation were done even before senior officers could reach on the spot - Material on record shows that Superintendent of Police came to the spot and disturbed the entire place of incident - Even no substantial progress was shown by CID when the matter was handed over to it - Prima facie enquiry and investigation being conducted by CID and attitude of State Govt. is not in conformity with requirements of conducting proper investigation - CBI directed to take over investigation and proceed to enquire into the matter and bring it to its logical end.

In the present case, *prima facie* the inquiry and investigation being conducted by the CID and the attitude of the State Government is found to be not in confirmity with the requirements of conducting a proper investigation into the matter, that being so, interest of justice require that the investigation and inquiry should be done by a independent agency which is not influenced in any manner whatsoever either by the State Government or the local police authorities.

Accordingly, this petition is allowed. The respondent No.7, Director, Central Bureau of Investigation (CBI) is directed to take over the investigation of the matter and on the basis of the material available on record, proceed to enquire into the matter and bring it to its logical conclusion in accordance with law. (Paras 39,40)

Cases referred :

Mohindro VS. State of Punjab and others; (2001) 9 SCC 581, *Prakash Singh Badal and another Vs. State of Punjab and others;* (2007) 1 SCC 1, *Ramesh Kumari VS. State (NCT of Delhi) and others;* (2006) 2 SCC 677, *Kashmeri Devi Vs. Delhi Administration and another;* 1988 SCC (Cri) 864, *R.S. Sodhi Vs. State of U.P. and others;* AIR 1994 SC 38, *Mohammed Anis Vs. Union of India and others;* 194 Supp (1) SCC 145, *Central Bureau of Investigation through S.P., Jaipur Vs. State of Rajasthan and another;* (2001) 3 SCC 333, *State of Bihar and another Vs. Ranchi Zila Samta Party and another;* AIR 1996 SC 1515, *Giridhari Lal Kanak Vs. State of M.P. and others;* 2002 (1) MPLJ 596, *M.C. Abraham and another Vs.*

STte of Maharashtra and others; (2003) 2 SCC 649, *Hari Singh Vs. State of U.P.;* (2006) 5 SCC 733,*Gangadhar Janardan MhatreVs. State of Maharashtra and others;* (2004) 7 SCC 768, *Shashikant Vs. Central Bureau of Investigation and others;* (2007) 1 SCC 630, *Adri Dharan Das Vs. State of W.B.;* (2005) 4 SCC 303, *Common Cause, A Registered Society Vs. Union of India and others;* (1999) 6 SCC 667, *Rajesh and others Vs. Ramdeo and others;* (2001) 10 SCC 759, *T.T. Antony Vs. State of Kerala and others;* (2001) 6 SCC 181, *Popular Muthiah Vs. State represented by Inspector of Police;* (2006) 7 SCC 296, *State of West Bengal and others Vs. Sampat Lal and others;* (1985) 1 SCC 317, *Secretary, Minor Irrigation and Rural Engineering Services U.P. and others Vs. Sahngoo Ram Arya and another;* AIR 2002 SC 2255, *Shakikla Abdul Gafar Khan (Smt.) VS. Vasant Raghunath Dhoble and another;* (2003) 7 SCC 749.

Abhishek Nagarajan, with *Jitendra Sharma,* for the petitioner.
V.K.Sharma, for the respondent No.1 and 7.
Brijesh Sharma, Govt. Advocate for the respondents No.2 to 6.
Raju Sharma, for the respondent No.7.
M.P.S.Raghuvanshi, with *Mrigendra Singh* and *Prashant Sharma,* for the intervenor, *Rajababu Singh.*

Cur.adv.vult.

ORDER

RAJENDRA MENON, J. :–Petitioner, a 82 years old person has invoked the writ jurisdiction of this Court aggrieved by the manner in which the process of investigation and inquiry into the death of his daughter, Kumari Chetana Sharma who was working as Sub Inspector in district Bhind is being carried out. *Inter alia* contending that investigation in the matter is not conducted properly and the then Superintendent of Police, Bhind, one Shri Rajababu Singh has in fact murdered petitioner's daughter, the first information report lodged by him is not properly registered, action is not being taking for registering the case under section 302 of I.P.C., petitioner has filed this petition and the reliefs claimed are that a writ of *Mandamus* or any other writ be issued directing the respondents to handover investigation of the offence to the Central Bureau of Investigation (CBI) for it's fair and impartial investigation and CBI be directed to register a case under section 302 I.P.C., against the accused persons which include Shri Rajababu Singh and investigate the matter in accordance with law.

2. Facts in a nutshell relevant and necessary for disposal of this petition are that late Chetana Sharma was a member of the District Police Force, Bhind. She was working there since May, 2006 and was posted as Sub Inspector, Police Station (Dehat), Bhind. Chetana Sharma at the relevant time was staying in the official quarter allotted to her by the department and on the date of the incident, i.e., 29th / 30th November, 2006, it is stated that she was alone in the house. When the servant lady who does domestic work in the house of late Chetana Sharma, one Renu w/o Ramsiya came to

the house at 7.30 A.M., of 30th November, 2006 and when she did not receive any response, she called certain ladies living in the neighbourhood, one Smt. Jadon with others came along with Renu and on a slight push, the door opened, when they went inside the house, it was found that Chetana Sharma was lying in the bed (indicated as Thakat in the investigation report) with a razai covering up to her forehead, the razai was removed from the forehead and blood was seen on the nose and the region of the mouth, it was thought that this was due to snake bite. Accordingly, the matter was reported to the Police Station, Kotwali, Bhind. Officials came and on investigation it was found that Chetana Sharma is dead, the razai was removed and a service pistol issued to the deceased was found on the bed. Injuries were found on the breast and also on the back side. It is stated that crime was registered under section 174 I.P.C., panchnama was prepared, and accordingly all concerned were informed and investigation into the matter progressed.

3. Grievance of the petitioner is that immediately after he received the information, he came to Bhind from Gwalior and even before that his relatives, namely; Brijmohan Sharma, uncle and aunti Vimala Sharma of Chetan Sharma and nephews, Radhakrishna Sharma and Chandra Kant Sharma of the deceased had reached the spot as all of them were staying in Bhind and requested the police authorities not to remove the dead body and send it to post mortem till the petitioner and his family members arrives. Grievance of the petitioner is that at the instance and intervention of Shri Rajababu Singh, the S.P. of Bhind, the dead body was sent for post morten without waiting even for the I.G., and D.I.G., who were coming to Bhind from Gwalior. It is stated that before the aforesaid senior officials could came from Gwalior, at the instance of the then Superintendent of Police, panchnama was prepared, the entire site of the incident was disturbed and the body was sent for post mortem. According to the petitioner, immediately after he came to the spot and after meeting various people, it became clear to him that his daughter has not committed suicide but she has been killed and the then Superintendent of Police is responsible for the same. It is stated that petitioner immediately submitted a written report to the Inspector General of Police on 30th November, 2006 itself before post-mortem vide Annexure P/3 demanding registration of a case under section 302 of I.P.C., and further investigation into the matter. It was stated in the complaint that his daughter, Chetana Sharma had been informing him for the last three to four months that the Superintendent of Police, Shri Rajababu Singh is troubling, harassing and insisting upon her accompanying him in official trips to Delhi and Bhopal, he had tried to give her gifts and when she refused to accept them, the same were sent through a constable. It was pointed out that before her death on 29th November, 2006 when the Superintendent of Police has misbehaved with her after calling her to his house, Chetana Sharma had sent a compliant to the President of the National Women Commission, New Delhi vide Annexure P/1 making allegations against the then Superintendent of Police. In this complaint, it is stated that certain gifts were proposed to be offered to her by the then Superintendent of Police and when she

refused to take the same, the gifts were sent through a constable to her official residence and she was left with no option to accept them. According to Chetana Sharma, the then Superintendent of Police was harassing her in many ways which included sexual harassment. According to the petitioner, when the investigation and processing of the matter on 30th November, 2006 was proceeding under the direct supervision of the then Superintendent of Police, he submitted objection vide Annexure P/3 to the Inspector General of Police, and thereafter his son also made persistent requests to the police authorities to get the post mortem done by a team of doctors from Gwalior and ensure proper investigation into the matter after registration of first information report on the basis of the complaint, Annexure P/3. It is stated that various complaints were made, to the National women Commission, New Delhi vide Annexure P/4, the Chief Minister vide Annexure P/5 and the Director General of Police and the Principal Secretary, Home on various dates, upto 3-12-2006, pointing out to that the case is not being properly investigated, it is being treated as a case of suicide whereas it is a case of murder of Chetana Sharma by the then Superintendent of Police, inter alia contending that no action was taken on the complaint submitted by the petitioner and the investigation is not being properly conducted, petitioner has filed this petition on 5th January, 2007.

4. From the averments made in the petition, it is seen that after the incident was reported to the police on the basis of complaint made by Smt. Renu, a case under section 174 of Cr.P.C., was registered as Marg No.50/06 by Police Station, Kotwali, Bhind. The body was sent for post mortem. The post mortem report was received and it was indicated to be a case of suicide. In the meanwhile, there had been a public out cry in the matter, various agitations were taking place and even the parents of the deceased, Chetana Sharma were not willing to accept the body for cremation, they were insisting upon proper inquiry and investigation into the matter and arrest of the then Superintendent of Police for his alleged involvement in the entire episode. However, because of the intervention and on some assurance given by the Inspector General of Police, and the Deputy Inspector General of Police and the district administration for proper investigation into the matter, the dead body was taken over and cremated on 1st December, 2006. In the meanwhile, the Inspector General of Police passed orders directing the D.I.G., Chambal Range to carry out the investigation and thereafter the investigation was conducted by the DIG from 1st December, 2006 to th December, 2006. On 6th December, 2006, the matter was transferred to Crimes Investigation Department, Bhopal (hereinafter referred to as 'C.I.D') by orders of the competent authority. From 6th December, 2006 to 27th December, 2006, the CID conducted inquiry and registered the first information report on 27th December, 2006 as crime No.4/66 for offences under section 306 read with section 201 I.P.C., and in the aforesaid first information report, the then Superintendent of Police, Rajababu Singh was accused of having committed offence under section 306 read with section 201 I.P.C., In the meanwhile the then Superintendent of Police, Rajababu Singh was transferred from Bhind on th December, 2006 and he was relieved on 12th December, 2006 and is now posted as Commandant, First Battalion, S.A.F., Indore.

5. The petitioner has also contended in the petition that the then Superintendent of Police, Shri Rajababu Singh is related to certain office bearers of the ruling party of the State Government, namely; Bharatiya Janta Party and at the instance of political influence, he is being protected.

6. Respondents have filed a return and they have refuted the aforesaid contentions. The respondents have denied the fact of irregularity or illegality in the matter of investigation. They have also stated that investigation is being properly conducted by the CID and there is no illegality as alleged by the petitioner. Involvement of the then Superintendent of Police is denied and it is submitted that from the material that have come on record, registration of a case under section 302 I.P.C., is not made out at this stage. It is stated by the State Government that on further investigation, if the CID finds any material to register a case under section 302 I.P.C., they will do so after the material is brought out on record. The learned counsel for the State argued that no case is made out for transfer of the case to the CBI nor registration of the case under section 302 I.P.C., is made out against the then Superintendent of Police on the basis of material available on record for the present.

7. The respondent No.7, CBI have also filed a short return and they have stated that they have no objection for taking over the investigation of the case if directed by the Hon'ble Court.

8. The then Superintendent of Police, Rajababu Singh was permitted to intervene in the matter. He has filed a separate return. In the return, he has tried to point out that he is respectable I.P.S., officer with a unblamished service career and the petitioner is attempting to malign and disrepute him and in fact, the petitioner is trying to black mail him. Various allegations are made against the son and other family members of the petitioner. It was pointed out that Chetana Sharma had tried to commit suicide earlier also when she was working at Mandsaur as Sub Inspector. Her brother also tried to commit suicide and it is alleged that the petitioner wants to convert a case of suicide into a murder case only to get Rs.10,00,000/-from the insurance company on the basis of the insurance policy taken by the deceased. The said intervener - respondent submits that no case for interference is made out and the investigation being conducted by the CID is going in the right direction, and therefore, at the instance of the petitioner on the basis of the material adduced, it was argued that no case is made out for granting any relief to the petitioner.

9. During the course of hearing of this petition on 7th, 8th and 9th August, 2007, Shri Abhishek Nagarajan, Advocate along with Shri Jitendra Sharma, Advocate representing the petitioner took me through the material available on record and tried to emphasise and demonstrate that the investigation in the matter is wholly misdirected and is being progressed in such a manner so as to protect the main accused persons which included Shri Rajababu Singh, the then Superintendent of Police. From the photographs, post mortem report and the other documents available on record, it was

emphasised that *prima facie* the theory of suicide as is being put forth by the respondents is not made out. It is further argued that from the facts that have come on record, the entire investigation is seem to be tainted with *mala fides* and arbitrariness. Learned counsel argued that this is a fit case where powers under Article 226 of the Constitution should be invoked and the reliefs claimed by the petitioner can be granted.

10. *Inter alia* contending that when the information is made to the police authorities in the matter of committal of a cognizable offence, section 154 Cr.P.C., mandates the police authorities to register the first information report and take action in the matter. It is argued by learned counsel for the petitioner that in this case even though the complaint is made and the information is given by the petitioner to the effect that his daughter, Chetana Sharma was murdered by Shri Rajababu Singh, no first information report is registered as required under section 154 of Cr.P.C., and no case is registered by the police authorities against Rajababu Singh. Placing reliance on various judgments as indicated hereunder, learned counsel tried to emphasise that the entire action of the respondents is not only *mala fide* but is also contrary to the statutory provisions pertaining to registration and inquiry as contemplated under the Code of Criminal Procedure, 1973, and therefore, interference in the matter is sought for. Learned counsel taking me through in detail to the statements of some of the witnesses, findings of the post mortem report and the photographs available on record, and pointing out various infirmities in the investigation and conclusion being drawn by the investigating officer tried to demonstrate that the investigation and inquiry is not being conducted in a proper manner. The judgments relied upon by learned counsel for the petitioner are as under:

(a) *Mohindro vs. State of Punjab and others,* (2001) 9 SCC 581;

(b) *Parkash Singh Badal and another vs. State of Punjab and others,* (2007) 1 SCC 1;

(c) *Ramesh Kumari vs. State (NCT of Delhi) and others;* (2006) 2 SCC 677;

(d) *Kashmeri Devi vs. Delhi Administration and another,* 1988 SCC (Cri) 864;

(e) *R.S.Sodhi vs. State of U.P., and others,* AIR 1994 SC 38;

(f) *Mohammed Anis vs. Union of India and others,* 1994 Supp (1) SCC 145;

(g) *Central Bureau of Investigation through S.P., Jaipur vs. State of Rajasthan and another,* (2001) 3 SCC 333;

(h) *State of Bihar and another vs. Ranchi Zila Samta Party and another,* AIR 1996 SC 1515;

(i) *Giridhari Lal Kanak vs. State of M.P., and others,* 2002 (1) MPLJ 596.

Accordingly, it was emphasised on behalf of the petitioner that in the facts and circumstances of the case, a *prima facie* case is made out for investigation and inquiry into the matter by the CBI.

11. Shri Brijesh Sharma, learned counsel for the State submitted that registration of the case under section 154 of Cr.P.C., is not necessary when the investigation after registration of marg under section 174 of Cr.P.C., is already in progress. It was argued by him that immediately when the matter was reported, the higher officials of the department including the I.G., from Gwalior and the DIG, Chambal Range, Gwalior came to the spot and the Inspector General of the Police immediately ordered for taking over of the investigation by the DIG Chambal Range, Gwalior. The investigation was taken over on the 1st same day and from December 2006 to 5th December, 2006, investigation was conducted under the guidance and supervision of DIG, Chambal Range, Gwalior and thereafter from 6th December, 2006, the matter was transferred to the CID and even now the matter is being investigated by the CID but due to pendency of this writ petition, investigation is stopped as the case diary is produced in this Court, it is submitted by the respondents that no case is made out for transfer of the case to the CBI as prayed by the petitioner. By taking me through the case diary and indicating the action taken by the Inspector General of Police, DIG, Chambal Range, Gwalior, the Additional Director General, CID and other material available on record, it was argued by the learned Government Advocate that the investigation is moving forward in the right direction by the competent officials of the department and the apprehension of the petitioner is wholly unsustainable, and therefore, it is stated that no case is made out for interference. It was argued by learned Government Advocate that investigation of a crime is a statutory right and duty of the police authorities and this right cannot be taken away at the instance of the petitioner on the basis of vague and misconceived contentions of the petitioner. According to the learned counsel for the State Government, the State Government has taken all steps as are permissible, and therefore, there is no illegality in the matter warranting interference and transfer of the case to the CBI. In support of his contention, Shri Brijesh Sharma places reliance on the following judgments.

(a) *M.C.Abraham and another, vs. State of Maharashtra and others,* AIR 2003 (2) SCC 649.

(b) *Hari Singh vs. State of U.P., 2006 (5) SCC 733 (c) Gangadhar Janardan Mhatre vs. State of Maharashtra and others,* (2004) 7 SCC 768;

(d) *Shashikant vs. Central Bureau of Investigation and others,* (2007) 1 SCC 630;

(e) *Adri Dharan Das vs. State of W.B.,* (2005) 4 SCC 303;

12. Shri M.P.S.Raghuvanshi, Advocate, Shri Mrigendra Singh, Advocate and Shri Prashant Sharma, Advocate for the intervener, Shri Rajababu Singh submits that the

petitioner has not come before this Court with clean hands. Attributing *mala fides* on the part of the petitioner in the matter of making allegations against him, learned counsel for the intervener tried to emphasise that the intervener has a fundamental right to protect his life and dignity and on the basis of the vague and misconstrued notions of the petitioner, a case under section 302 of I.P.C., cannot be registered against the intervener and the matter is not required to be transferred to CBI. It was emphasised that the petition is filed by the petitioner with mala fide intention only to black mail the intervener without any just cause or reason.

13. Shri Mrigendra Singh, learned counsel representing the intervener had made certain submissions by placing reliance on a judgment of the Supreme Court in the case of Common Cause, A Registered Society vs. Union of India and others, (1999) 6 SCC 667, it was argued by him that the police had a right to discharge its statutory duty as per law and this right cannot be taken away by issuing any direction for transfer of the investigation to the CBI as prayed for by the petitioner. Placing reliance on the following judgments, learned counsel for the intervener tried to emphasise that by issuing any direction of the nature as claimed for by the petitioner, this Court would be contravening the statutory provisions and therefore, the same is not permissible, the judgments relied upon on behalf of the intervener are;

(a) Rajesh and others vs. Ramdeo and others, 2001 (10) SCC 759;

(c) T.T.Antony vs. State of Kerala and others, (2001) 6 SCC 181;

(d) Popular Muthiah vs. State represented by Inspector of Police, (2006) 7 SCC 296;

(e) State of West Bengal and others vs. Sampat Lal and others, 1985 (1) SCC 317;

14. Apart from the aforesaid, during the course of hearing, Shri Raghuvanshi had invited my attention to the principles of law laid down in the case of *Secretary, Minor Irrigation and Rural Engineering Services U.P., and others, vs. Sahngoo Ram Arya and another,* 2002 SC 2225, to submit that *prima facie* no case is made out for transfer of investigation to the CBI.

15. Finally, on behalf of the intervener, it was submitted that in the facts and circumstances of the case if this Court comes to the conclusion that the investigation is not properly done, this Court can always issue direction to the CID and get the investigation done under the supervision of this Court and for this purpose, it is stated that no direction as prayed for by the petitioner is required to be issued.

16. During the course of hearing, learned counsel for the State and the intervener placed much emphasise on the fact that the petitioner and his family members are not co-operating in the inquiry being conducted, they have not even cared to come and record their statements under section 161 Cr.P.C., even though notices have been issued. Instead of co-operating into the fair investigation and inquiry in progress, petitioner

has rushed to this Court with a totally unjustified claim and unwanted relief is being claimed for. Accordingly, the learned counsel for the respondents and the intervener seek for dismissal of this petition.

17. I have heard learned counsel for the parties, perused the record and the original case diary.

18. Before venturing into marshalling of the facts, it is proper to consider the legal position with regard to powers that can be exercised by this Court in the matter of directing for inquiry and investigation into a criminal case by a independent authority like CBI.

19. In the case of Common Cause, A Registered Society (supra), relied upon by Shri Mrigendra Singh, the Supreme Court has laid down the principles in detail and according to the principles laid down in the said judgment as contained in paragraphs 174 and 175, this Court cannot issue direction to the CBI to investigate as to whether a person has committed a offence or not. It is held by the Supreme Court that such a direction would be contrary to the concept and philosophy of life and liberty guaranteed to a person under Article 21 of the Constitution. It has been held that such a direction to investigate whether any person has committed a offence or not is in complete negation of various decisions in which the concept of "life and liberty" is considered and explained. However, the judgment of the Supreme Court in the case of Common Cause, A Registered Society (supra) was again taken note of in a subsequent case by the Supreme Court in the case of *Secretary, Mining Irrigation & Rural Engineering Services, U.P., and others* (supra) and while considering the scope of interference in such matters under Article 226 of the Constitution, it has been held by the Supreme Court in paragraphs 5 and 6 of this judgment that the High Court has power under Article 226 of the Constitution to direct inquiry and investigation by the CBI but the said power can be exercised only in cases where there is sufficient material to come to a prima facie conclusion that there is need for such a inquiry, a complete reading of the principles laid down by the Supreme Court in both the aforesaid cases indicates that even though direction as prayed for by the petitioner for directing CBI to register a case against the intervener and conduct inquiry cannot be granted but a direction to investigate the entire case properly so as to bring the accused after such investigation to book can be issued by this Court as held by the Supreme Court in the case of *Secretary, Mining Irrigation & Rural Engineering Services, U.P., and others,* (supra). However, this direction also can be issued only if this Court is satisfied that prima facie inquiry conducted in the matter by the police authorities and the CID is not proper, and therefore, inquiry by a independent agency like the CBI is necessary.

(Emphasis supplied)

20. That being the scope of interference by this Court, in this petition, it is appropriate to consider the manner in which the investigation has progressed, out come of the same and the circumstances that have come on record is required to be assessed so as

to ascertain whether a *prima facie* case for investigation by the CBI is made out or not.

21. From the complaint, Annexure P/1 submitted by Chetana Sharma on 29th November, 2006 to the President, National Women Commission, New Delhi and from the complaints, Annexures P/3, P/4 and P/5 submitted by the petitioner to various authorities and from the statement of Chetana's mother, Smt. Pratiba as recorded by the authorities during the course of investigation, so also, from the statement of one Anjali Kaushik daughter of Hemchand, a close friend of the deceased, Chetana Sharma, it is seen that during her life time, Chetana Sharma had made serious allegations against the then Superintendent of Police, in the complaint, Annexure P/1, Chetana Sharma has indicated that the then Superintendent of Police (i.e., the intervener, Shri Rajababu Singh) was harassing her and has also made sexual advances, offered gifts to her and was insisting on her accompany him to Bhopal and Delhi on official visits. The respondents have objected to the consideration of this letter, Annexure P/1 said to have been sent by late Chetana Sharma to the National Women Commission, New Delhi. It is stated that this letter is created subseequently and is a fabricated document made after 30th November, 2006 and is a after thought. However, this contention seems to be *prima facie* baseless in view of the fact that available on record is another letter written by one Gurpreet Kaur, Deputy Secretary of the National Commission for Women, New Delhi to the Director General of Police, Government of Madhya Pradesh, Address - Police Head Quarters, District Bhopal, Madhya Pradesh vide Annexure P/13 dated December 19, 2006. In this letter, it is indicated that the letter dated 29th November 2006 is received by the Commission by post and on verifying the postal seal available on the envelope this letter is seen to have been posted from Bhind on 29th November, 2006. Even though during the course of hearing, learned counsel for the intervener and the respondents tried to emphasise that the postal seal is a fabricated one but at this stage it is not necessary for this Court to look into this question as the same is within the realm of the investigating authority. In this complaint made by Chetana Sharma, allegations are levelled against Rajababu Singh, the then Superintendent of Police. This fact would become more relevant when the subsequent conduct of the State Government in the matter of taking action against the then Superintendent of Police is analysed.

22. When the matter was reported to the authorities concerned by Smt. Renu at 7.30 in the morning on 30th November, 2006, the records indicate that certain police officers including the Additional Superintendent of Police, Dy. Superintendent of Police and the Superintendent of Police, Shri Rajababu himself came to the spot. At that relevant time, one Radhakrishna Sharma, Chandra Kant Bohare, nephews, Brijmohan Sharma and Smt. Vimala Sharma, uncle and aunti, of late Chetana Sharma are said to have reached the spot. The compliant made by the petitioner indicates that these persons requested the then Superintendent of Police not to take the body for post morten. It was requested that body of the deceased be kept at the spot till her parents, I.G., and

D.I.G., arrive from Gwalior. In spite of this, the intervener, Shri Rajababu Singh is said to have been instrumental in sending the body for post mortem at 10.30 A.M., even before the I.G, and D.I.G., came to the spot. Before doing so, panchama, inquest report and various other procedures in the course of investigation were conducted. However, interestingly, the then Superintendent of Police failed to call the finger print expert to take the finger prints on the revolver and other areas of the spot and the house. Thereafter, when the body was sent for post mortem and when the body was lying in the hospital for post mortem, the records indicate that the petitioner himself had arrived at the spot and by submitting written representation sought for post mortem to be conducted by expert doctors from Gwalior.

23. A perusal of the case diary indicates that most of the complaints in this regard submitted by the petitioner and his son are available on record. However, the post mortem is done by a team of doctors from Bhind itself and the report is submitted. The case diary indicates that the investigation was taken over and the case diary was transferred to DIG, Chambal Range on 1st December, 2006 and when the case was transferred to him various processes and actions which form important part of the investigation were already completed. Amongst others, post mortem was over, the report of post mortem was available, panchnama of the dead body, spot map and all other seizures were completed and materials for further analysis by the forensic laboratory were collected, packed and sealed. After the case was transferred to DIG on 1st December, 2006, he has only visited the site along with some experts of the forensic laboratory and has tried to reconstruct the site and find out as to what is the cause of the death. However, no concrete step was taken by him to conduct further inquiry into the matter or to undo the irregularity, if any in the investigation or to find out the effect of these irregularities. He has only visited the spot at various times for four days up to 5th December, 2006 and thereafter, the entire case diary is transferred to CID. Except visiting the spot and collecting some particulars, the DIG, Chamabal Range, the case-diary indicates has not taken any concrete step in the matter of investigation. Thereafter from 6th December, 2006 the matter is being investigated by the CID. The CID also except for recording statements of various persons and processing the material already available on record have not taken any such step which may be said to be material for considering the complaint made by the petitioner with regard to murder of his daughter or to remedy the irregularity in the investigation which is found to be established. On a close scrutiny of the entire case diary and other documents available on record, following factual aspects come to light:-

> (a) Chetana Sharma is said to have died because of gun shot injury. She is said to have used her service pistol for the said purpose and by keeping the nozzle of the pistol on her chest towards the left side. She is said to have fired by lying sideways as a result the bullet entered into her body from chest side and came out from back side and was found on a wooden door in the room. The shot is fired from such a

close range that the entire lung is pierced and heart has been damaged. If this is the manner in which suicide is said to have been committed then the photographs available on record does not indicate these facts, because

(i) the statement of Smt. Renu who is the first person along with Madam Jadon who had seen the dead body, says that they saw the deceased lying covered with the razai up to the forehead. They removed the same and found blood in the nose and the mouth region. Bullet mark is found on the T-shirt worn by the deceased and it is stated that she has fired from in-between the rasai and her body. If that be so, after receiving such a severe bullet injury, the position in which Chetana Sharma is lying by putting razai over her forehead cannot be possible; her left hand is found to be under her head and right hand is on the pillow. Pistol which is said to have been used for killing herself is lying on the left side of the body and the nozzle is facing away from the body.

(ii) If the scene of incidence is recasted and the entire episode as narrated hereinabove is reviewed it is impossible to convince that a person after receiving such a bullet injury would lay on the bed and that also under a razai covered upto forehead and the pistol facing towards the other side, i.e., away from the body, prima facie material available on record does not tally with the story put forth by the investigating authority and the photographs do not confirm the story of suicide put forth by the respondents; and

(iii) These facts and various other material available on record if analysed, *prima facie* go to show that committing suicide in the manner as stated is not possible.

24. Accordingly, I am of the considered view that the investigating authority has not analysed the matter properly and *prima facie* it is seen that they have not made any efforts to enquire into the above aspect of the matter in a proper manner, on the contrary they have tried to put forth the theory of suicide without trying to enquire into or investigating into the matter on the basis of any other theory.

25. The records also indicate that the legs of the deceased were lying one over the other when her body was found. This also seems to be impossible. Thereafter, if it is assumed that blood which is found in the mouth, nose and on the clothes are because of shock and struggle just before the death then the position in which the body of the deceased is found is not correct. All these factors indicate that there are many questions which remain unanswered and investigation into the matter done so far by the authorities concerned has totally failed to enquire into and find out the correct facts.

26. Investigation was derailed at the very outset after the then Superintendent of

Police, Shri Rajabau Singh came to the spot and removed the body immediately and sent it for post mortem and in the process has disturbed the entire place of the incident in such a manner that proper investigation and inquiry is not possible. Because of this act on his part, he has been charged under section 201 I.P.C., These factors are *prima facie* established and that is the reason why first information report is registered by the CID against the then Superintendent of Police, Shri Rajababu Singh, however in spite of this, no steps are taken by the investigating authorities to undo the irregularity committed in the matter by the then Superintendent of Police and find out to what extent the irregularity committed by him has adversely effected the investigation and the damage done for destroying the evidence. There is nothing on record to suggest as to what CID has done in the matter to find out the damage caused because of the action of the then Superintendent of Police and no effort is taken to ascertain the extent of damage done to the investigation and find out the truth.

27. During the course of hearing, it was emphasised that investigation is still in progress and inquiry could not be completed because of the requisition of the case diary by this Court. This excuse cannot be accepted. The investigation was transferred to the CID on 6th December, 2006. The case diary indicates that the proceedings up to 16th January, 2007 are recorded therein and during the investigation conducted by the CID from 6th December, 2006 to 16th January, 2007, except for recording statement of various persons and collecting the reports from various laboratories and forensic institutes, no concrete effort is made to inquire into the matter and to find out whether the contentions put forth in the compliant made by the petitioner is correct or not. Even if the petitioner and his family members are not cooperating and are not coming forward to record their statements, it was the duty of the investigating authorities to find out and make efforts for finding out the correct fact even in the absence of any such co-operation from the petitioner. The case diary does not indicate that any such steps were taken by the authorities concerned. In this regard, it is seen that much emphasis was laid during the course of hearing to the effect that the CID is still investigating the matter and as the case diary is produced in the Court, the investigation has not progressed since January, 2007. This contention seems to be totally misconceived and cannot be accepted. The petition was filed on 5th January, 2007 and on 12th January, 2007, notice was issued to the respondents to produce the case diary and the case was fixed for 22nd January, 2007. The case was taken up on 24th January, 2007. The case diary was produced before the Court and *prima facie* case for investigation by the CBI was found to be made out on going through the case diary. Accordingly, CBI was directed to be impleaded as party and the case diary was returned back to the Government Advocate and she was directed to keep it in the custody in the office of the Additional Advocate General. However, after 24th January, 2007, the case has been adjourned on various dates. Return was filed by the State Government on 3rd April, 2007 and during the period from 24th January, 2007 till hearing of the case, even though there was no stay with regard to inquiry or investigation, respondents could have proceeded

with the investigation after obtaining case diary from the office of the Additional Advocate General by moving a appropriate application. For the reasons best known to the respondents, they have not taken any such step and the only excuse made is that they have kept the case diary in the office of the Additional Advocate General without taking any action from 24th January, 2007 till date. If the respondents were really interested in conducting the inquiry expeditiously, they could have requested this Court for the same however that was not done.

28. The records further indicate that before post mortem was done videograph of the same was ordered and the communication available on record indicate that a local videographer was engaged for the same and a 24 minutes video of the entire post mortem was recorded. It is indicated in the communication that as a fresh blank cassette is not available, the videograph was done in a cassette wherein some marriage ceremony is already recorded and the twenty-four minute in this video cassette is the post mortem done and recorded. Surprisingly, the video cassette does not form part of the case diary, may be it is kept some where else. However, the case diary does not indicate that any effort was made to go through this video cassette and find out the discrepancies, if any, in the matter of conducting post mortem on the body of the deceased.

29. When the case was registered under section 174 Cr.P.C., and investigation progressed immediately, investigation was entrusted to one Shri B.P.Trivedi of Police Station, Kotwali, Bhind. After making inquest report, by his communication available at page 10 of the case diary, Shri Trivedi forwarded the body of the deceased for post mortem. In the forwarding memo addressed to the District Hospital, Bhind, he had forwarded the dead body along with the clothes and other material as indicated in item No.1,2,3, 4 and 5 and it was requested by him that the post mortem be conducted by a team of doctors. Thereafter, in this memo there is a requisition in a different handwriting and a endorsement is made by a unknown person whose signature is very different from that of Shri Trivedi, by this endorsement name of two doctors are mentioned and it is stated that one of these doctors whose name is mentioned should be a member of the team of doctors which is to conduct the post mortem. It is not known as to at whose instance this request is made for a particular doctor to be included in the team of doctors for conducting the post mortem of the body. Records indicate that the doctor whose name is indicated was in the team which conducted the post mortem. When case was being investigated by Shri B.P.Trivedi, endorsement by a third person in the matter of conducting the post mortem is a serious anomaly which has to be taken note of by this Court. Thereafter, available at page 174 of the case diary is a letter written by the Central Forensic Laboratory, Hyderabad to whom some samples were forwarded for analysis. This sample is not tested and returned back by the CFL, Hyderabad. The reason given for not accepting the sample was that the sample is tampered with and not in a proper form capable of being tested. The sample was sent even before the case was handed over to CID on 6th December, 2006 from Police Station, Kotwali through one Shri Vijay Singh Tomar of district police force, Bhind. In

his report, Shri R.S.Mohali, Deputy Superintendent of Police, C.I.D., Bhopal as contained in page 245 of the case diary has mentioned about certain discrepancies in sealing of the sample which were sent for examination and scientific test and it is observed that these irregularities have been committed in the matters prior to his taking over of the investigation. Again in her report dated 12th December 2006, Smt. Reena Mitra, the Additional Director General, CID has observed that the then Superintendent of Police and other officers had reached the spot immediately after the matter was reported to them and within one and half hours, they sent the body for post mortem and also took the photographs and FSL without calling the finger printing expert and before I.G., could come from Gwalior. The spot has been disturbing and it has caused great impediment in the matter of investigation. She further narrates that while making investigation, Anjali Kuashik, while talking to her into the matter gave some incriminating material, some secretes were brought to her notice but the said Kumari Anjali Kaushik expressed her desire not to record her statement, details of the facts revealed are not recorded in the diary. Thereafter, when Anjali was interrogated, she was interrogated by some other person and not by Smt. Reena Mitra and the facts with regard to the matter indicated in paragraph 5 of this report dated 12th December, 2006 at page 503 are totally ignored. What were those informations which Anjali Kaushik revealed are not mentioned in the report and the entire investigation does not indicate as to what steps were taken to find out about the veracity and truth of the information said to have been disclosed by Anjali Kaushik to Smt. Reena Mitra.

30. Apart from these factors that are revealed from the case diary, two more striking features have to be taken note of for considering the grievance of the petitioner.

31. The first striking feature is that the petitioner has made a allegation that death of his daughter is not suicidal but is homicidal. Petitioner may be right or may be wrong, it may be his apprehension but when such a allegation is made and prima facie material available on record shows that the initial investigation was tampered with and evidences were tried to be destroyed, the investigating authorities should have made some inquiry on this theory also and direct some inquiry to find out as to whether this allegation of the petitioner has any substance or not. The entire case diary and the manner in which the investigation has progressed indicates that the authorities have only proceeded to investigate the matter on the theory of suicide as was indicated by the local police authorities at the initial stage of investigation and no effort is made to even remotely to explore the possibility of there being any other reason for death of Chetana Sharma, no such effort to explore any other possibilities that may have caused the death is at all made and therefore, it can be said that the respondents except for contending that the petitioner is not co-operating the investigating authorities have not made any effort to explore the possibility of any other act being committed and if so, by whom?

32. The second striking feature which cannot be ignored by this Court and which has great bearing with regard to apprehension of the petitioner is the attitude of the State Government in the matter of dealing with the then Superintendent of Police, Shri

Rajababu Singh. The investigation is taken over by the CID on 06th December, 2006 and after conducting preliminary inquiries, they have registered the first information report on 27th December, 2006 and in the first information report allegations of destroying evidence are levelled against Shri Rajababu Singh. The allegations levelled against him are twin folded; (i) the allegation of harassing Chetana Sharma is found to be established as a result, it is assumed that she has committed suicide, therefore, he is alleged to be responsible for having committed offence under section 306 of I.P.C., A offence under section 306 I.P.C., is a cognizable offence and non-bailable offence. Even though, first information report was registered on 27th December, 2006, there is nothing on record to indicate as to what steps were taken to arrest, Shri Rajababu Singh or even to interrogate him or recorded his statement, and (ii) the investigation even if assumed to be preliminary in nature as contended by the respondents has resulted in registration of first information report after it is found that Shri Rajababu Singh has visited the spot of the incident immediately and was instrumental in destroying vital evidence. This goes to show the manner in which he has acted a conduct unbecoming of a senior police officer who is responsible for proper investigation and inquiry into the offence committed within the jurisdiction of his district, a senior I.P.S., officer himself is alleged to have committed a offence of destroying the evidence in a case pertaining to death of young police officer aged 29 years working under him. It is surprising that the Government has slept over the matter and even after more than ten months have passed no action is taken against Shri Rajababu Singh. In the backdrop of the serious allegations found to be established, prima facie, which has resulted in registering of a first information report, the conduct of the respondents has to be considered by this Court. If such a offence is committed by a ordinary person, the police would have taken all steps, normally, including taking the person into custody, interrogation and recording his statement, but the same is not done in the present case. Considering the prima facie material on record, the authorities concerned should have arrested Shri Rajababu Singh or at least taken into custody, interrogated him and his statement recorded to find out the correct position. In the present case even though the investigation by CID is in progress from 6th December, 2006, the first information report is registered on 27th December, 2006 and the case diary was available with the authorities up to 16th January, 2007, nothing is done either to arrest or interrogate or record the statement of Shri Rajababu Singh in the matter. This attitude of the State Government in dealing with the officer in such a manner gives credence to the apprehension of the petitioner that justice may not be done to him in the matter of fair investigation and inquiry by the State Government.

33. Apart from this aspect of the matter, the intervener is holding the post of Superintendent of Police, i.e., he is head of the district police force and Chetana Sharma was working under him. She has made serious allegations of harassment and misuse of the office by Shri Rajababu. The allegations may be wrong or may be right but that is not relevant at this point of time. If such serious allegation is made against a senior

officer then the principle laid down by the Supreme Court in the case of *Vishaka and others vs. State of Rajasthan and others,* (1997) 6 SCC 241 is attracted. The State Government in such circumstances was expected at least to issue a show cause notice and proceed departmentally against the senior officer when such serious allegations are made. This is also not done by the State Government in the present case. The attitude of the State Government in the matter of dealing with the intervener, Shri Rajababu Singh remains unexplained. The callous manner in which the matter is being dealt with by the State Government is evident from the fact that on the basis of the report, Annexure P/1 received by the National Women Commission, New Delhi, correspondence is being made by the National Women Commission and the State Government is being requested to take action in the matter and submit a report to the Commission so that the Commission can take further steps. Even though more than ten months have passed, there is nothing on record to indicate that the State Government has even responded to the queries made by the National Commission for Women. Even yesterday, i.e., 08-8-2007 during the course of hearing when the learned counsel for the State was asked as to whether any action was taken by the State Government, he was unable to give a convincing reply, and therefore, it has to be presumed that till date, the State Government has not responded to the queries made by the National Commission for Women which is also enquiring into various allegations including harassment by Shri Rajababu of the deceased, Chetana Sharma. Added to this, the petitioner a 82 years old senior citizen is making complaint after complaint to the Chief Minister, Principal Secretary of the Home Department, and various other higher authorities of the State Government and none of these authorities have even cared to reply to the petitioner or to ensure him that the State Government will take all possible steps in the matter and justice will be done. All these factors that have come on record compels this Court to believe that the petitioner is right in apprehending that the State Government will not do justice to him, and therefore, he is seeking transfer of the matter to the CBI.

34. In the light of the circumstances as indicated hereinabove, this Court is of the considered view that sufficient prima facie material are available on record to indicate that the inquiry being conducted by the CID is not convincing enough to hold that the State Government is conducting a proper and impartial inquiry into the matter. At this stage, it would be proper to take note of certain observations made by the Supreme Court in the case of *Shakila Abdul Gafar Khan (Smt.) vs. Vasant Raghunath Dhoble and another,* (2003) 7 SCC 749. Speaking for the Bench and writing the judgment, Hon'ble Mr. Justice Arijit Pasayat in the said case started the judgment with a quotation by Abraham Lincoln. The quotation reads as under:

> " If you once forfeit the confidence of your fellow citizens you can never regain their respect and esteem."

After reproducing the aforesaid quotation, the Supreme Court has expressed serious concern with regard to custodial violence, torture and abuse of police power

which are not peculiar to this country, but is widespread. In paragraph 3 of the judgment, it is so observed:

> "If it is assuming alarming proportions, nowadays, all around, it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from rooftops to be the defenders of democracy and protectors of people's rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace-loving puritans and saviours of citizen's rights."

35. Thereafter taking note of Article 21 of the Constitution, a sacred and cherished right, i.e., life or personal liberty the human dignity approach is highlighted. In paragraph 35 after observing the principles laid down by the English Court in the case of *Jennison vs. Baker,* (All ER P.106d), it has been observed by the Supreme Court that the Courts have to ensure that accused persons are punished and if deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the deficiencies, deal with the same appropriately within the framework of law. It has been held by the Court that justice has no favourite, except the truth.

36. Keeping in view the principle laid down by the Supreme Court in the case of *Shakila Abdul Gafar Khan (Smt.)* (supra), and analysing the manner in which the investigation has progressed in the peculiar facts and circumstances of the present case, this Court is of the considered view that apprehension of the petitioner that justice is not being done to him is not free from doubt, that being so, interest of justice require that part of relief claimed by the petitioner pertaining to transfer of the investigation to the CBI should be allowed.

37. The judgments relied upon by the parties concerned, and in particular by Shri Mrigendra Sigh, learned counsel for the intervener and Shri Brijesh Sharma, learned Government Advocate are with regard to registration of offence under section 154 Cr.P.C., on information and protection of right and liberty of even the accused persons in the matter of registering a case, this Court is conscious of the aforesaid right of the intervener, and therefore, does not propose to grant relief claimed by the petitioner for registering a offence under section 302 I.P.C., against the intervener at this stage and proceeding to investigate into the matter. If this is done, the same would be contrary to the principles of law laid down by the Supreme Court in the case of *Common Cause, A Registered Society* (supra). To that extent, the prayer made the petitioner cannot be allowed.

38. The cases relied upon by Shri Brijesh Sharma, learned Government Advocate and S/Shri M.P.S.Raghuvanshi and Mrigendra Singh, learned counsel for the intervener pertains to statutory right of the police to investigate the matter, action to be taken under section 154 Cr.P.C., and 174 Cr.P.C., and the invidual's right in the matter of investigation of a crime. In the case of *Hari Singh* (supra), the Supreme Court has

refused to interfere in the matter in a petition under Article 32 of the Constitution in view of specific remedy available under the Code of Criminal Procedure. In the case of *Prakash Singh Badal and another* (supra) also the question pertains to interference in criminal matters and the control to be exercised by the High Court and the Supreme Court in such cases. Both these judgments are not very much relevant in the facts and circumstances of the present case as it is well settled in law that in a given case, if the material indicate *prima facie* irregularity in the matter of investigation, the Supreme Court and the High Court have power to order for investigation by CBI or by any independent agency. These principles are enumerated in the judgment of the Supreme Court in the case of *R.S.Sodhi* (supra), *Secretary, Mining Irrigation & Rural Engineering Services, U.P., and others* (supra), *Ranchi Zila Samta Party and another, (supra) and Mohammed Anis* (supra). After considering the principles laid down in all these judgments, there cannot be any iota of doubt that in a given case jurisdiction in a writ petition under Article 226 of the Constitution can be exercised by this Court for ordering investigation by CBI or a independent agency.

39. In the present case, *prima facie* the inquiry and investigation being conducted by the CID and the attitude of the State Government is found to be not in confirmity with the requirements of conducting a proper investigation into the matter, that being so, interest of justice require that the investigation and inquiry should be done by a independent agency which is not influenced in any manner whatsoever either by the State Government or the local police authorities.

40. Accordingly, this petition is allowed. The respondent No.7, Director, Central Bureau of Investigation (CBI) is directed to take over the investigation of the matter and on the basis of the material available on record, proceed to enquire into the matter and bring it to its logical conclusion in accordance with law.

41. Case diary received from the State Government be kept in a sealed cover in the safe custody of the Registrar of this Bench. Respondent No.7 is directed to collect the case diary available with the Registrar of this Bench after completing the necessary formalities. The respondent No.7 is further directed to nominate a officer or a team of officers under his control to conduct investigation and proceed to investigate into the matter in accordance with law.

42. In the matter of investigation into the matter, it is expected that the State Government and the local police authorities and the authorities of the CID shall co-operate with respondent No.7.

43. Before parting, it would be appropriate to observe that this Court has not given any conclusive finding with regard to any of the allegations made by the petitioner or refuted by the respondents and the intervener. The findings recorded and the observations made in this order are only *prima facie* assessment of the material to find out existence of a *prima facie* case for transfer of the investigation to the CBI. The observations made are only to that extent and shall not be construed to mean that

the findings are conclusive finding on any fact or material indicated therein. Needless to emphasise that it is for the investigating authority, CBI to investigate and inquire into the matter in accordance with law and come to a independent conclusion uninfluenced by any observation made in this order.

44. Accordingly, this petition is allowed to the extent indicated hereinabove and disposed of without any order so as to cost.

I.L.R. [2007] M.P., 1599
WRIT PETITION
Before Mr. Justice Abhay M. Naik.
13 September, 2007

PROF. A.D.N. BAJPAI ....Petitioner*
Vs.
STATE OF M.P. and anr. .....Respondents

A. Vishwavidyalay Adhiniyam, M.P. (XXII of 1973) - Sections 10, 14(3) - Conditions of Services of Kulpati - Petitioner was appointed as Kulpati of Awadhesh Pratap Singh University - Enquiry was conducted against the Petitioner - Certain allegations were found proved - Show cause notice was issued as to why an order for relinquishment from the post of Vice Chancellor may not be passed against Petitioner - Petitioner was ordered to relinquish the post of Vice - Chancellor - Held - Section 10 of Act prescribes a procedure for action against University, College or Institution - Executive Council has no power to take action against Kulpati - Communication under Section 10(3) or (4) is required through Kulpati, who cannot be permitted to be a judge or participant in mater of any complaint against himself - Section 14 is not dependent of Section 10 - Absence of enquiry under Section 10 would not vitiate the impugned order.

In totality, Section 10 of the University Act prescribes a procedure for action against the University, College or Institution. The communication of result of the inspection or inquiry is to be made by the Kuladhipati through the Kulpati to the Executive Council or the management.

A bare look at Section 24 of the University Act makes it clear that the Executive Council has no power to take action against the Kulpati. Moreover, the communication under sub-sections (3) & (4) is required through the Kulpati, who cannot be permitted to be a judge or participant in the matter of any complaint against himself.

A perusal of the aforesaid provision makes legislative intent clear that Section 14 is not made dependent of Section 10. There is no reference to any of the provisions of Section 10 in Section 14 of the University Act. Thus, the legislative intent behind

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Section 14 is clear that no enquiry under Section 10 is contemplated for exercise of powers under Section 14 either expressly or by necessary implication. Section 14 deals with Emoluments and Conditions of service of Kulpati. Sub-section (3) of Section 14 is very much clear that Kuladhipati, if, finds that the Kulpati has made default in performing any duty imposed on him or has acted in a manner prejudicial to the interest of the University or is incapable of managing the affairs of the University, may require the Kulpati to relinquish his office.

From the language of Section 10 as well as Section 14, one thing is clear that for exercise of power under Section 14(3), an enquiry under Section 10 was not required to be made; nor was it contemplated. A complete procedure is prescribed under Section 14 whose observance is necessary on the part of Kuladhipati before requiring the Kulpati to relinquish his office. This being so, the contention of the petitioner's learned senior counsel that absence of enquiry as prescribed under Section 10 of the University Act, would vitiate the impugned order, is not accepted.

Under Section 10 of the University Act, the University or management alone is entitled to be heard at the time of inspection or inquiry, whereas, under sub-section (4) of Section 14, the Kulpati is to be necessarily provided with a reasonable opportunity of showing cause against the particulars of the grounds as well as the proposed order. Thus, the enquiry contemplated under sub-section (4) of Section 14 is quite independent and Section 14 cannot be treated as dependent of Section 10.

(Paras11, 12,13 & 19)

B. Vishwavidyalay Adhiniyam, M.P. (XXII of 1973) - Section 10 A - Enquiry against Kulpati - Section 10 is enabling provision under which a reference could have been made - Kuladhipati may take action in accordance with other relevant provisions in addition to power of reference - Powers under Section 10A and 14 work in different spheres- Section 10A does not divest Kuladhipati of his powers under other relevant provisions of Act, Rules or Statutes made thereunder.

Aforesaid is an enabling provision under which a reference could have been made by the Kuladhipati to the Lokayukt or Up-Lokayukt for enquiry, who could have inquired in the complaint/allegation against the Kulpati. Sub-section (2) of Section 10-A of the University Act, makes it clear that in addition to the power of reference, the Kuladhipati may take action in accordance with other relevant provisions of the Adhiniyam and the Rules or Statutes made thereunder. This itself goes to show that powers under Section 10-A and Section 14 work in different spheres and the action can well be taken under other relevant provisions of the University Act and the Rules or the Statutes made thereunder. On scrutiny of Section 10-A in the light of the provisions contained in M.P. Lokayukt and Up-Lokayukt, 1981, it is found that this Section is merely of enabling nature and it does not divest the Kuladhipati of his powers under other relevant provisions of the University Act and the Rules or Statutes made thereunder. Thus, it was not obligatory on the part of Kuladhipati to refer the complaint

or allegations against Kulpati to the Lokayukt or Up-Lokayukt for enquiry and the Kuladhipati is well within his powers to act in accordance with Section 14 of the University Act. (Paras16)

Cases Referred :

E.P. Royappa Vs. State of Tamil Nadu; AIR 1974 SC 555, *R/o Ram Ashray Yadav;* AIR 2000 SC 1448, *Bangalore Medical Trust Vs. B.S. Muddappa and others;* AIR 1991 SC 1902, *Dr. K.C. Malhotra Vs. H.P. University, Shimla;* AIR 1995 HP 156, *High Court of Judicature at Bombay Vs. Shashikant S. Patil;* AIR 2000 22, *Ganesh Santa Ram Sirur Vs. State Bank of India;* AIR 2005 SC 314, *Regional Manager, UPSRTC, Etawah and others Vs. Hotilal and another;* (2003) 3 SCC 605.

K.P. Mishra, with *Vibudendra Mishra,* for the Petitioner.
Vinod Mehta, for the Respondent No.1
Rajendra Tiwari, with *T.K. Khadka,* for the Respondent No.2

Cur.adv.vult.

ORDER

ABHAY M. NAIK, J. :–Facts leading to the petition are that the petitioner joined as 'Kulpati' (Vice Chancellor) of Awadhesh Pratap Singh Vishwa Vidyalay (hereinafter referred to as APS University for brevity) on 15.9.2003 for a period of four years. Hon'ble Governor of State of Madhya Pradesh in the capacity of 'Kuladhipati' (Chancellor) of the APS. University constituted a Committee for making enquiry with respect to various allegations relating to administrative, financial and academic irregularities against the petitioner. It was found prima facie that further enquiry was required against the petitioner within the meaning of sub-section (3) of Section 14 of M.P. Vishwa Vidyalay Adhiniyam, 1973 (hereinafter referred to as University Act for short). Accordingly, an order was passed on 23.9.2006 by the 'Kuladhipati' to make an enquiry in public interest vide Annx.A/1. Petitioner was provided with an opportunity to prove his case before the enquiry committee. The Committee levelled in all 19 allegations against the petitioner with respect to 7 financial irregularities, 6 academic irregularities and 6 administrative irregularities. Certain allegations were, ultimately, found as proved by the enquiry committee and on its basis a show cause notice dated 6.12.2006 contained in Annx.A/3 was issued to the petitioner in exercise of powers under sub-section (4) of Section 14 of the University Act. Hon'ble 'Kuladhipati' in exercise of powers under Section 14(4) of the University Act directed the petitioner to show cause as to why an order for relinquishment from the post of Vice Chancellor may not be passed against the petitioner for the latter's inability to discharge the duties as provided in Clauses (i), (ii) & (iii) of sub-section (3) of Section 14 of the University Act. It was further mentioned in the show cause notice that in case, if, the petitioner wishes to peruse the record or to obtain the copies, he may submit a list of such record/ documents to the Registrar of the University. Petitioner submitted his reply to the show cause notice as contained in Annx.A/6. Writ Petition No.18476/06(S) was

submitted by the petitioner against the show cause notice which was dismissed by this Court on 5.12.2006 on the ground that no case for interference was made out. Hon'ble 'Kuladhipati', thereafter, passed the impugned order dated 25.1.2007 contained in Annx.A/8 holding that the petitioner has failed to discharge his duties entrusted to him under the Act and has acted in certain cases against the interest of the University in adverse manner and that the petitioner has been unable to manage the activities of the University. Hon'ble 'Kuladhipati' found that the petitioner's continuance on the post of 'Kulpati' was not in the interest of the University. Accordingly, in exercise of the powers under sub-section (3) of Section 14 of the University Act, the petitioner was ordered to relinquish the post of Vice Chancellor with effect from 27.1.2007. Simultaneously, Hon'ble 'Kuladhipati' nominated Dr. R.N. Shukla, Professor, Environment Biology, APS University, Rewa to act as 'Kulpati' of the APS University until further orders or until appointment of 'Kulpati' in accordance with Section 13(1) of the University Act. This order is on record as Annx.A/9.

2. In the aforesaid background, the present petition has been submitted by the petitioner with allegations that the entire action on the part of respondent No.2 is illegal, arbitrary and mala fide. According to the petitioner, the enquiry conducted against the petitioner is in contravention of the mandatory provisions of the University Act. No enquiry has been held under Section 10 of the University Act, which alone could have been resorted to. It is contended that without holding an enquiry under Section 10 of the said Act, the impugned order contained in Annx.A/8 could not have been legally passed. It is further contended that the respondent No.2 ought to have made a complaint to Lok Ayukt under Section 10-A of the said Act. Particulars of the complainants were not provided to the petitioner and the same were not even disclosed. Copies of the complaints were also not supplied to the petitioner. Accordingly, it is contended that the impugned order having been passed in violation of the principles of natural justice, is not sustainable in law. Petitioner has not committed any irregularity; financial, academic or administrative and could not have been ordered to relinquish the post of Vice Chancellor in the impugned manner. Enquiry under Section 10 of the said Act is *sin qua non* for exercise of power under Section 14(3) of the University Act. The impugned order having been passed in exercise of such powers without making an enquiry required mandatorily under Section 10 of the University Act is liable to be quashed. This apart, most of the allegations against the petitioner were found not proved and on the basis of proven charges, the impugned order regarding relinquishment is not sustainable in law being highly disproportionate. Order directing relinquishment was not warranted in the facts and circumstances of the case. Moreover, the impugned order has also been passed ignoring the observations of this Court made in Annx.A/7.

3. Respondent No.2 submitted his return refuting thereby the allegations contained in the writ petition. According to respondent No.2, the impugned order has been passed by the Hon'ble 'Kuladhipati' after due enquiry and in accordance with the provisions of the University Act. Petitioner was found to have acted against the

interest of the University and was found guilty of various charges. He failed to discharge the duties of Vice Chancellor and was unable to manage the administration of the University. Accordingly, the powers under Section 14(3) of the said Act have been rightly and lawfully exercised.

4. Petitioner submitted his rejoinder with supporting affidavit.

5. Shri K.P. Mishra and Shri Rajendra Tiwari, learned Senior Advocates, argued at length. Their arguments have been considered in the light of the material on record and the law governing the situation in succeeding paragraphs.

6. First submission of Shri K.P. Mishra, learned Senior counsel is that the copy of complaints were not provided to the petitioner. Even the particulars of the complainants were not disclosed. I am not impressed with the submission for the reason that allegations were levelled against the petitioner with respect to financial, academic and administrative irregularities. This Court is required to examine irrespective of the particulars of the complainants, that whether the charges against the petitioner are established and the powers under the University Act and the statute made thereunder could be legally exercised. There were no personal allegations viz-a-viz the alleged complainants, therefore, non-disclosure of particulars of the complainants did not prejudice the petitioner. Moreover, learned Senior counsel has been unable to demonstrate that how and in what manner the non-disclosure of complainants would be fatal to his defence. Since the enquiry was made by a duly constituted committee and the petitioner was given an opportunity to adduce his defence, non-supply of complaints is not found to have created any hindrance in participation of the petitioner in the enquiry in an effective manner. Moreover, the complaints on having been prima-facie found to contain substance, an enquiry was directed. No reliance is found to have been placed on the alleged complaints or part thereof and the allegations made in the alleged complaints are not found to have been treated as proof of allegations. In this view of the matter, the grievance of the petitioner about non-disclosure of the particulars of the complainants and non-supply of the copies of complaints has no bearing on the present writ petition.

7. It is further submitted that before passing an order under Section 14(3) of the University Act, an enquiry under Section 10 ought to have been made. Without holding such an enquiry, the impugned order contained in Annx.A/8 is without jurisdiction.

8. In order to examine this plea, it is necessary to examine the Scheme of the University Act, moreso, the provisions contained in Section 10 & 14. Section 10 is reproduced below for convenience :-

> "10. (1) The Kuladhipati may, on his own motion, and shall on a request made by the State Government cause an inspection to be made by such person, or persons as he may direct, of the University, its buildings, laboratories, museums, workshops and equipment and of any College or Institution maintained by the University or admitted to its privileges, and also of the Examinations, teaching and other work

conducted or done by the University and cause an inquiry to be made in the manner in respect of any matter connected with the administration or finances of the University, Colleges or Institutions.

(2) The Kuladhipati shall, in every case, give notice of his intention to cause an inspection or inquiry to be made:

(a) to the University, if such inspection or inquiry is to be made in respect of the University, College or Institution maintained by it;

(b) to the management of the College or Institution if the inspection or inquiry is to be made in respect of a college or institution admitted to the Privileges of the University and the University or management, as the case may be, shall be entitled to appoint a representative who shall have the right to be present and be heard at such inspection or inquiry.

(3) Such person shall report to the Kuladhipati the result of such inspection or inquiry and the Kuladhipati shall communicate through the Kulpati to the Executive Council or the said management, as the case may be, his views with reference to the result of such inspection or inquiry and shall after ascertaining the opinion of the Executive council or the management thereon advise the University or the management upon the action to be taken;

Provided that where an inspection or inquiry is caused on a request from the State Government the Kuladhipati shall take action under this sub-section in consultation with State Government.

(4) The Executive Council or the management as the case may be, shall communicate through the Kulpati to the Kuladhipati such action, if any, as it has taken or may propose to take upon the result of such inspection or inquiry and such report shall be submitted within such time as the Kuladhipati may direct.

(5) Where the Executive Council or the management, does not, within a reasonable time, take action to satisfaction of the Kuladhipati, the Kuladhipati may, after considering any explanation furnished or representation made by the Executive Council or the management, issue, in consultation with the State Government such directions as he may think fit and the Executive-Council or management as the case may be shall comply therewith."

Perusal of the aforesaid provision makes it clear that sub-section (1) empowers the Kuladhipati to cause inspection of the University, its building laboratories, museums, workshops and equipment and of any college or institution maintained by the University or admitted to its privileges, and also of the Examinations, teaching and other work conducted or done by the University and cause an enquiry to be made in like manner

in respect of any matter connected with the administration or finances of the University, Colleges or Institutions.

9. University has been defined in Section 4(xvii) of the University Act as follows :-

> " 4(xvii) University means :
>
> (i) the University deemed to be established under this Act and specified in part 1 of the Second Schedule; and
>
> (ii) the University which may be established after the commencement of this Act and specified in part II of the Second Schedule."

10. Sub-section (2) of Section 10 of the University Act, requires the Kuladhipati to give notice of his intention to cause an inspection or inquiry to the University and to the management of the College or Institution. Under sub-section (3) of the said Act, the report of inspection/enquiry shall be made to the Kuladhipati who is required to communicate through the Kulpati to the Executive Council or the said management as the case may be and is further required after ascertaining the opinion of the Executive council or the management thereon to advise the University or the management upon the action to be taken. Proviso to this sub-section does not come into play because the inspection or inquiry in the case in hand was not made on a request from the State Government. Further under sub-section (4), the Executive Council or the management is required to communicate through the Kulpati to the Kuladhipati of the proposed action. In case of failure on the part of Executive Council or the management to take action within a reasonable time to the satisfaction of the Kuladhipati, the Kuladhipati is empowered under sub-section (5) to issue the directions after considering the explanation furnished or representation made by the Executive Council or the management. Such directions would be issued to the Executive Council or the management who would be bound to make the compliance of such directions.

11. In totality, Section 10 of the University Act prescribes a procedure for action against the University, College or Institution. The communication of result of the inspection or inquiry is to be made by the Kuladhipati through the Kulpati to the Executive Council or the management.

12. Powers of Executive Council are provided in Section 24 of the University Act which are to the following effect :-

> "24. Subject to the provisions of this Act, and the Statutes, Ordinances and Regulations made thereunder, the Executive Council shall have the following powers and perform the following duties, namely :
>
> (i) to hold, control and administer the property funds of the University;
>
> (ii) to administer the funds placed at the disposal of the University for specific purposes;
>
> (iii) to adopt annual accounts together with the audit report;

(iv) to frame the annual financial estimates of the University and to place them before the Court for its consideration;

(v) (a) to adopt the annual financial estimates after considering suggestions of the Court, if any;

(b) to fix the limit for the total recurring expenditure and total non-recurring expenditure for the year based on the resources of the University which in the case of productive works may include the proceeds of loans;

(vi) subject to clause (v), at any time during the financial year :

(a) to reduce the amount of the budget grant;

(b) to sanction the transfer of any amount within a budget grant from one head to another or from a subordinate head under one minor head to a subordinate head under another minor head; or

(c) to sanction the transfer of any amount not exceeding rupees five thousand within a minor head from one subordinate head to another or from one primary unit to another;

(vii) to borrow the lend funds on behalf of the University;

Provided that funds shall not be borrowed on the security of University property without the prior approval of the [State Government];

(viii) to transfer any movable or immovable property on behalf of the University;

Provided that no immovable property of the University shall, except with the prior sanction of the State Government, be transferred by way of mortgages, sale, exchange, gift or otherwise;

(ix) to enter into, vary, carry out and cancel contracts on behalf of the University in the exercise of performance of the powers and duties assigned to it by this Act, and the Statutes.

(x) to determine the form of, provide for the custody and regulate the use of the common seal of the University;

(xi) to lay before the [Commissioner, Higher Education], annually a full statement of the financial requirements of all colleges and halls;

(xii) to admit colleges to the privileges of the University on the recommendation, of the Academic Council and with the previous sanction of the [Commissioner, Higher Education] and subject to the provisions of this Act and Statutes and to withdraw any of the privileges and to take over the management of the college in the manner and under conditions prescribed by the Statues and Ordinances;

(xiii) to declare Teaching Department of the University; Schools of Studies or Colleges, autonomous Colleges;

Provided that the extent of autonomy which each such Teaching Department of the University, School of Studies or Colleges may have and the matters in relation to which it may exercise such autonomy, shall be such as may be prescribed by the Statute;

(xiv) to make provision for building, premises, furniture apparatus, books and other means needed for carrying on the works of the University;

(xv) to accept on behalf of the University, trusts, bequests, donations and transfers of any movable or immovable property to the University;

(xvi) to manage and regulate the finances, accounts and investments of the University;

(xvii) to institute and manage;

(a) a Printing, Publication and Translation Bureau;
(b) an Information Bureau;
(c) an Employment Bureau;

(xviii) to make provision for;

(a) (i) Extramural teaching and research
(ii) University extension activities,
(iii) Correspondence Courses,

(b) Physical training;
(c) Students' Union;
(d) Students' Welfare;
(e) Sports and athletic activities;
(f) Social Service Schemes; and
(g) National Cadet Corps;

(xix) to scrutinise all proposals of the Academic Council with a view to their execution within the framework of the budget;

(xx) to institute such Professorships, Readerships, [x x x] Lecturerships or other teaching posts as may be proposed by the Academic Planning and Evaluation Board;

Provided that no teaching post shall be instituted without the prior approval of the [Commissioner, Higher Education];

(xxi) to create administrative, ministerial and other posts with the prior sanction of the State government;

(xxii) to abolish or suspend, after report from the Academic Planning and Evaluation Board thereon any Professorships, Readerships [x x

x] Lecturerships, or other teaching posts in the University;

(xxiii) to establish, maintain and manage colleges, teaching departments, institutions of research or specialised studies, laboratories, libraries, museums and halls;

(xxiv) to recognise halls and to provide housing accommodation for teachers of the University paid by the University;

(xxv) to arrange for and direct the inspection of affiliated colleges, recognised institutions and halls and to issue instructions for maintaining their efficiency and for ensuring proper conditions of employment for members of their staff, and payment of adequate salaries, and, in case of disregard of such instructions, to modify on the recommendations of the Academic Council the conditions of affiliation or recognition or taking of such other steps as it deems necessary and proper in that behalf;

(xxvi) to prepare a college code laying down therein the terms and conditions of affiliation of colleges other than Government Colleges;

(xxvii)to call for reports, returns and other information from affiliated colleges, recognised instructions or halls;

(xxviii) to supervise and control the admission, residence, conduct and discipline of the students of the University and to make arrangements for promoting their health and general welfare;

(xxix) to recommend to the Kuladhipati the conferment of Honorary degrees and academic distinctions in the manner prescribed by Statutes;

(xxx) to confer or withdraw degrees, diplomas, certificates and other academic distinctions in the manner prescribed by the Statutes;

(xxxi) to institute fellowships, scholarships, studentships, exhibitions, medals and prizes;

(xxxii) save as otherwise provided by this Act, or the Statutes, to appoint the officers other than the Kulpati, teachers and other employees of the University, to define their duties and the conditions of their service, and to provide for the filling of temporary vacancies in their posts;

(xxxiii) to regulate and enforce discipline among members of the teaching, administrative and ministerial staff of the University in accordance with the Statues and Ordinances;

(xxxiv) to recognise a member of the staff of an affiliated college or recognised institution as a teacher of the University and withdraw such recognition;

(xxxv) to fix remuneration of examiners and to arrange for the conduct of and for publishing the results of the University examinations and other tests;

(xxxvi) to cancel examinations in the event of malpractices partially or wholly and to take action against any person or group of persons or institutions found guilty of such malpractices, including rustication of students;

(xxxvii) to take disciplinary action against students enrolled in the University, including candidates for any examinations;

(xxxviii) to take disciplinary action against staff, persons appointed as invigilators, examiners etc.;

(xxxix) to fix, demand and receive such fees and other charges as may be prescribed by the Ordinances;

(xl) to make, amend and cancel Ordinances;

(xli) to accept, reject or return to the Academic Council for consideration but not to amend, Regulation framed by the Academic Council;

(xlii) to entertain, adjudicate upon and, if deemed fit, to redress grievances of the employees and the students;

(xliii) to exercise such other powers and perform such other duties as may be conferred or imposed on it by or under this Act;

(xliv) to exercise all powers, of the University not otherwise provided for in this Act or the Statutes and all other powers which are requisite to give effect to the provisions of this Act or the Statues;

(xlv) to delegate by Regulations any of its powers to the Kulpati, the Registrar or such other officer of the University or a Committee appointed by it as it may deem fit."

A bare look at Section 24 of the University Act makes it clear that the Executive Council has no power to take action against the Kulpati. Moreover, the communication under sub-sections (3) & (4) is required through the Kulpati, who cannot be permitted to be a judge or participant in the matter of any complaint against himself.

13. This Court may further examine Section 14 of the University Act which is as follows :-

"14. (1) The Kulpati shall be a whole-time salaried officer of the University and his emoluments and other terms and conditions of service shall be prescribed by the Statues.

(2) The Kulpati shall hold office for a term of four years and shall not be eligible for appointment for more than two terms;

[x x x]

Provided that notwithstanding the expiry of his term he shall continue to hold office until his successor is appointed and enters upon his office but this period shall not in any case exceed six months.

(2-A) The person holding office of the Kulpati in any University immediately before the commencement of the Madhya Pradesh Vishwavidyalaya (Sanshodhan) Adhiniyam, 1988, shall continue to hold his office till the expiry of his term of office notwithstanding anything contained in the first proviso to sub-section (2).

(3) If at any time upon representation made or otherwise and after making such enquiries as may be deemed necessary, it appears to the Kuladhipati that the Kulpati :

(i) has made default in performing any duty imposed on him, by or under this Act; or

(ii) has acted in a manner prejudicial to the interest of the University; or

(iii) is incapable of managing the affairs of the University the Kuladhipati may, notwithstanding the fact that the terms of office of the Kulpati has not expired, by an order in writing stating the reasons therein, require the Kulpati to relinquish his office as from such date as may be specified in the order.

(4) No order under sub-section (3) shall be passed unless the particulars of the grounds on which such action is proposed to be taken are communicated to the Kupati and he is given a reasonable opportunity of showing cause against the proposed order.

(5) As from the date specified in the order under sub-section (3), the Kulpati shall be deemed to have relinquish the office and the office of the Kulpati shall fall vacant.

(6) In the event of the occurrence of any vacancy including a temporary in the office of the Kulpati by reason of his death, resignation leave, illness or otherwise the Rector and if no Rector has been appointed or if the Rector is not available, the Dean of any faculty or the senior most Professor of University teaching department nominated by the Kuladhipati for that purpose shall act as the Kulpati until the date on which the Kulpati appointed under sub-section (1) or sub-section (7) of section 13, enters or reenters as the case may be, upon his office;

Provided that the arrangement contemplated in this sub-section shall not continue for a period of more than six months."

A perusal of the aforesaid provision makes legislative intent clear that Section 14 is not made dependent of Section 10. There is no reference to any of the provisions of Section 10 in Section 14 of the University Act. Thus, the legislative intent behind Section 14 is clear that no enquiry under Section 10 is contemplated for exercise of powers under Section 14 either expressly or by necessary implication. Section 14 deals with Emoluments and Conditions of service of Kulpati. Sub-section (3) of Section 14 is very much clear that Kuladhipati, if, finds that the Kulpati has made default in performing any duty imposed on him or has acted in a manner prejudicial to the interest of the University or is incapable of managing the affairs of the University, may require the Kulpati to relinquish his office. From the language of Section 10 as well as Section 14, one thing is clear that for exercise of power under Section 14(3), an enquiry under Section 10 was not required to be made; nor was it contemplated. A complete procedure is prescribed under Section 14 whose observance is necessary on the part of Kuladhipati before requiring the Kulpati to relinquish his office. This being so, the contention of the petitioner's learned senior counsel that absence of enquiry as prescribed under Section 10 of the University Act, would vitiate the impugned order, is not accepted.

14. Shri Mishra, learned Senior counsel submitted that since the procedure of inquiry is prescribed under Section 10 of the University Act, the impugned order having been passed without following the prescribed procedure under Section 10, is not sustainable in law.

15. I do not find myself in a position to favour this submission because the scope of Sections 10 and 14 is altogether different. Section 14 empowers the Kuladhipati to take action against the Kulpati, whereas, Section 10 has been provided to empower the Kuladhipati to take action against the University, College or Institution. Since an action under Section 10 is to be proposed by the Executive Council or the management and the Executive Council or the management is not empowered to propose any action against Kulpati, provisions of Section 10 are not liable to be invoked while exercising powers under Section 14.

16. Further contention of Shri Mishra, learned Senior counsel is that the Kuladhipati instead of passing the impugned order ought to have referred the matter to Lokayukt or Up-Lokayukt for enquiry under Section 10-A of the University Act. Section 10-A is reproduced below for convenience :-

> "10-A (1) Notwithstanding anything contained in Section 10, the Kuladhipati may refer to the Lokayukt or Up-Lokayukt for enquiry, any complaint or allegation against Kulpati, Rector or Registrar.
>
> (2) On receiving the report of the Lokayukt or Up-Lokayukt, pursuant to the Provisions of sub-section (1) or otherwise, the Kuladhipati may, in his discretion, take action without following the procedure laid down in sub-section (3), (4) and (5) of Section 10, but in accordance with other relevant provisions of the Adhiniyam and the rules or statutes made thereunder."

Aforesaid is an enabling provision under which a reference could have been made by the Kuladhipati to the Lokayukt or Up-Lokayukt for enquiry, who could have inquired in the complaint/allegation against the Kulpati. Sub-section (2) of Section 10-A of the University Act, makes it clear that in addition to the power of reference, the Kuladhipati may take action in accordance with other relevant provisions of the Adhiniyam and the Rules or Statutes made thereunder. This itself goes to show that powers under Section 10-A and Section 14 work in different spheres and the action can well be taken under other relevant provisions of the University Act and the Rules or the Statutes made thereunder. On scrutiny of Section 10-A in the light of the provisions contained in M.P. Lokayukt and Up-Lokayukt, 1981, it is found that this Section is merely of enabling nature and it does not divest the Kuladhipati of his powers under other relevant provisions of the University Act and the Rules or Statutes made thereunder. Thus, it was not obligatory on the part of Kuladhipati to refer the complaint or allegations against Kulpati to the Lokayukt or Up-Lokayukt for enquiry and the Kuladhipati is well within his powers to act in accordance with Section 14 of the University Act.

17. Contention of Shri Mishra, learned Senior counsel is that the powers under sub-section (3) of Section 14 of the University Act, could not have been exercised without holding an enquiry prescribed under Section 10, and the impugned order contained in Annx.A/8 is vitiated in the absence of such an enquiry.

18. Under sub-section (3) of Section 14 of the University Act, the Kuladhipati, if, it appears to him after making such inquiries, as may be deemed necessary that the Kulpati has made default in performing any duty imposed on him by or under the University Act, or has acted in a manner prejudicial to the interest of the University, or is incapable of managing the affairs of the University may require Kulpati to relinquish his office. On the basis of the language used in sub-section (3), it cannot be said that this provision has been made dependant of Section 10 in any manner for the purpose of enquiry. On the contrary, it has been clearly mentioned in sub-section (3) that the Kuladhipati may make such inquiries as may be deemed necessary. Had the legislature intended to make the enquiry as prescribed under Section 10 compulsory, it could have been clearly mentioned in this sub-section. Sub-section (3), thus, speaks about the subjective satisfaction of the Kuladhipati with regard to failure on the part of the Kulpati in respect of the situations enumerated therein. It is no doubt true that the University is constituted by virtue of Section 5 of the University Act by the Kuladhipati, Kulpati, members of the Court, of the Executive Council and the Academic Council, but the action against Kulpati by the Kuladhipati is contemplated under Section 14 of the Act which by no stretch of imagination can be said to be dependent in any manner of Section 10. Under sub-section (2) of Section 10, the Kuladhipati shall give notice of his intention to cause an inspection or enquiry to be made to the University and/or to the management of the College or Institution. Result of such inspection/inquiry is to be reported to the Kuladhipati who communicates his views with reference to the result

of such inspection or inquiry through the Kulpati to the Executive Council or the said management. The Kuladhipati after ascertaining the opinion of the Executive Council or management shall advise the University or the management upon the action to be taken. Since the University or the Executive Council or management has no power to take action against Kulpati, the provisions contained in Section 10 of the University Act cannot be invoked in the matter of relinquishment of the post of Kulpati. On the other hand, the Kuladhipati by virtue of sub-section (4) of Section 14 is required to communicate the particulars of the grounds on which action under sub-section (3) is proposed to be taken and is further required to give a reasonable opportunity to the Kulpati of showing cause of the proposed order under sub-section (3).

19. Under Section 10 of the University Act, the University or management alone is entitled to be heard at the time of inspection or inquiry, whereas, under sub-section (4) of Section 14, the Kulpati is to be necessarily provided with a reasonable opportunity of showing cause against the particulars of the grounds as well as the proposed order. Thus, the enquiry contemplated under sub-section (4) of Section 14 is quite independent and Section 14 cannot be treated as dependent of Section 10.

20. Here, I may also refer to Section 52 of the University Act, which empowers the State Government to supersede the University when the State Government is satisfied that the administration of the University, cannot be carried out in accordance with the provisions of the Act. In this situation also, the Kulpati of the University would stand superseded by the Kulpati appointed by the Kuladhipati by virtue of supersession of University. However, this being not a position in the present case, this Court is not required to dwell upon it any more.

21. Shri Mishra, learned Senior counsel further contended that the Kuladhipati in exercise of powers under Section 12 of the University Act could have annulled the alleged irregularities under sub-section (4). No order of annulment has been passed which is indicative of the malafides on the part of the Kuladhipati. Referring to page 87, it is contended that the petitioner is found to have awarded Ph.D, in contravention of clause 22 of statute 30 read with Section 24 of the University Act. However, the Ph.D. Has not been withdrawn and the Kuladhipati has not annulled the proceedings of awarding Ph.D. which was held to be in contravention of law. Thus, it is contended that the action against the petitioner is malafide and the impugned order is not, therefore, sustainable in law. It is contended by Shri Mishra that at pages 103 and 104 of the writ petition, there are certain suggestions made by the enquiry committee which have not been implemented and they were not followed up. According to the learned counsel, this also amounts to mala fide on the part of respondents.

22. I am not impressed with this submission for the reason that there is no statutory provision obliging the respondents to act in pursuance of the suggestions. Moreso, absence of follow up action in this regard would not amount to mala fide so far as the petitioner's case is concerned.

23. It is true that the power of annulment is vested in the Kuladhipati by virtue of Section (4) of Section 12 of the University Act and there is no justification with the respondents not to initiate for withdrawal of Ph.D. which was found to have been awarded in violation of law. However, 9 charges were found to be proved against the petitioner. Therefore, merely, on account of absence of annulment of the order awarding Ph.D. the entire inquiry report containing findings about proven charges cannot be treated as vitiated. It is always easy to term an action as malafide, but is not easy to establish it. Hon'ble Supreme Court of India in the case of *E.P. Royappa Vs. State of Tamil Nadu* (AIR 1974 SC 555) has held :-

> "We must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility."

24. In the case in hand 19 charges were levelled against the petitioner; out of which, charge Nos.1,2,4,6,7 (partly), 8, 10, 13, 15 and 17-B are found to have been proved. This being so, merely, absence of annulment in case of two out of 9 proven charges, will not vitiate the entire proceedings. Moreso, it was the petitioner who is found to have committed the financial, academic and administrative irregularities as revealed in the enquiry report contained in Annx.A/2.

25. Shri Mishra, learned Senior counsel referring to point No.7 of enquiry as contained at page nos. 61 to 63, submitted that the petitioner was not found to have committed any irregularity in allotting the quarter to Shri Shyam Kumar Jha and the petitioner could not have been found guilty with respect to this charge.

26. On perusal, it is found that this charge involved question of recovery/realisation of licence fees from Shyam Kumar Jha (Clerk) at less than prescribed rate. As regards allotment, the petitioner is not found guilty. However, as regards monetary loss, it has been found that Shyam Kumar Jha was allotted 'E' type quarter which was available at the licence fees of Rs.700/- per month. Instead, Rs.425/- per month were recovered from him by virtue of the petitioner's order dated 15.2.2005 which has caused monetary loss to the University. In this view of the matter, the petitioner cannot be said to be fully exonerated of enquiry point No.7.

27. Shri Mishra, learned Senior counsel further took this Court through the enquiry report and contended that no work was executed or caused to be executed by the petitioner without financial sanction.

Issue No.1 (charge No.1) at page 34 relates to the allegation regarding absence of financial sanction. Neither in the enquiry nor before this Court an effort was made to place on record or to requisition the financial sanction. On perusal, it is found that at pages 41 & 42 of the writ petition, it has been clearly found that the petitioner had a right to spend in excess of Rs.20,000/- only after obtaining administrative and financial sanction. Petitioner was found to have spent excess money in exercise of his powers

without obtaining the requisite sanction. Surprisingly, the petitioner has nowhere averred in the writ petition that there were necessary financial sanctions. In the absence of such averment and equally the proof on his part, the petitioner would not be benefited, unless he establishes that the financial sanction was not required at all. Petitioner has been unable to demonstrate that he has spent money within his limitation according to the Financial Code. Details of the money spent by the petitioner in the capacity of Kulpati are already on record in the enquiry report which could have been spent by him only after obtaining the requisite sanction. In the absence of any such sanction, no fault is found with the findings contained in the enquiry report.

28. It has been contended that the University Grants Commission did not raise any objection about financial sanction. This, too, will not give any benefit to the petitioner because the financial sanction was required under the University Financial Code and the petitioner cannot be absolved in the absence of financial sanction, merely, on the ground that no such objection was raised by the University Grants Commission. It is further submitted that the petitioner was not given an opportunity to requisition the financial sanction during enquiry. This submission will not detain this Court any more. for the reason that the petitioner has nowhere averred in the writ petition that the requisite financial sanction was available and the entire money was spent by him only after obtaining due financial sanction.

29. Much emphasis has been made on the order of this Court contained in Annx.A/7, passed in Writ Petition No. 18476/06. Suffice it to say, that the said writ petition was submitted when the show cause notice was issued and served upon the petitioner. Learned Dy. Advocate General in the said petition stated that the decision pursuant to show cause notice would be taken after considering all the relevant provisions contained in the University Act. Applicability of Section 10-A and/or Section 12 of the University Act was not acknowledged/admitted as revealed in Annx.A/7. Application of a particular provision is always a matter of law and the petitioner having failed to demonstrate the applicability of the said provision cannot be allowed to make grievance. Accordingly, the impugned order is not found to have been passed in violation of Annx.A/7.

30. It is further contended that copies of various documents mentioned in the show cause notice ought to have been provided to the petitioner and the same was objected to by him as contained in the reply to show cause notice marked as Annx.A/6. In paragraph 8 of the show cause notice, it was clearly mentioned that the petitioner if desirous of making inspection of the record or of obtaining copies, may submit a list of such documents to the Registrar of the University. In the reply contained in Annx.A/6, although, an objection is raised, but the petitioner had not specifically demanded the inspection or copy of any of the documents. The petitioner was given an opportunity vide paragraph 8 of the show cause notice. He does not seem to have submitted any such list of documents to the Registrar. This apart, there is no averment in the writ petition nor any such prayer for inspection or for obtaining copies of the documents is

made before this Court. This being so, I find that an adequate opportunity of hearing was given to the petitioner.

31. It is further contended that there is no allegation of misappropriation or embezzlement of money against the petitioner. Therefore, the impugned order directing the relinquishment from the post of Kulpati is highly arbitrary and illegal besides being extremely disproportionate. Reliance has been placed on the Supreme Court decisions in *R/o Ram Ashray Yadav* (AIR 2000 SC 1448), *Bangalore Medical Trust Vs. B.S. Muddappa and others* (AIR 1991 SC 1902), Dr. K.C. *Malhotra Vs. H.P. University, Shimla* (AIR 1995 HP 156).

32. In case of *Dr. Ram Ashray Yadav* (supra), no charge of misbehaviour was found to be established, whereas, in the instant case about 10 charges are found to be proved against the petitioner.

33. In the case of *Bangalore Medical Trust decision* (supra), it is held :-

> " Even where Statues are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness. "

Further in paragraph 52, it has been held :-

> "The Section authorises the Government to issue directions to ensure that the provisions of law are obeyed and not to empower it itself to proceed contrary to law. What is not permitted by the Act to be done by the Authority cannot be assumed to be done by State Government to render it legal. An illegality cannot be cured only because it was undertaken by the Government. The Section authorises the Government to issue directions to carry out purposes of the Act. That is the legislative mandate should be carried out. And not that the provision of law can be disregarded and ignored because what was done was being done by State Government and not the Authority. An illegality or any action contrary to law does not become in accordance with law because it is done at the behest of the Chief Executive of the State. No one is above law. In a democracy what prevails is law and rule and not the height of the person exercising the power."

Accordingly, it has been contended that Kuladhipati who happens to be the Governor of the State, cannot be permitted to pass the impugned order under Section 14(3) of the University Act without making an enquiry prescribed under Section 10.

34. It has been already found by this Court that no enquiry prescribed under Section 10 is contemplated for exercising the powers under Section 14(3). An opportunity of hearing as contemplated under sub-section (4) of Section 14 was the requirement in the present case which was duly complied with.

35. Shri Mishra, learned Senior counsel on the basis of *Dr. K.C. Malhotra's* decision

(supra) submitted that the removal of the petitioner is bad in law on account of illegal inquiry against him. In Dr. K.C. Malhotra's case, the High Court of Himachal Pradesh found that the enquiry conducted against the said K.C. Malhotra was vitiated on account of violation of principles of natural justice. Here the enquiry against the petitioner is not found to have been vitiated as revealed in the preceding paragraphs.

36. Shri Rajendra Tiwari, learned Senior Advocate, contended that the impugned order marked as Annx.A/8 is based on the subjective satisfaction of the Kuladhipati which cannot be challenged on the basis of sufficiency of the material which formed basis for the subjective satisfaction. He placed reliance on the Supreme Court decision in the case of High Court of Judicature at *Bombay Vs. Shashikant S. Patil* (AIR 2000 SC 22), wherein it has been held :

> "The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article 226 of the Constitution."

37. It is almost a settled law that it is a decision making process which is liable to scrutiny and not the decision itself. It cannot be overlooked that this Court in exercise of powers under Article 226 of the Constitution of India does not act as an Appellate Authority. If the conclusion upon consideration of the evidence reached by the departmental authorities is perverse or suffers from apparent patent error on the face of the record or based on no evidence at all, writ may be issued. In the present case, the enquiry report could not be assailed substantially by the petitioner in successful manner. This being so, no interference is warranted in Annx.A/8.

38. As regards, the plea of highly disproportionate penalty, Shri Rajendra Tiwari, learned Senior counsel relied upon *Ganesh Santa Ram Sirur Vs. State Bank of India* (AIR 2005 SC 314). Accordingly, he submitted that the objection on the ground of absence of misappropriation or embezzlement is not available to the petitioner as he was found to have committed defaults and incapable of managing the affairs within the meaning of sub-section (3) of Section 14 of the University Act. The Hon'ble Supreme Court in the case of *Ganesh Santaram* (supra) has approved the submission that *"good conduct and discipline are inseparable for the functioning of every officer, Manager or employee of the Bank, who deals with public money and there is no defence available to say that there was no loss or profit resulted in the case, when the Manager acted without authority and contrary to the rules and the scheme which is formulated to help the Educated Unemployed Youth."*

39. Hon'ble Supreme Court in the case of *Regional Manager, U.P. SRTC, Etawah & Ors. V. Hoti Lal & Anr.* [2003 (3) SCC 605] has held as under :

> " If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases

has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court do not appear to be proper. We set aside the same and restore order of the learned single judge upholding the order of dismissal."

40. In the result, the enquiry report holding the petitioner to be guilty of number of charges is not found to have been vitiated. The petitioner has been unable to establish that the enquiry was conducted in contravention of any statutory rule, or in violation of principles of natural justice. It cannot be said to be based on no evidence. Consequently, the impugned order based upon the enquiry report, also cannot be said to be unsustainable.

41. In the result, I do not find any merit in the writ petition. The same is, hereby, dismissed. However, without order as to costs.

Petition dismissed.

I.L.R. [2007] M.P., 1618

WRIT PETITION

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

25 September, 2007

MEDHA PATKAR ....Petitioner*

Vs.

STATE OF M.P. and anr. .....Respondents

A. Constitution of India - Articles 19(1)(a),(b), 21 - Protection of certain rights regarding freedom of speech etc. - Petitioners and other agitators were exercising their fundamental right to freedom of speech and expression and to assemble peaceably and without arms - They were shouting slogans demanding land for land and demanding other rehabilitation measures - Nothing in their conduct to show that they had design to commit cognizable offence - They have not done anything giving apprehension that they will disturb public tranquility, public peace or public order - Insistence by S.D.M. to execute personal bonds under section 107 of Cr.P.C. and on refusal sending them to jail was in gross violation of their fundamental rights - Payment of compensation is one of the way to prevent violation of fundamental right under Article 21 of Constitution by the authorities - State to pay Rs. 10,000 each to Petitioner and those who were arrested and detained in jail - Petition allowed.

Bearing in mind the aforesaid law laid down by the Supreme Court in the decisions

*W.P. No. 10021/2007 (ज)

discussed above, we find that on 25.7.2007 the petitioner and other agitators were exercising their fundamental rights to freedom of speech and expression and to assemble peaceably and without arms guaranteed under Articles 19(1)(a) and 19(1)(b) of the Constitution, when they had assembled on the road and were shouting slogans demanding land for land and demanding other rehabilitation measures and there was nothing in their conduct to show that they had any design to commit a cognizable offence the commission of which had to be prevented by their arrest by the Police under Section 151 Cr.P.C., and yet they were forcibly dragged by the Police and put in the van on the evening of 25th July 2007. We also find that although the petitioner and other agitators had done nothing to give rise to even an apprehension that they will disturb the public tranquillity, public peace or public order and yet the SDM, Badwani insisted upon the petitioner and other agitators to execute personal bonds under Section 107 Cr.P.C. and on refusal on the part of some of the male and female agitators to furnish such personal bonds under Section 107 Cr.P.C., the SDM, Badwani, sent the male agitators to the Jail at Badwani and the female agitators to the Jail at Indore. In our considered opinion, since the pre-conditions of Section 151 Cr.P.C. for arrest by the Police without an order of the Magistrate or without any warrant as provided in the section did not exist, the arrest by the police of the petitioner and other agitators from the road where the petitioner and other agitators were squatting and shouting slogans was in gross violation of their fundamental rights under Articles 19(1)(a) and 19(1)(b) of the Constitution. Similarly, since the demand by the SDM, Badwani on the petitioner and other agitators to execute bonds when they had done nothing to give rise to even an apprehension that they will disturb the public tranquillity, public peace or public order and the detention of the petitioner and other agitators in Badwani and Indore Jails on refusal on the part of the petitioner and other agitators to execute such bond during 25.7.2007 to 30.7.2007 is wholly without the authority of law and was in violation of their fundamental right guaranteed under Article 21 of the Constitution. (Para 28)

B. Criminal Procedure Code, 1973 (IIof 1974) - Section 151 - Arrest to prevent commission of cognizable offence - Before resorting to Section 151 of Cr.P.C., it must appear to police officer that person who is sought to be arrested is designing to commit cognizable offence and commission of that cannot be prevented except by such arrest.

The very language of sub-section (1) of Section 151 Cr.P.C. quoted above makes it clear that before the Police Officer resorts to section 151 Cr.P.C. to arrest without orders from a Magistrate and without a warrant, it must appear to him that the person, who is sought to be arrested, is designing to commit a cognizable offence and that the commission of offence cannot be prevented except by such arrest. This interpretation of Section 151 Cr.P.C. has been given by the Supreme Court in *Ahmed Noormohmed Bhatti Vs. State of Gujarat and others* ({2005} 3 SCC 647). Paragraph 5 (five) of the judgment in Ahmed Noormohmed Bhatti as reported in the SCC is quoted hereinbelow : (Para 24)

C. **Criminal Procedure Code, 1973 (IIof 1974) - Section 107 - Security for keeping peace - Term Public Order and Public Tranquility mean absence of insurrection, riot, turbulence or crimes of violence and includes absence of all acts which are danger to the security of State and which disturb serenity of others.**

Therefore, the terms 'public order' and 'public tranquillity' mean absence of insurrection, riot, turbulence or crimes of violence and includes absence of all acts which are a danger to the security of the state and which disturb the serenity of others. (Para 26)

Cases Referred :

Narmada Bachao Andolan Vs. Union of India & others; (2005) 4 SCC 32, *Kaneshwar Prasad and others Vs. State of Bihar;* AIR 1962 SC 1166, *Ahmed Noormohmed Bhatti Vs. State of Gujarat and others;* (2005) 3 SCC 647, *Madhu Limaye and another Vs. SDM Monghyr and others;* AIR 1971 SC 2486, *Himatlal K. Shah Vs. Police Commissioner, Ahemdabad;* AIR 1973 SC 87, *Rudul Sah Vs. State of Bihar and another;* AIR 1983 SC 1086, *State of Maharashtra Vs. Christian Community Welfare Council of India & another;* AIR 2004 SC 7.

N.S.Kale, With *A. Bhoumik,* for the petitioner.
R.N. Singh, Advocate General : for the respondents.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A. K. Patnaik, C. J.** :–This is a Public Interest Litigation registered pursuant to a letter dated 26.7.2007 from District Jail, Indore, written by the petitioner on behalf of the people affected by the Sardar Sarovar Project who, while agitating from their demands for rehabilitation were arrested and detained in the Badwani and Indore Jails.

2. The petitioner has alleged that 26 women agitators and 1 child of seven years of age were brought from police custody of Badwani at 4 a.m. early morning on 26.7.2007 and about 200 men agitators and 10 children were also arrested along with them using immense police force. She has further stated that they were all arrested at around 6.00 p.m. on 25.7.2007 from the place of their agitation called Jamin Hak Satyagrah for giving land to adiwasis, farmers, fishermen, labourers as per the Narmada Water Dispute Tribunal (NWDT) award, the policy of the State Government of Madhya Pradesh and the orders passed by the Supreme Court. She has alleged that all the agitators were forcibly removed from the place of agitation and women and children were badly beaten up by the Police and some also received wounds and that the banners, tents and other documents of the agitators were destroyed by the Police. She has stated that the agitation pertains to demands relating to the land, rehabilitation, compensation for loss of boats and thousands of motor pumps due to uninformed releases of water of upstream dams resulting in submergence of the land of the oustees and that the agitation

was peaceful. She has stated that more than 2 lakhs people in different villages have suffered submergence in the Jhabua and Badwani districts. Hence, adiwasis from the hills and mountains of Jhabua had to take to agitation for establishing their rights to land for rehabilitation since 13th July, 2007. She has also stated that the adiwasis and other farmers could not see any alternative when not less than 177 villages with 19 to 25 thousand families staying in the villages and two townships having a thick tree cover, temples, mosques, markets, schools, dispensaries, land and houses were to be drowned due to dam water. The petitioner has prayed that the right to agitation of Sardar Sarovar Project affected adiwasis, fishermen and labourers be protected and the arrested agitators be released and action taken against unjustifiable use of force and destruction of property and direction be issued to the authorities to guarantee the right to full, fair and timely rehabilitation before submergence and destruction of property.

3. The respondents have stated in their reply that on 13.7.2007, about 200 agitators under the leadership of the petitioner organised a vehicle rally in Badwani town without any prior intimation to the District Magistrate, Badwani and without any prior permission from the District Magistrate, Badwani. They have further stated that after crossing Badwani town, the rally proceeded to village Bajatta Khurd situated on Highway No.26 at about 8 kms away from Badwani and on reaching village Bajatta Khurd, all the agitators provoked by the petitioner occupied 100 acres of farm land belonging to the M.P. Seed and Farm Development Corporation (for short the Corporation) and Jawaharlal Nehru Krishi Vishwa Vidyalaya, Jabalpur and by the evening of 13.7.2007, they fixed tents on the Government farm land using iron pipes and wood logs belonging to the Corporation without any permission from the Corporation. The respondents have also stated in the reply that on 14.7.2007, the officials of the district administration along with senior police officials visited village Bajatta Khurd agricultural farm and advised the agitators as well as the petitioner to vacate the farm land and raise their grievance in a lawful manner.

4. The respondents have further stated in their reply that on 15.7.2007, the Sub-Divisional Magistrate, Badwani and other officials met the petitioner and the supporters and requested them to give their demands in writing and the petitioner gave a copy of the letter dated 13.7.2007 signed by 13 agitators on a letter head of Narmada Bachao Andolan and also gave an ultimatum that they would not leave the farm land until and unless their demands are accepted. The respondents have also stated that on 17.7.2007, the Regional Manager of the Corporation informed the Collector, Badwani that the agitators started ploughing the land with tractors and the petitioner was advised by the Collector to stop cultivating the farm land but she refused to do so. The respondents have further stated in their reply that on 19.7.2007, the District Magistrate, Badwani as well as the Superintendent of Police, Badwani visited the place of agitation and had discussion with the petitioner and her supporters relating to their demands pertaining to the Government policy of rehabilitation and assured the petitioner that the demands will be referred to the State Government for consideration and accordingly, the Collector, Badwani sent a communication to the Divisional Commissioner. The respondents have

further stated in their reply that on 20.7.2007, the petitioner started addressing agitators that until the officials of Narmada Control Authority and the NHDC come to the place for discussion, the agitation will continue and on 21.7.2007, the Incharge Minister of District Badwani invited the petitioner and her supporters to have a talk on the issues and on such invitation, some of the agitators met the Incharge Minister at Badwani and they were advised by him that some representatives may come to Bhopal where a meeting will be arranged with the Chief Minister to resolve the grievances but the agitators did not respond to the invitation but became violent and suddenly started shouting against the Minister and also abducted him when he proceeded back to Bhopal. The respondents have stated in their reply that for such unlawful action on the part of agitators, cases under Sections 341, 147 and 186 IPC have been registered against Ashish Mandloi and others in the Police Station at Badwani. The respondents have also stated in their reply that on 22.7.2007 the petitioner started collecting individual applications from surrounding villages and brought 70 children from surrounding villages to the place of agitation assuring them school education and food at the place of agitation.

5. Regarding the circumstdances under which the arrests were made, the respondents have alleged that on 25.7.2007 under the provocation of the petitioner, the agitators organised a Chaka Jaam on the state Highway blocking the Highway with 350 people and asked the 70 children to sit on the front line of the agitation and the petitioner warned the district administration that if their demands are not fulfilled in four days, they will resort to violent agitation. Consequently, a criminal case under Sections 341 and 147 IPC against the petitioner, Ashish Mandloi and others was registered by the Police Station, Badwani and by the evening the district administration warned the petitioner and other agitators that if they do not recall the agitation and vacate the agricultural farm land they will be arrested and on such warning the agitators became furious and some of them attempted to manhandle the officials present at the spot and as the law and order situation went out of control because of the agitation by the agitators under the leadership of the petitioner, 26 females including the petitioner and 95 male agitators were arrested under Section 151 Cr.P.C. , for attempting breach of peace and all the arrested persons were brought to Badwani and presented before the SDM, Badwani at 6.50 p.m. on 25.7.2007 and thereafter 30 male agitators, accompanied with their children were released on furnishing personal bonds and the remaining male agitators were sent to the Jail at Badwani and 26 female agitators were sent to the Jail at Indore as there was no arrangement to keep female agitators in the Jail at Badwani.

6. The respondents in their reply have further stated that the banners, tents, utensils and food-grains which were kept on the farm land were removed and seized in accordance with the procedure prescribed under the Cr.P.C. and no other article was found or seized and no personal belonging of the petitioner was seized. They have stated that agitators have destroyed the entire Moong (green gram) sown by the Corporation on the land causing loss of lakhs of rupees to the Corporation. The respondents have denied the allegations that while arresting the agitators any excessive

police force was applied and that the female agitators were manhandled. They have stated that the female agitators were arrested by female police officials and no personal injury or loss of property was reported by any of them in the Police Station and all the female agitators were properly and safely handled. They have stated that after entering into the Jail at Indore early in the morning at about 4.00 a.m. on 26.7.2007 all the female agitators were accommodated in the female cell and that they were examined and none of them including the petitioner was found injured.

7. The respondents have further stated in their reply that on 27.7.2007, 26 persons including the petitioner applied for bail along with required security bonds and the SDM, Badwani, after having the securities and bonds verified by the Tahsildar and the concerned Police Station and after receiving the verification report on 28.7.2007 fixed the bail proceedings for hearing on 30.7.2007 and after considering all the bail applications, directed release of the arrested persons on furnishing bail bonds. They have stated that all the persons except the petitioner and Ashish Mandloi were accordingly released on 30.7.2007 and the petitioner and Ashish Mandloi were detained because they were required in Criminal Case Nos. 399 of 2002 and 646 of 2006 pending before the Chief Judicial Magistrate, Badwani. The respondents have stated that the Court of Chief Judicial Magistrate was intimated and requested to issue production warrant on 27.7.2007 and the petitioner was produced before the Chief Judicial Magistrate, Badwani on 1.8.2007 and since the offences against the petitioner and Ashish Mandloi were found bailable, they were granted bail by order dated 1.8.2007 passed by the Chief Judicial Magistrate, Badwani in Criminal Case No.646 of 2006. Regarding Criminal Case No.399 of 2002, the respondents have stated that the petitioner was produced before the Chief Judicial Magistrate on 3.8.2007 and as the trial was pending before the Sessions Judge, Badwani, the case was forwarded to the Sessions Judge, Badwani, who after hearing the bail issue, granted bail to the petitioner on 3.8.2007 and the petitioner was released on bail on 4.8.2007.

8. Regarding the grievance of the agitators relating to rehabilitation of displaced persons under the Sardar Sarovar Project, the respondents have stated in their reply that the matter is subjudice before the Supreme Court in Narmada Bachao Andolan vs. Union of India and others and the Supreme Court has taken a view that in case any person affected by the project has any grievance relating to rehabilitation, he may approach the Grievance Redressal Authority. The respondents have stated that all the displaced families required to be rehabilitated at present dam height 121.92 meters have been duly extended rehabilitation benefits as per the NWDT award, R & R policy of the State Government of Madhya Pradesh and various orders passed by the Supreme Court and in case any affected person has any grievance, he is free to approach the Grievance Redressal Authority.

9. In reply to the allegations by the petitioner relating to submergence of pumps and loss of boats due to release of water from the dam, the respondents have stated in their reply that due to sudden rain the catchment area of the dam was flooded with

water and the pumps installed by several persons for irrigation got submerged and the boats were flown away or submerged and the applications received for loss of boats were processed and Rs.72,000/- have been distributed to 14 applicants for the loss of boats and the other applications are being processed. The respondents have further stated that the district administration has arranged divers to search out the pumps and 19 pumps have been recovered and divers are making efforts to recover other pumps. The respondents have stated that in absence of any provision for grant of compensation for such loss, the matter has been referred to the State by the district administration for compensation.

10. The petitioner has filed a rejoinder reiterating that it is a mandatory for the respondents to rehabilitate Sardar Sarovar Dam affected families in accordance with the NWDT award, the Madhya Pradesh R & R Policy and the directions of the Supreme Court in different orders passed in 1991, 2000, 2002 and 2005, Action Plan of Narmada Valley Development Authority (1993), Master Plan of Narmada Control Authority (1995) and ILO Convention 107. The petitioner has denied the allegation in the reply of the respondents that a vehicle rally was organized through Badwani and undertaken on 13.7.2007. The petitioner has also denied the allegation that she provoked the project affected families to occupy the farm land. She has stated that the decision to occupy the farm land was taken collectively by the project affected families. The petitioner has denied the allegation that iron pipes and wood logs were forcibly taken from the Corporation. The petitioner has stated that the SDM and Tahsildar came to the Satyagraha site in Bajatta and held discussions with the petitioner and the project affected families on a memorandum submitted by the Narmada Bachao Andolan on 4.7.2007 regarding submergence of pumps and loss of boats and other implements due to sudden rise in Narmada waters on 30.6.2007. The petitioner has stated in the rejoinder that the Collector visited the site of 'Dharna' for the first and only time on 19.7.2007 and held discussion on R & R issues and mainly on land for land and other related issues.

11. The petitioner has denied the averment in the reply of the respondents that the Minister extended the invitation for dialogue and has stated that in fact, the Minister refused to meet the people and hear their grievances. The petitioner has stated that a false case has been registered against those activitists allegedly for having abducted the Minister and having committed the offence of wrongful restraint under Section 341 of the Indian Penal Code. The petitioner has stated that there was nothing illegal on her part to collect individual applications from the project affected families regarding their grievances in relation to the R & R process. The petitioner has denied the allegation that 70 children were called by her from the surrounding villages and has stated that the children were from the submerged villages Bhitada and Kharya Bhadal.

12. The petitioner has also denied the allegation that the agitators resorted to Chakka Jaam. She has stated that the Police had diverted traffic flow away from that stretch on the State Highway to another way and there was no chance of any Chakka Jaam. The petitioner has pointed out the discrepancies in the report of the Superintendent of Police, Badwani and the communication of the Collector to the Divisional Commissioner

in this regard. The petitioner has pointed out that while the Superintendent of Police, Badwani, has stated in his report in Annexure R/14 that Satyagrahis were arrested from the Satyagraha site at Bajatta town late in the evening on 25.7.2007, the Collector in his letter to the Divisional Commissioner has reported that the arrests were carried out when the Satyagrahis were attempting at Chakka Jaam. The petitioner has also denied the allegation in the reply that the agitators manhandled the officials and has relied on the report dated 26.7.2007 of the Superintendent of Police in Annexure R/14 that due to refusal by the petitioner and other Satyagrahis to withdraw the Satyagraha, they were arrested. The petitioner has stated in the rejoinder that the Police was abusive and violent and manhandled the Satyagrahis in the most inhuman fashion. The petitioner has stated that some Satyagrahis were having their evening meals when they were arrested and she herself was isolated, dragged by her hair, beaten and then literally thrown into the police van. She has stated that she and the other women who were arrested, have filed a complaint in Badwani Police Station in this regard, a copy of which has been filed as Annexure P/4.

13. The petitioner has stated in the rejoinder that there were more than 700 project affected families participating in the Satyagraha at the time of arrest and 150 persons were arrested by the Police between 6.00 p.m. and 7.30 p.m. and taken to Badwani Jail by about 8.30 p.m. and from there, children and parents were taken to the Town Hall in Badwani and released and the men were put into Badwani Jail and women were transported to Indore Jail and detained there. The petitioner has reiterated that the Police destroyed the tent, smashed the sound system and broke the poles holding up the tents, all of which were rented, and spilled food grains and burnt papers belonging to the petitioner and resorted to other destructive activities. The petitioner has stated that the seizure memo annexed to the reply of the respondents in Annexure R/8 is incomplete and that a complaint has been filed with the Police and a memorandum has been submitted listing the various items that have been lost during the arrest including the personal belongings of some adivasis and the petitioner.

14. The petitioner has denied the averment in the reply of the respondents that there was loss of lakhs of rupees belonging to the Corporation and that no sowing is possible. The petitioner has stated that the land which was occupied by the agitators had been sown with soyabean by the authorities after the authorities had destroyed the maize crop sown by the Satyagrahis. With regard to Moong crop, the petitioner has stated in the rejoinder that the Satyagrahis were actually weeding out and fully protecting the Moong crop, which is standing even today.

15. The petitioner has stated in the rejoinder that the arrested persons including the petitioner were kept in jail from the night of 25th July to evening of 30th July by resorting to Section 151 of the Cr.P.C., and that no one was produced before the SDM after they were arrested and the 26 women and 65 men who were arrested, were not informed about the bail or personal bonds. The petitioner has stated that in the order of the SDM, he has stated that if strict action was not taken and a high bail amount was

not charged along with personal bonds then the Satyagrahis will again cause serious law and order problem in Bajatta and Badwani and this was entirely false since there was no law and order problem that was caused during the entire Zameen Hak Satyagraha. The petitioner has made a submission in the rejoinder that the intention behind the arrest was to ensure that those arrested be kept in jail for as long a time as possible. The petitioner has stated that applications for bail were made on 26th July, but the SDM refused to grant bail stating that the land surety produced was of land from the adjoining district and hence unacceptable and when sureties from the same district were produced the SDM said that only land which was out of the submergence zone would be acceptable and accordingly, the land documents were verified by the Tahsildar and the bail was given by the SDM only on 29.7.2007 after 4.00 p.m. and the arrested men (except Mr. Ashish Mandloi) and arrested the women project affected families (except the petitioner) were released on 30.7.2007.

16. The petitioner has stated in the rejoinder that she was not released since production warrant was issued in Case No.399/2002 in respect of a matter in which all other accused persons had been acquitted and the petitioner was held to be an absconder. The petitioner has also stated that a production warrant could have been served on her at any time as she was in public life but this was done to target her and to ensure that she stays in jail for as long a time as possible. The petitioner has stated that in the other case (No.646/2006) for which she was detained, she is alleged to have used loudspeaker past midnight in a programme in which Swami Agnivesh was the Chief Guest and others public figures were also guests. She has stated that the programme ended well before midnight and false cases were registered against her on the basis of complaint filed by a local Senior BJP Office Bearer of Badwani, who has now been made the Chairman of the District Level Rehabilitation Advisory Committee. Other averments made in the rejoinder relate to proper rehabilitation of the project affected families.

17. At the hearing of the PIL, Mr. N.S. Kale, learned senior counsel with Mr. A. Bhaumik, learned advocate, appearing for the petitioner, submitted that under Article 19(1)(b) of the Constitution of India, all citizens shall have a fundamental right to assemble peaceably and without arms. He submitted that in exercise of the fundamental right guaranteed under Article 19(1)(b) of the Constitution of India, the petitioner and other members of the project affected families of the Sardar Sarovar Project had assembled together and were making demands for land for land as per R & R policy of the Government, NWDT award and the judgment of the Surpeme Court in *Narmada Bachao Andolan Vs. Union of India & others* (2005(4) SCC 32), but they were arrested by use of brutal force by the police on 25.7.2007 and were detained in jail for several days in violation of the right guaranteed by Article 21 of the Constitution. He further submitted that thousands of pumps and other properties of the project affected families were submerged by the sudden release of the water from the dam. He submitted that after the arrest of the petitioner and other Satyagrahis on 25.7.2007, all their belongings at the Satyagarh site were taken away by the police. He argued that

the constitutional right to property of the petitioner and other agitators guaranteed under Article 300-A of the Constitution of India was, thus, affected. He submitted that for violation of fundamental rights guaranteed under the Constitution of India and for loss of properties of the petitioner and other agitators, this Court should award heavy compensation against the respondents. He submitted that the High Court should also direct the respondents to implement the NWDT award in accordance with the judgment of *Narmada Bachao Andolan Vs. Union of India & others* and grant to the oustees of the Sardar Sarovar Project of their entitment including land for land submerged by the Project.

18. Mr. R.N. Singh, the learned Advocate General appearing for the respondents, on the other hand, submitted that Narmada Bachao Andolan has filed an application in Writ Petition (civil) No. 328/2002 before the Supreme Court making a grievance that there are 4262 project affected families, who have not been rehabilitated and lands/ houses have not been offered to them and the Supreme Court has passed an order in the application on 23.4.2007 directing the State of Madhya Pradesh to file a comprehensive affidavit within a period of two weeks giving out the details of rehabilitation so far done by the State. He submitted that the issue regarding rehabilitation of the project affected families of the Sardar Sarovar Project is, therefore, sub-judice before the Supreme Court and should not be taken up by the High Court in the present PIL. Regarding the arrests made on 25.7.2007, he submitted that the facts stated in the reply filed on behalf of the respondents would show that the conduct of the petitioner and other agitators was such that they had to be arrested under Section 151 of the Code of Criminal Procedure 1973. He further submitted that this is not a fit case in which the Court should award compensation against the State respondents.

19. The issue with regard to rehabilitation of the project affected families of the Sardar Sarovar Project is before the Supreme Court in an application filed by the Narbada Bachao Andolan in WP (C) No. 328/2002 and, therefore, it will not be proper for the HIgh Court to consider and decide this issue or give any direction to the respondents regarding rehabilitation. It will also not be possible for the High Court to decide in this case whether the petitioner and other members of the project affected families have suffered loss of property on account of destruction of personal belongings of the petitioner and the adiwasis at the time of their arrest. The respondents have in their reply stated that there is not a single report of loss of property. The allegation of loss personal belongings of the petitioner and other agitators at the time of their arrest having been disputed, the High Court in exercise of jurisdiction under Article 226 of the Constitution of India cannot decide this question and direct the respondents to compensate the petitioner and other members of the project affected families for loss of property. Further, the High Court cannot go into the claim of compensation for loss of pumps and boats as the respondents have stated in their reply that pumps and boats have been recovered and given to the respective owners and have further stated that the claims of other owners have been referred to the State Government. But as the

petitioner has alleged that the fundamental rights guaranteed under Articles 19(1) and 21 of the Constitution of the petitioner and other agitators have been violated by the respondents on account of the arrests of the petitioner and other agitators with brutal force by the police on 25.7.2007 and their detention in jail thereafter, the High Court will have to decide this grievance of the petitioner and other agitators. Under Article 226 of the Constitution of India, the High Court has power, through out the territories in relation to which it exercises jurisdiction to issue to any person or authority or the Government within the territories, directions, orders or writs for the enforcement of fundament rights conferred under Part III of the Constitution of India and when it is brought to the notice of the High Court either by a formal petition or by a letter from a jail that rights of the citizens under Articles 19(1) and 21 of the Constitution of India have been violated, the High Court is under an obligation to consider such a grievance and grant relief to persons whose fundamental rights are affected.

20. The circumstances under which the petitioner and other agitators were arrested on 25.7.2007 have been stated in the letter petition sent from the Jail. The petitioner has stated that when she along with other agitators were agitating for giving land to adiwasis, farmers, fishermen, labourers as per the Narmada Water Dispute Tribunal award, the policy and the plan of the State Government and the orders passed by the Supreme Court, she and the other agitators were forcibly removed from the place of agitation and the women and children were badly beaten up by the Police at 6 p.m. on 25.7.2007. In the reply, the respondents have a different story to say. They have stated that under the provocation of the petitioner, the agitators organized a Chaka Jaam on 25.7.2007 on the State Highway and asked the 70 children to sit on the front line of the agitation and the petitoner warned the district administration that if their demands are not fulfilled in four days, then they will resort to violent agitation and a criminal case under Sections 341 and 147 IPC against the petitioner, Ashish Mandloi and others was registered by the Police Station, Badwani and by the evening the district administration warned the petitioner and other agitators that if they do not recall the agitation and vacate the agricultural farm land they will be arrested, but the agitators became furious and some of them attempted to manhandle the officials present at the spot and as the law and order situation went out of control because of the agitation, 26 females including the petitioner and 95 male agitators were arrested under Section 151 Cr.P.C. and were presented before the SDM, Badwani, at 6.50 p.m. on 25.7.2007 and thereafter 30 male agitators along with their children were released on furnishing personal bonds under Section 107 Cr.P.C. and the remaining male agitators were sent to the Jail at Badwani and 26 female agitators were sent to the Jail at Indore, as there was no arrangement to keep female agitators in the Jail at Badwani. In the rejoinder, the petitioner has stated that the agitators had not organized any Chaka Jaam and they had not manhandled the officials. The petitioner has relied upon the report dated 26.7.2007 of the Superintendent of Police in Annexure R/14 annexed to the reply of the respondents to establish that the petitioner and other agitators

were arrested because they refused to withdraw from the Satyagrah. The petitioner has also stated that the Police was violent and manhandled the agitators in the most inhuman fashion while arresting them. The petitioner has stated that she herself was isolated, draged by her hair, beaten and thrown into the police van.

21. On 16.8.2007, learned counsel for the petitioner and the respondents requested us to watch the C.D's produced by the petitioner and the respondents in which the scene of agitation and arrest had been recorded. As there were two different stories, one given by the petitioner and the other given by the respondents, with regard to the circumstances under which the petitioner and other agitators were arrested we watched the two C.Ds on 16.8.2007 in the meeting room of the Court at about 4.30 p.m. in presence of the counsel for the petitioner and the respondents and we found that when the petitioner and other agitators were sitting on the road and were shouting slogans demanding land for land and making other demands, some officers of the district administration and some police personnel first discussed with the petitioner and the agitators about the demands made by the petitioner and the agitators in connection with rehabilitation of the project affected families but after some time the petitioner and the other agitators were forcibly dragged, bodily lifted and put inside the police van. Hence, the allegations in the reply of the respondents that the petitioner and other agitators were arrested because they resorted to Chakka Jaam, they manhandled the officials present at the spot and the law and order situation went out of the control, are totally false. On the other hand, the petitioner and other agitators appear to have been arrested because they refused to withdraw their agitation by shouting of slogans for land for land and making other demands.

22. Under Article 19(1)(a) of the Constitution, all citizens shall have the fundamental right to freedom of speech and expression and under Article 19(1)(b) of the Constitution they have the fundamental right to freedom to assemble peaceably and without arms. When a group of citizens, therefore, assemble and shout slogans making some demands they exercise their fundamental rights guaranteed under Articles 19(1)(a) and 19(1)(b) of the Constitution. This will be clear from the decision of the Supreme Court in *Kameshwar Prasad and others Vs. State of Bihar* (1962 AIR 1166) in which the Constitution Bench held that the right to make a demonstration is covered by either or both of the two freedoms guaranteed by Article 19(1)(a) and 19(1)(b) of the Constitution. Paragraph 13 of the judgment in *Kameshwar Prasad* as reported in the AIR is quoted hereinbelow :

> "The first question that falls to be considered is whether the right to make a 'demonstration' is covered by either or both of the two freedoms guaranteed by Article 19(1)(a) and 19(1)(b). A 'demonstration' is defined in the Concise Oxford Dictionary as "an outward exhibition of feeling, as an exhibition of opinion on political or other question especially a public meeting or procession". In Webster it is defined as a public exhibition by a party, sect or society .....

as by a parade or mass-meeting". Without going very much into the niceties of language, it might be broadly stated that a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others to whom it is intended to be conveyed. It is in effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech. It has however to be recognized that the argument before us is confined to the rule prohibiting demonstration which is a form of speech and expression or of a mere assembly and speeches therein and not other forms of demonstration which do not fall within the content of Article 19(1)(a) or 19(1)(b). A demonstration might take the form of an assembly and even then the intention is to convey to the person or authority to whom the communication is intended the feelings of the group which assembles. It necessarily follows that there are forms of demonstration, which would fall within the freedoms guaranteed by Article 19(1)(a) and 19(1)(b). It is needless to add that from the very nature of things a demonstration may take various forms; it may be noisy and disorderly, for instance stone-throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within Article 19(1)(a) or (b). It can equally be peaceful and orderly such as happens when the members of the group merely wear some badge drawing attention to their grievances."

23. The fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution, however, is not an absolute right and under Clause (2) of Article 19 of the Constitution, the State can make a law imposing reasonable restrictions on the exercise of this right in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Similarly, the fundamental right to freedom to assemble peaceably and without arms guaranteed under Article 19(1)(b) of the Constitution is not an absolute right and under Clause (3) of Article 19 of the Constitution, the State can make a law imposing in the interests of sovereignty and integrity of India or public order, reasonable restrictions on the exercise of this right. Thus, on both the fundamental rights to freedom of speech and expression guaranteed under Article 19(1)(a) and to freedom to assemble peaceably and without arms guaranteed under Article 19(1)(b), the State can make law imposing reasonable restrictions in the interests of public order.

24. One such provision of law made by the State in the interests of public order, on which respondents have relied upon, is Section 151 of the Cr P.C., which is quoted hereinbelow :

"S.151 (1) : A police officer knowing of a design to commit any

cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorized under any other provisions of this Code or of any other law for the time being in force."

The very language of sub-section (1) of Section 151 Cr.P.C. quoted above makes it clear that before the Police Officer resorts to section 151 Cr.P.C. to arrest without orders from a Magistrate and without a warrant, it must appear to him that the person, who is sought to be arrested, is designing to commit a cognizable offence and that the commission of offence cannot be prevented except by such arrest. This interpretation of Section 151 Cr.P.C. has been given by the Supreme Court in *Ahmed Noormohmed Bhatti Vs. State of Gujarat and others* ({2005} 3 SCC 647). Paragraph 5 (five) of the judgment in *Ahmed Noormohmed Bhatti* as reported in the SCC is quoted hereinbelow :

"A mere perusal of Section 151 of the Code of Criminal Procedure makes it clear that the conditions under which a police officer may arrest a person without an order from a Magistrate and without a warrant, have been laid down in Section 151. He can do so only if he has come to know of a design of the person concerned to commit any cognizable offence. A further condition for the exercise of such power, which must also be fulfilled, is that the arrest should be made only if it appears to the police officer concerned that the commission of the offence cannot be otherwise, prevented. The section, therefore, expressly lays down the requirements for the exercise of the power to arrest without an order from a Magistrate and without a warrant. If these conditions are not fulfilled and a person is arrested under Section 151 of the Code of Criminal Procedure, the arresting authority may be exposed to proceedings under the law. Sub-section (2) lays down the rule that normally a person so arrested shall be detained in custody not for a period exceedings 24 hours. It, therefore, follows that in the absence of anything else, on expiry of 24 hours, he must be released. The release, however, is not instead upon only when his further detention is required or authorized under any other provision of the Code or of any other law for the time being in force. It, therefore, follows that if before the expiry of 24 hours of detention it is found that the person concerned is required to be detained under any other provision of the Code of Criminal Procedure, or of any other law for the time being in force, he may not be released and his detention may continue under such law or such provision of the Code. The detention thereafter is not under Section 151 of the Code of Criminal Procedure

but under the relevant provision of the Code or any other law for the time being in force as the case may be. Section 151, therefore, only provides for arrest of a person to prevent the commission of a cognizable offence by him. The provision by no stretch of imagination can be said to be either arbitrary or unreasonable or infringing upon the fundament rights of a citizen under Articles 21 and 22 of the Constitution."

25. Another provision of law made by the State in the interest of public order on which reliance is placed by the respondents, is Section 107 Cr.P.C., which is quoted hereinbelow :

"S.107 (1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties, for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction."

Thus, Section 107 Cr.P.C. provides that when an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of peace or disturb public tranquillity and is of the opinion that there is sufficient ground for proceedings, he may, require such person to show cause why he should not be ordered to execute a bond with or without sureties, for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

26. The object of Section 107 Cr.P.C. was explained by a Constitution Bench of the Supreme Court in Madhu Limaye and another Vs. SDM Monghyr and others (AIR 1971 SC 2486). Paragraphs 33 and 34 of the Judgment in Madhu Limaye and another Vs. SDM Monghyr and others (supra) are quoted hereinbelow :

"33. The gist of S. 107 may now be given. It enables certain specified classes of Magistrates to make an order calling upon a person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix. The condition of taking action is that the Magistrate is informed and he is of opinion that there is sufficient

ground for proceeding that a person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. The Magistrate can proceed if the person is within his jurisdiction or the place of the apprehended breach of the peace or disturbance is within the local limits of his jurisdiction. The section goes on to empower even a Magistrate not empowered to take action, to record his reason for acting, and then to order the arrest of the person (if not already in custody or before the Court) with a view to sending him before a Magistrate empowered to deal with the case, together with a copy of his reasons. The Magistrate before whom such a person is sent may in his discretion detain such person in custody pending further action by him.

34. The section is aimed at persons, who cause a reasonable apprehension of conduct likely to lead to a breach of the peace or disturbance of the public tranquillity. This is an instance of preventive justice which the Courts are intended to administer. This provision like the preceding one is in aid of orderly society and seeks to nip in the bud conduct subversive of the peace and public tranquillity. For this purpose, Magistrates are invested with large judicial discretionary powers for the preservation of public peace and order. Therefore, the justification for such provisions is claimed by the State to be in the function of the State which embraces not only the punishment of offenders but as far as possible, the prevention of offences."

It will be clear from the paragraphs of the judgment of the Supreme Court in *Madhu Limaye and another Vs. SDM Monghyr and others* (supra) quoted above that Section 107 Cr.P.C. is aimed at persons who by their conduct cause a reasonable apprehension in the mind of the Magistrate that there is likelihood of breach of the peace or disturbance of the public tranquillity and the power is to be used by the Magistrate under Section 107 Cr.P.C. for the preservation of public peace and tranquillity and to prevent commission of offence. Paragraph 16 of the judgment in *Madhu Limaye and another Vs. SDM Monghyr and others* (supra), in which the Supreme Court has explained the terms "public order" and "public tranquillity" is quoted hereinbelow :

" We may here observe that the overlap of public order and public tranquillity is only partial. The terms are not always synonymous. The latter is a much wider expression and takes in many things which cannot be described as public disorder. The words 'public order' and public tranquillity' overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. A person playing loud music in his own house in the middle of the night may disturb public tranquillity, but he is not causing public disorder. 'Public

> order' no doubt also requires absence of disturbance of a state of serenity in society but it goes further. It means what the French designate order publique defined as an absence of insurrection, riot, turbulence, or crimes of violence. The expression 'public order' includes absence of all acts which are a danger to the security of the State and also acts which are comprehended by the expression 'order publique' explained above but not acts which disturb only the serenity of others."

Therefore, the terms 'public order' and 'public tranquillity' mean absence of insurrection, riot, turbulence or crimes of violence and includes absence of all acts which are a danger to the security of the state and which disturb the serenity of others.

27. The Supreme Court has also held in *Himatlal K. Shah Vs. Police Commissioner, Ahemdabad* (AIR 1973 SC 87), that the State cannot by law abridge or take away the right of assembly by prohibiting assembly on every public street or public place though it can only make regulations in aid of the right of assembly of each citizen and can only impose reasonable restrictions in the interests of public order. Paragraph 33 of the judgment of Sikri C.J. delivered on behalf of himself and on behalf of A.N. Ray and Jaganmohan Reddy, JJ, in *Himatlal K. Shah* is quoted hereinbelow :

> "...the State cannot by law abridge or take away the right of assembly by prohibiting assembly on every public street or public place. The State can only make regulations in aid of the right of assembly of each citizen and can only impose reasonable restrictions in the interest of public order. This Court in Babulal Parate v. State of Maharashtra, (1961) 3 SCR 423 at p. 438 = (AIR 1061 SC 884), rightly observed :
>
> "The right of citizens to take out processions or to hold public meetings flows from the right in Art. 19(1)(b) to assemble peaceably and without arms and the right to move anywhere in the territory of India."

28. Bearing in mind the aforesaid law laid down by the Supreme Court in the decisions discussed above, we find that on 25.7.2007 the petitioner and other agitators were exercising their fundamental rights to freedom of speech and expression and to assemble peaceably and without arms guaranteed under Articles 19(1)(a) and 19(1)(b) of the Constitution, when they had assembled on the road and were shouting slogans demanding land for land and demanding other rehabilitation measures and there was nothing in their conduct to show that they had any design to commit a cognizable offence the commission of which had to be prevented by their arrest by the Police under Section 151 Cr.P.C., and yet they were forcibly dragged by the Police and put in the van on the evening of 25th July 2007. We also find that although the petitioner and other agitators had done nothing to give rise to even an apprehension that they will disturb the public tranquillity, public peace or public order and yet the SDM, Badwani insisted upon the petitioner and other agitators to execute personal bonds under Section 107 Cr.P.C. and on refusal on the part of some of the male and female agitators to furnish such

personal bonds under Section 107 Cr.P.C., the SDM, Badwani, sent the male agitators to the Jail at Badwani and the female agitators to the Jail at Indore. In our considered opinion, since the pre-conditions of Section 151 Cr.P.C. for arrest by the Police without an order of the Magistrate or without any warrant as provided in the section did not exist, the arrest by the police of the petitioner and other agitators from the road where the petitioner and other agitators were squatting and shouting slogans was in gross violation of their fundamental rights under Articles 19(1)(a) and 19(1)(b) of the Constitution. Similarly, since the demand by the SDM, Badwani on the petitioner and other agitators to execute bonds when they had done nothing to give rise to even an apprehension that they will disturb the public tranquillity, public peace or public order and the detention of the petitioner and other agitators in Badwani and Indore Jails on refusal on the part of the petitioner and other agitators to execute such bond during 25.7.2007 to 30.7.2007 is wholly without the authority of law and was in violation of their fundamental right guaranteed under Article 21 of the Constitution.

29. We may now consider the relief that can be granted to the petitioner and other agitators, who were arrested and detained in Badwani and Indore Jails, when they have already been released from custody on 30.7.2007. In *Rudul Sah v. State of Bihar and another* (AIR 1983 SC 1086), the Supreme Court has held that one of the ways in which violation of the fundamental right under Article 21 of the Constitution by the authorities of the Statewq can reasonably be prevented is to direct payment of monetary compensation to the individuals whose rights are affected. Chandrachud, C.J., as his Lordship then was, who delivered the judgment on behalf of the three Judges Bench, in para 10 has held :

> "..... Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violaters in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

30. In a recent case in State of Maharashtra Vs. Christian Community Welfare

Council of India & another (AIR 2004 SC 7), the Supreme Court has observed that the law that the liability to pay to aggrieved party who has suffered because of police excesses cannot be doubted and has further held that whether such compensation paid by the State can be recovered from the officers concerned will depend on the fact whether the alleged misdeeds by the officers concerned are committed in course of discharge of their lawful duties or beyond or in excess of the same and this will have to be determined in a proper inquiry.

31. We, therefore, direct the State of Madhya Pradesh to pay compensation of Rs.10,000/- (Rupees Ten Thousand) to the petitioner and each of the male and female agitators, who were arrested in the evening of 25.7.2007 and thereafter detained in Badwani and Indore Jails, in violation of their fundamental rights guaranteed under Articles 19 and 21 of the Constitution within a period of two months from today. We further hold that and it will be open for the State to recover the compensation paid from the officers responsible for the unauthorized arrest and detention of the petitioner and other agitators in accordance with law after proper inquiry. We make it clear that we have not directed the State of Madhya Pradesh to pay any compensation to the agitators who were arrested on 25.7.2007 but were released soon thereafter and were not detained in the jail at Badwani or Indore.

With the aforesaid directions, the writ petition is allowed with costs of Rs.10,000/- which will also be paid by the State to the petitioner within two months from today.

Petition allowed

I.L.R. [2007] M.P., 1636
ELECTION PETITION
Before Mr. Justice Shantanu Kemkar
26 September, 2007

KANKAR MUNJARE ...Petitioner*
Vs.
GAURISHANKER and another ...Respondents

Representation of People's Act, (XLIII of 1951) - Sections 80-A, 81, 83, 100, 123(1) - Corrupt Practice - Petitioner and first respondent contested election for Lok Sabha - First respondent declared elected - Election challenged by filing election petition on the ground of corrupt practice alleging distribution of liquor and money based upon information received from residents of villages-Preliminary Objection raised by First Respondent on the ground that election petition lacks material particulars-Held - Election Petition alleging corrupt practice must set forth full particulars of any corrupt practice including full statement of names of parties alleged to have committed such corrupt practice, date

*Election Petition No. 16/2004 (J)

and place of commission of such practice - It is not duty of Court to direct furnishing of better particulars when objection is raised - Averments made in election petition in regard to corrupt practice are vague and cannot be said to be fulfilling requirement of Section 83(1) of the Act - Election Petition dismissed.

On going through the allegations of the corrupt practice made by the petitioner in this election petition, I am of the view that the allegations are lacking full particulars of any corrupt practice and the date and the place of the commission of such practice. The aforesaid averments made in the petition in regard to the corrupt practice are extremely vague and cannot be said to be fulfilling the requirement of Section 83 (1) (b) of the Act. On the basis of such vague and bald allegations without full particulars, the petition cannot be allowed to proceed further as it lacks mandatory compliance of the pleadings required for a petition alleging corrupt practice. Not only the petition lacks the details as required under Section 83 (1) (b) of the Act but the affidavit filed along with the petition is not in consonance with the provisio of Section 83 (1) (b). On going through the affidavits, I find that the petitioner has failed to state as to which corrupt practice alleged by him is true to his personal knowledge and which is true to his information. In the affidavit reference has been made by the petitioner in regard to the statements made in paras 1 to 9 of the petition though the said paragraphs are not any way related to allegation about corrupt practice. The statements about the paragraphs 10 to 18 are also lacking requirement of the affidavit which should be filed along with the petition alleging corrupt practice. Thus, in the absence of full particulars about the corrupt practice as required under Section 83 (1) (b) of the Act and in the absence of requisite affidavit filed in support of the allegation of corrupt practice under Section 123 (1) of the Act, no issue could be raised for trial. (Para 12)

Cases Referred :

R.P. Moidutty Vs. P.T. Kunju Mohammad and another; (2000) 1 SCC 481, *Ravinder Singh Vs. Janmeja Singh and others;* (2000) 8 SCC 191, *V. Narayanswamy VS. C.P. Thirunavukkarasu;* (2000) 2 SCC 294, *Azhar Hussain Vs. Rajiv Gandhi;* 1986 (Supp) SCC 315.

Arun Kakonia, for the petitioner
Arpan J. Pawar, for the respondent No.1.
Alok Pathak, for the respondent No. 2

Cur.adv.vult.

ORDER

SHANTANU KEMKAR, J. :– Through this Election Petition filed under Section 80-A read with Section 81 of The Representation of People Act, 1951 (for short 'the Act') the petitioner a defeated candidate has challenged the election of the returned candidate (first respondent). In the petition corrupt practices under Section 123 (1) of the Act are alleged.

2. Briefly stated, the petitioner and the first respondent contested the election for Lok Sabha Constituency no. 12, Balaghat held on 5.5.2004. The counting of the votes was held on 13.5.2004. The first respondent was declared elected by the Returning Officer of Balaghat Parliamentary Constituency. Feeling aggrieved, the petitioner has filed this Election Petition. In the petition the petitioner has alleged corrupt practices mainly basing upon the news published in the News Paper `C-Times' and `Jabalpur Express'. The allegations about distribution of liquor and money is based upon the information received from the residents of the villages which he stated be examined by the Court. Many other allegations are levelled which are against the Returning Officer and the Police Officials. An allegation of bogus voting is also levelled.

3. On being noticed the first respondent filed an application I.A. No. III (4/2005) under Section 86 of the Act read with Order 7 Rule 11 of the Code of Civil Procedure (for short CPC) praying for dismissal of the petition on the grounds that the petition is lacking material particulars, it does not disclose any cause of action and is not supported by an affidavit in Form 25 prescribed under Conduct of Election Rules, 1961 (for short Rules). It is also stated by the first respondent in the application that the alleged corrupt practice has not been stated as required under Section 83 (1) (b) of the Act. According to the first respondent in the absence of disclosure of full particulars of the corrupt practice and cause of action no triable issue exists in the petition, therefore, the petition is liable to be dismissed at the threshold.

4. The petitioner filed reply to the aforesaid application seeking dismissal of the petition and stated that the petition contains the necessary details as required in a petition alleging corrupt practice. He further stated that from the averments made in the petition the cause of action is also clearly spelled out and as such he prayed for dismissal of the application filed by the first respondents.

5. Heard learned counsel for the parties on the aforesaid application I.A. III (4/2005) seeking dismissal of the petition.

6. In order to decide the preliminary objection raised by the first respondent by way of the aforesaid application it would be appropriate to consider the relevant provisions of the Act on which strong reliance has been placed by the learned counsel for the first respondent. The relevant provisions are extracted below.

Section 83 of the Act reads thus:

83. Contents of petition – (1) An election petition –

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1905) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

Section 100 which deals with grounds for declaring election to be void reads thus:

"100. Grounds for declaring election to be void – (1) Subject to the provisions of sub-section (2) if the High Court is of opinion-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court,, a returned candidate has been guilty by an agent other than his election agent, or any corrupt practice but the High Court is satisfied -

(a) that ho such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate or his election agent;

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practice at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents then the High Court may decide that the election of the returned candidate is not void.

Chapter I of Part VII deals with Corrupt Practice. Section 123 (1) reads thus:

"123. Corrupt Practices - The following shall be deemed to be corrupt practices for the purposes of this Act:

(1) "Bribery", that is to say -

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing –

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to –

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward -

(a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being, a candidate; or

(b) by any person whosoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

Explanation – For the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78.

Rule 94 A of the Rules reads thus

"94A. Form of affidavit to be filed with election petition - The affidavit referred to in the provisio to sub-section (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in form 25."

7. On a close scrutiny of the aforesaid provisions of the Act and the Rules it is very clear that in case of an election petition alleging corrupt practices the election petition should contain full particulars of any corrupt practice which the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice and it should be signed by the petitioner and verified in the manner laid down in the CPC for the verification of pleadings. The provisio of Section 83 (1) which is relevant for the present petition which is based on allegation of corrupt practice it requires that the petition shall be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

8. On going through the Section 83 (1) (b) of the Act it is apparent that in an election petition alleging corrupt practice the legislature has taken extra care to make special provisions for pleadings. Ordinarily it would suffice if the election petition contains a concise statement of the material facts on which the petitioner relies. However, in the case of petitioner alleging corrupt practice the election petition must set forth full particulars of any corrupt practice including as full statement as possible, of the names of the parties alleged to have committed such corrupt practice, the date and place of the commission of each such practice. Provisio of Section 83 (1) requires that in the petition alleging any corrupt practice the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. Thus, an election petition alleging commission of corrupt practice has to satisfy additional requirements which are mandatory in nature. [See *R.P. Moidutty vs. P.T. Kunju Mohammad and another* – (2000) 1 SCC 481].

9. In the case of *Ravinder Singh vs. Janmeja Singh and others* [(2000) 8 SCC 191] the Supreme Court on considering the provisio to Section 83 (1) of the Act has held that Section 83 of the Act is mandatory in character and requires not only a concise statement of material facts and full particulars of the alleged corrupt practice, so as to present a full and complete picture of the action to be detailed in the election petition but under the provisio to Section 83 (1) of the Act, the election petition leveling a charge of corrupt practice is required, by law, to be supported by an affidavit in which the election petitioner is obliged to disclose his source of information in respect of the commission of that corrupt practice. It is necessary for an election petitioner to make such a charge with full responsibility and to prevent any fishing and roving inquiry and save the returned candidate from being taken by surprise. It has been further observed by the Supreme Court that in the absence of proper affidavit, in the prescribed form, filed in support of the corrupt practice of bribery, the election pertaining

thereto, could not be put to trial. The defect is fatal in nature.

10. In the case of *V. Narayanswamy vs. C.P. Thirunavukkarasu* [(2000) 2 SCC 294] the Supreme Court has said that for the purpose of considering a preliminary objection as to the maintainability of the election petition, the averments in the petition should be assumed to be true and the Court has to find out whether these averments disclose a cause of action or a triable issue as such. It has been held that Sections 81, 83 (1) (c) and 86 read with Rule 94-A of the rules and Form 25 are to be read conjointly as an integral scheme. When so read if the court finds non-compliance it has to uphold the preliminary objection and has no option except to dismiss the petition. Under clause (b) of sub section (1) of Section 83, the election petition must contain full particulars of any corrupt practice. These particulars are obviously different from material facts on which the petition is founded. A petition leveling charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or conjecture for the court to draw inference by adopting an involved process of reasoning. Where several paragraphs of the election petition alleging corrupt practices remain unaffirmed under the verification clause as well as the affidavit, the unsworn allegation could have no legal existence and the court could not take cognizance thereof. Charge of Corrupt practice being quasi-criminal in nature the court must always insist on strict compliance with the provisions of law. In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition. The violation of the provisions of Section 81 can attract the application of doctrine of substantial compliance. The defects of the type provided in Section 83 of the Act can be dealt with under the doctrine of curability. Non compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6 Rule 16 and order 7 Rule 11 of the CPC. The Supreme Court further observed that where neither the verification in the petition nor the affidavit gives any indication of the source of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and the affidavit in the form prescribed does not suffer from any defect the allegations of corrupt practices cannot be inquired into and tried at all. In such a case the petition has to be rejected at the threshold for non compliance with the mandatory provisions of law as to pleadings. It is no part of the duty of the Court suo motu even to direct furnishing of better particulars when objection is raised by the other side.

11. In the case of *Azhar Hussain v. Rajiv Gandhi* [1986 (Supp) SCC 315] the

Supreme Court has held that an election petition can be dismissed summarily if it does not furnish cause of action in exercise of the powers conferred under Order 7 Rule 11 of the CPC. It has been further observed by the Supreme Court that the purpose of conferment of such power is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and the concerned litigants are relieved of the psychological burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties.

12. On going through the allegations of the corrupt practice made by the petitioner in this election petition, I am of the view that the allegations are lacking full particulars of any corrupt practice and the date and the place of the commission of such practice. The aforesaid averments made in the petition in regard to the corrupt practice are extremely vague and cannot be said to be fulfilling the requirement of Section 83 (1) (b) of the Act. On the basis of such vague and bald allegations without full particulars, the petition cannot be allowed to proceed further as it lacks mandatory compliance of the pleadings required for a petition alleging corrupt practice. Not only the petition lacks the details as required under Section 83 (1) (b) of the Act but the affidavit filed along with the petition is not in consonance with the provisio of Section 83 (1) (b). On going through the affidavits, I find that the petitioner has failed to state as to which corrupt practice alleged by him is true to his personal knowledge and which is true to his information. In the affidavit reference has been made by the petitioner in regard to the statements made in paras 1 to 9 of the petition though the said paragraphs are not any way related to allegation about corrupt practice. The statements about the paragraphs 10 to 18 are also lacking requirement of the affidavit which should be filed along with the petition alleging corrupt practice. Thus, in the absence of full particulars about the corrupt practice as required under Section 83 (1) (b) of the Act and in the absence of requisite affidavit filed in support of the allegation of corrupt practice under Section 123 (1) of the Act, no issue could be raised for trial.

13. One of the allegation which has been levelled in the election petition is that the first respondent managed withdrawal of certain criminal cases pending against him in order to contest the election. However, from the petitioner's own showing the withdrawal of cases was much prior to first respondent's nomination as candidate for the said election. In this view of the matter, this ground of the petitioner on the face of it is liable to be rejected.

14. Having regard to the aforesaid, in my considered view the election petition being lacking the full particulars of the corrupt practice as required to be set forth under Section 83 (1) (b) of the Act and the affidavit accompanied with it being not in confirmity with the prescribed Form No. 25 under the Rules, the preliminary objection raised through the application filed by the first respondent deserves to be and is hereby allowed. Consequently, the petition is dismissed.

Petition dismissed.
