I.L.R. [2007] M. P., 1644

APPELLATE CIVIL

Before Mr. Justice U. C. Maheshwari

3 September, 2007

GOVERDHANDAS (DEAD) .... Appellant*

v.

SMT. GOPIBAI. .... Respondents

A. Evidence Act, Indian (I of 1872) - Section 68 - Proof of Execution of Document- Will executed by testator in presence of witnesses - Attesting witness stating that testator had signed in his presence - Merely because attesting witness does not know the language in which will is written, the same cannot be disbelieved.

The appellant's counsel objected such document on the ground that testator did not knew the Urdu language and the same is not got registered. Thus, the possibility of false fabrication could not be ruled out. It is settled proposition of law that only on account of non-registration of a Will it could not be disbelieved because the registration of the Will is not made compulsory under the law. So far language is concerned the documentation is normally carried out in the language prevailed under the legal system. The Will was written in Urdu the then prevalent language of such State; hence merely on this ground the document could not be disbelieved. It is true that Jagnnath Prasad resident of Jahagirabad the scriber of the Will has not been examined but under the law examination of scriber is not mandatory but as per provision of Section 68 of Evidence Act it should be proved by attesting witness. I have not been apprised by any legal position showing that witness of the Will must know the language, subject matter and description of the Will mentioned by the testator. Hence, in the lack of such knowledge the witness of the Will cannot be disbelieved. In such premises the objections of the plaintiff's counsel does not have any material force and court has to consider only the execution of said document by the testator in presence of the witnesses.

(Para 17)

B. Succession Act, Indian (XXXIX of 1925) - Section 63 - Execution of unprivileged will- No specific proforma or method of attestation is prescribed - Will should be signed by testator in presence of attesting witnesses - Attesting witnesses should sign subsequent to the signature of testator - If such things are found document could be held to be validly executed.

As per provision of Section 63 of the Succession Act or under the definition of "attestation" enacted under Section 3 of Transfer of Property Act no specific proforma or method of attesfation has been prescribed but as per such provision the Will should be signed by the testator in presence of the attesting witnesses and subsequent to the signature of testator the same should be signed by the witnesses in presence of

*F.A. No. 110/1992 (J)

the testator. If such things are found to be proved then such document could be held to be a validly executed document. Such principle is laid down in all the cases, cited by the parties in this regard. (Para 18)

C. Words and Phrases - Will - Propounder of will bound to remove all suspicious circumstances and prove will with all probabilities.

It is true that propounder of the Will is bound to remove all the suspicious circumstances and prove the Will with all probabilities that the same was executed by the deceased in accordance with law. In the lack of such evidence Will cannot be deemed to be a genuine and validly executed document as laid down by the Apex Court in the matter of Kalyan Singh Vs. Smt. Chhoti and others reported in AIR 1990 S. C. 396. In view of this announcement of the Apex Court while deciding such question court may consider the conduct of propounder also. I have not found any pleading or evidence on record showing that during the period in which the alleged Will was executed the conduct of the defendant was suspicious or the testator was suffering from any deformity or any infirmity regarding his physical and mental condition. Therefore, execution of Will could not be doubted on this count also. (Para 19)

D. Evidence Act, Indian (I of 1872) - Section 90 - Presumption as to document thirty years old - Will being 30 years old document and have come from proper custody - Presumption regarding signature of testator and other part of it could be drawn in favour of beneficiary/defendant.

Besides the above the aforesaid Will being 30 years old document has come from the proper custody of the propounder the beneficiary the defendant and in view of aforesaid mentioned circumstance the presumption regarding signature of the testator Chhotulal and also other part of it could be drawn in favour of the defendant by virtue of Section 90 of Evidence Act such aspect was considered by this court in the aforesaid earlier judgment dated 24.11.1988 passed in F. A. No.74/1985 in which it was held as under:

> "7. Perusal of Exhibit D-3 and D-4 further reveals that these two documents i.e. the Will executed by late Chhotelal in favour of the appellant bequeathing the suit house, are more than 50 years old. No doubt, evidence of persons who were not present at that time are not available, yet, in Munnalal (minor and others Vs. Mst. Kashibai & others (AIR 1947 P. C. 15), dealing with this aspect. Their Lordships have laid down the law applicable to such ancient wills which are more than 30 years old, as follows:
>
> "Party setting up a will is required to prove that the testator was of sound disposing mind when he made his will but, in the absence of any evidence as to the state of the testator's mind, proof that he had witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified

under the express provisions of section 90, since a will cannot be said to be 'duly' executed by a person who was not competent to execute it; and the presumption can be fortified under the more general provisions of section 114, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about."

Therefore, in view of the above referred decision, the actual execution and attestation of a will, which is more than 50 years old and produced by the appellant from proper custody can be presumed in accordance with the provision of Section 90 of the Evidence Act."

(Para 22)

Cases Referred :

Kalyan Singh Vs. Smt. Chhoti and others; AIR 1990 SC 396, *Munnalal (Minor) and others Vs. Mst. Kashibai and others;* AIR 1947 P.C. 15, *Satyadhyan Ghosal and other Vs. Smt. Deorajin Debe and another;* AIR 1960 SC 941.

A. D. Deoras assisted by *R.K. Jaiswal* and *K. L. Gupta* for the appellant
R. P. Agrawal assistedby *Sharad Gupta,* for the respondents

Cur.adv.vult.

JUDGMENT

U. C. Maheshwari J.:–This judgment shall govern aforesaid both the appeals arising out of the same judgment and decree dated 17.2.1992 passed by First Additional District Judge, to the Court of District Judge, Bhopal in Civil Original Suit No.20-A/1985 whereby the suit for partition and separate possession filed by the Gopibai plaintiff, the appellant of F. A. No.111/92 while the respondent No.1 of F. A. 110/92 against the deceased defendant Govardhandas the predecessor of the respondent No.1 to 3 of F. A. No. 111/92 while the appellant No.1, 2 and respondent No.3 in F. A. No. 110/92 has been decreed in part for ¼ share in the disputed house. Hereinafter for brevity said Gopibai and Govardhandas with his legal representatives are said to be plaintiff and defendant respectively. Being aggrieved by the aforesaid decree the plaintiff filed the appeal for enhancement of her share in the property from ¼ to ½ while on behalf of the defendant the appeal is preferred for setting aside the entire decree by dismissal of the suit.

2. It is not in dispute that the principal owner of the disputed house late Chhotulal was the father of late Smt. Saoubai, the mother of both the parties.

3. The facts giving rise to these appeals in short are that the plaintiff Gopi Bai filed a suit against the deceased defendant Goverdhandas for partition with separate possession claiming half share of house No.39 situated in the lane of Opposite Shriji Mandir at Lakherapura, Bhopal. As per averments of the plaint late Chhotulal bequeathed the disputed house to said Smt. Saoubai, through Will, by virtue of it she became owner of it in 1936 on the death of Chhotulal. Since then till death of Saoubai

she remained in possession of it and also kept some tenants in some part of it. The plaintiff got married in the lifetime of said Chhotulal but her husband had died in the year 1940. Thereafter for some time she resided in the tenanted house but due to sickness of said Saoubai and Jagannath the parties of the parties to look after them she resided with them in the disputed house. Subsequently, Summa Bai gave her a part of said house separately comprising two rooms at first floor along with open yard (Dahlan) for her residence. It is further pleaded that defendant had gone to Ujjain with his family in the year 1940 from where he came back to Bhopal after 9-10 years. During this period plaintiff was residing in the house. In the year 1960 on demise of Saoubai the plaintiff and principal defendant being her heirs inherited such house in equal share, since then they being joint owner of the property are in possession of it. Thereafter plaintiff demanded her share and separate possession of the house by partition but the defendant was not ready to it, thus after giving the notice to defendant she filed the suit for declaration of her half share with separate possession through partition. In alternative it was pleaded that in case the right of the plaintiff is not found in such property, even then considering the circumstance that she was residing with the mother in such house she be permitted to reside there for her remaining life by restoring her possession.

4. In the written statement of the deceased defendant the averments regarding the ownership of said Summa Bai and the co-ownership of the plaintiff are denied. The defendant setup his exclusive ownership of the house on the strength of a "Will" dated 27.11.1935 executed by late Shri Chhotulal. It is specifically pleaded that Saoubai had not acquired any right in such house therefore as heir or under the right of Saoubai the plaintiff has not acquired any right or share in it. As per further averments after demise of her husband the plaintiff had strange relation with her in law's family. Therefore only on account of social courtesy the plaintiff was time being permitted to reside in such house with the family of defendant. The contention of the plaint about giving the separate portion of this house to her is specifically denied. In the year 1958-59 the daughter of the plaintiff Nanhi Bai got married and since then she is residing with her daughter and son-in-law in some other house and not in possession of the disputed house. The suit is neither valued in accordance with law nor filed with on proper court fees.

5. After holding the trial on earlier occasion vide judgment dated 24.9.1985 the trial court by holding the half share of the plaintiff in such house decreed the suit for her separate possession of such share by partition. The same was challenged by the defendant in First Appeal 74/1995. On consideration such appeal along with I. A. No.7759/88 filed by the defendant to amend the written statement for mentioning the date of the Will with some facts was allowed and by setting aside the said earlier judgment and decree remitted back the matter to the trial court for deciding afresh with certain directions. In compliance of such directions the further trial was held and the trial court concluded the matter holding the aforesaid Will set up by defendant was duly executed by the deceased Chhotulal but on interpretation of its averments decided

¼ share of the plaintiff in such house instead to ½ share while ¾ share was held in favour of the defendant. Thus the defendant filed his appeal for dismissal of the suit by setting aside the impugned judgment and decree while the plaintiff filed the appeal for holding her half share in such property by quashing the aforesaid Will.

6. In both the appeals Shri A. D. Deoras, learned Senior Advocate assisted by Shri R. K. Jaiswal and Shri K. L. Gupta learned counsel for the defendant by referring the judgment of this court dated 24.11.1988 passed in F. A. No.74/85 said that the trial court had to decide only the question directed by this court, the findings beyond the remand direction are not sustainable. In such premises the findings given by this court in earlier judgment are still binding at this stage. He further said that there is sufficient circumstance to draw the presumption under Section 90 of the Evidence Act regarding execution of the Will Ex.D.4 by testator Chhotulal and it's genuineness could not be doubted because it being 30 years old document has come from the proper custody of defendant. It does not require any other evidence to prove the same. Although the same has been proved by the defendant and attesting witness Laxminrayan (P.W.2) as per requirement of Law. The same has not been rebutted by the plaintiff even after remitting back the matter, she did not enter in the witness box for the same. By referring the averments of the Will he said that the disputed house was bequeathed to the defendant in his exclusive ownership and nothing in it was given to Saoubai. When the Saoubai had not got any right in it then the claim of the plaintiff through her is not sustainable. According to Will the testator kept only Rs.150/- with the Saoubai for some specific purposes and till this extent the Will was executed in favour of the Saoubai and not for the house. Thus, the last paragraph of the Will could not be interpreted for giving the half share of the house to Saoubai. Therefore the approach of the trial court holding such house was bequeathed in equal share to Saoubai and defendant and on demise of Saoubai the plaintiff inherited her half share i. e. ¼ share in entire house is not correct and the same is not sustainable. He also said that such Will was set up by the defendant at the initial stage in written statement and also produced at early stage of the case and not the belated stage. With these submissions he prayed for dismissal of the suit by setting aside the impugned judgment and decree by allowing his appeal.

7. Shri R. P. Agrawal, learned Senior Advocate assisted by Shri Sharad Gupta, learned counsel for the defendant argued in both the appeals saying that the alleged Will set up by the defendant was produced at very belated stage in the year 1985. The same was not produced while getting mutation of the house in the record of local authority. The same was not got registered. The testator, scriber and witnesses were not acquainted with the Urdu language in which it was written and in the absence of the testimony of scriber the same could not be deemed to be a validly executed document. The propounder has failed to prove the same with all probabilities. In such premises the Will appears to be a suspicious document. Besides it the same has not been proved in accordance with prescribed procedure and provision of law. Thus, the same could

not be acted upon holding any right in favour of the defendant. He further said that as per her pleading Late Chhotulal bequeathed the house to Saoubai through Will by which she acquired it on his demise. Such Will neither produced nor proved on record. As per his submission this case is not based only on such Will but also based on the law of Succession prevailed on the death of Chhotulal in the year 1936 when succession was opened, the then according to Hindu Law Late Saoubai being daughter of the deceased Chhotulal inherited sole right of such house and on her demise in the year 1960 the plaintiff and defendant both inherited the same in equal share under the provision of Hindu Succession Act 1956. In such premises the trial court committed grave error in holding the Will to be a proved document. The trial court ought to have decreed her suit for ½ share and prayed for modification of the impugned decree till this extent. In alternative he said that even on holding that the alleged Will was executed by the deceased Chhotulal, even then in view of it's averments it appears to be a sale deed. Thus, the same could not be considered as Will. Simultaneously, on merits by referring the last paragraph of the Will he said that mentioned house had bequeathed in equal share to Saoubai and the defendant and not to defendant only. The interpretation of the Will by the trial court could not be said to be wrong or contrary to the intention of the testator and prayed for allowing his appeal.

8. Subsequent to aforesaid arguments after closing the case for judgment on behalf of the plaintiff I. A. No.9726/07, an application under Order 6 Rule 17 CPC for amendment in the plaint regarding the right of natural succession of Saoubai after demise of her father and the particulars of her other heirs who are not alive was filed on 23.8.2007. The same shall be considered at the appropriate stage.

9. Having heard the learned counsel, I have gone through the record of the trial court along with the impugned judgment and the earlier judgment of this court dated 27.4.1985 passed in F. A. No.74/1985.

10. By earlier judgment of this court, the case was remitted back to the trial court after setting aside the earlier judgment of the trial court dated 27.4.1985 with following directions:

> "10. Consequently, from the discussions aforesaid the judgment and decree impugned is set aside and the case is remanded to the Trial Court for deciding second part of Issue No.1 relating to execution of the Will by late Chhotelal in favour of the appellant vide Exhibit D-3 and D-4 dated 27.11.1935."

11. It appears from the plaint that plaintiff filed the suit stating that principal owner of the house Chhotulal bequeathed the same through Will to his daughter Saoubai and on his demise by virtue of such Will she acquired the title of such house. It is undisputed fact that Chhotulal died in the year 1936 when the Hindu Succession Act 1956 was neither enacted nor came into force. There was no any other law accept the general principle of Hindu Law regarding inheritance of the property by the daughter of the

deceased Hindu person. It has also come on record that one Narayan the nephew of the deceased Chhotulal covered by sapinda gotra was alive on his death. As per principle of Hindu Law in the absence of any testamentary document such nephew was falling in class-I heir of the deceased as prescribed in Hindu Law edited by Mulla (19th edition), the same is read as under:

38. THE CLASSES OF HEIRS:

(1) There are three classes of heirs recognized by Mitakshara, namely

(a) Gotraja sapindas;
(b) Samanodakas; and
(c) bandhus.

(2) The first class succeeds before the second; the second succeeds before the third.

12. According to it Saoubai did not acquire any right as heir of Choutulal under the prevalent provision of the then Hindu Law as Narayan Gotraja Sapindas was alive and daughter after marriages could not be treated the gotraja sapindas of deceased.

13. Apart the above the absence of any Will in favour of the Saoubai as pleaded by the plaintiff it could not be assumed that the house was bequeathed to her by Chhotulal. It is undisputed fact that the Will pleaded by the plaintiff neither produced nor proved on record, even the description of the Will like date, place etc are also not mentioned in the plaint. Therefore, it is held that house in question was not acquired by Saoubai by Will alleged by the plaintiff in plaint.

14. In written statement the deceased defendant claimed such house as his exclusive property on the strength of Will executed by said Chhotulal but its date and other description were not pleaded at initial stage, the same were inserted by way of amendment in earlier F. A. No.74/1985. Subsequent to such amendment the case was remitted back with the aforesaid direction to the trial court and in compliance of the same by extending the opportunity for adducing the evidence to the parties on appreciation the Will alleged by the defendant is found to be executed by Chhotulal.

15. It appears from earlier judgment of this court that objection about filing such Will at belated stage was never taken by the plaintiff in such appeal and the same is raised by the plaintiff first time, hence such objection cannot be sustained. Besides this the arguments advanced by the plaintiff's counsel that the defendant filed the alleged Will only on 7.1.1985 and not prior to it the same is falsified by the proceedings of the trial court dated 19.12.1978 directing the parties to comply the Order 11 & 12 of CPC regarding admission and denial of documents, on which the defendant filed the Will with his affidavit as per order sheet dated 6.2.1979. Subsequent to it, the same was inspected by the plaintiff's counsel, as recorded by the trial court in the order sheet dated 26.10.1979. Therefore, it could not be said that such document was filed in the year 1985 or at any belated stage. It also appears that subsequent to filing such

Will the issues were framed on dated 2.12.1980 and settling date of the issues was 11.12.1980 on which the parties were directed to lead their evidence. Since the document was filed before framing and settling the issues. Thus, the objection raised by the plaintiff's counsel in this regard does not have any force and same is not sustainable.

16. Coming to the question of legality of the Will (Ex.D.4 and its translated version in Hindi Ex.D.5) set up by the defendant. The same is written in Urdu language, the language of old Bhopal State as apprised by the learned counsel of the parties. Incidentally I would like to mention here that translation of such document in Hindi (Ex.D.5) was placed and proved on record, the same has not been objected by either of the parties at any stage of the case and the same was taken into consideration along with original document by the trial court and also by this court at earlier stage. On perusing such document, it is apparent that it has a signature of testator Chhotulal along with the signatures of alleged witnesses Guttulal, Vallabhdas, Narayandas and Laxminarayan in Hindi language. It is apparent that this document was not got registered.

17. The appellant's counsel objected such document on the ground that testator did not knew the Urdu language and the same is not got registered. Thus, the possibility of false fabrication could not be ruled out. It is settled proposition of law that only on account of non-registration of a Will it could not be disbelieved because the registration of the Will is not made compulsory under the law. So far language is concerned the documentation is normally carried out in the language prevailed under the legal system. The Will was written in Urdu the then prevalent language of such State; hence merely on this ground the document could not be disbelieved. It is true that Jagnnath Prasad resident of Jahagirabad the scriber of the Will has not been examined but under the law examination of scriber is not mandatory but as per provision of Section 68 of Evidence Act it should be proved by attesting witness. I have not been apprised by any legal position showing that witness of the Will must know the language, subject matter and description of the Will mentioned by the testator. Hence, in the lack of such knowledge the witness of the Will cannot be disbelieved. In such premises the objections of the plaintiff's counsel does not have any material force and court has to consider only the execution of said document by the testator in presence of the witnesses.

18. As per provision of Section 63 of the Succession Act or under the definition of "attestation" enacted under Section 3 of Transfer of Property Act no specific pro-forma or method of attestation has been prescribed but as per such provision the Will should be signed by the testator in presence of the attesting witnesses and subsequent to the signature of testator the same should be signed by the witnesses in presence of the testator. If such things are found to be proved then such document could be held to be a validly executed document. Such principle is laid down in all the cases, cited by the parties in this regard.

19. It is true that propounder of the Will is bound to remove all the suspicious

circumstances and prove the Will with all probabilities that the same was executed by the deceased in accordance with law. In the lack of such evidence Will cannot be deemed to be a genuine and validly executed document as laid down by the Apex Court in the matter of Kalyan Singh Vs. Smt. Chhoti and others reported in AIR 1990 S. C. 396. In view of this announcement of the Apex Court while deciding such question court may consider the conduct of propounder also. I have not found any pleading or evidence on record showing that during the period in which the alleged Will was executed the conduct of the defendant was suspicious or the testator was suffering from any deformity or any infirmity regarding his physical and mental condition. Therefore, execution of Will could not be doubted on this count also.

20. Although before remanding the matter to the trial court not a single witness of the Will (Ex.D.4).was examined on behalf of the defendant but subsequent to remand the defendant himself entered into the witness box and besides his earlier deposition he additionally proved the said Will and it's one attesting witnesses Laxminarayan (D.W.2) has also been examined. He categorically proved A to A the signature of the testator Chhotulal on Ex.D.4 along with his signature E to E, signature. He further proved the signature of other witnesses Guttu B to B and Narayandas as C to C. He also stated that Will was executed by Chhotulal and the same was signed by him and other persons as witnesses. He categorically stated that such signature took place in his presence. Although in cross examination he accepted his relation with the defendant, as they were working together for social services. He also deposed that he does not know the Urdu language. The alleged Will was executed in the year 1935 and his deposition was recorded on 7th May 1991 i.e. after 56 years inspite it he stated aforesaid version in the age of 85 years by which he proved that testator signed such document in presence of him and other witnesses and he along with other witnesses signed the same in presence of the testator. Accordingly the execution of the Will has been proved with all probabilities.

21. Apart the above after remanding the matter to rebut the aforesaid evidence plaintiff did not enter into the witness box. Even in earlier statement she did not challenge the aforesaid Will even in her chief. After incorporating the amendment in the written statement she also amended her plaint in this regard but in support of such pleading she did not enter into the witness box. Although her daughter Smt. Narayani Agrawal (P.W.7) examined on 10.1.1992 but she did not depose anything against the aforesaid Will (Ex.D.4). Accordingly in support of the Will there is un-rebutted evidence is available on record.

22. Besides the above the aforesaid Will being 30 years old document has come from the proper custody of the propounder the beneficiary the defendant and in view of aforesaid mentioned circumstance the presumption regarding signature of the testator Chhotulal and also other part of it could be drawn in favour of the defendant by virtue of Section 90 of Evidence Act such aspect was considered by this court in the aforesaid

earlier judgment dated 24.11.1988 passed in F. A. No.74/1985 in which it was held as under:

> "7. Perusal of Exhibit D-3 and D-4 further reveals that these two documents i.e. the Will executed by late Chhotelal in favour of the appellant bequeathing the suit house, are more than 50 years old. No doubt, evidence of persons who were not present at that time are not available, yet, in *Munnalal (minor and others Vs. Mst. Kashibai & others* (AIR 1947 P. C. 15), dealing with this aspect. Their Lordships have laid down the law applicable to such ancient wills which are more than 30 years old, as follows:
>
> "Party setting up a will is required to prove that the testator was of sound disposing mind when he made his will but, in the absence of any evidence as to the state of the testator's mind, proof that he had witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of section 90, since a will cannot be said to be 'duly' executed by a person who was not competent to execute it; and the presumption can be fortified under the more general provisions of section 114, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about."
>
> Therefore, in view of the above referred decision, the actual execution and attestation of a will, which is more than 50 years old and produced by the appellant from proper custody can be presumed in accordance with the provision of Section 90 of the Evidence Act."

23. The aforesaid earlier findings are still binding at this stage as led down by the Apex Court in the matter of *Satyadhyan Ghosal and other Vs. Smt. Deorajin Debe and another* reported in AIR 1960 SC 941 in which it was held as under:

> "8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter against at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter?"

24. So far the argument that the said document could not be treated as Will because as per it's averments the same was executed by the testator in consideration of the

money. In view of definition of Will defined under Section 2 (h) of the Succession Act on perusing the document it is apparent from some part of it that the mentioned properties are bequeathed to the beneficiaries concerned after the death of testator. Therefore, on interpretation of the document the same should be treated the Will as the same was executed for giving the properties after the death of testator.

25. Under the aforesaid premises, the approach of the trial court holding the aforesaid Will as genuine validly executed document is not perverse in any manner. Hence the same is hereby affirmed.

26. Now the court has to consider to whom the disputed house was bequeathed either to the defendant in exclusive ownership or to the defendant and his mother Saoubai both jointly in equal share. In order to consider such controversy, I would like to reproduce the relevant abstract (the Hindi translated version Ex.D.5) of the Will by which the rival parties are claiming their rights in the house:

"..... .....

1. मकान मुतजिकराबाला जिस पर मुसम्मात सौआ बाई दुख्तर मिनमुकिर काबिज है ओर जोर हर तरह के बारो मुआखिजा से पाक व साफ है । वह मुस्समी गोवर्धनदास नबीरा खुद के हक मालकाना में रहेगा और वह बाद वफात् मेरे उसका मालिक कामिल होगा । किसी दूसरे को उसमें किसी किस्म का कोई दस्तनदाजी का हक न होगा । जिसका बयनामा हवाले मुस्समी गोवर्धनदास कर दिया गया है । मैने मस्समी गोवर्धनदास से मुबलिग 325 रूपया बएवज मकान जरिये मुस्समात सौआ बाई बजुरूरत जेल हासिल कर लिये है ।

2. मुबलिग 325 रूप्या जो बएवज मकान मुस्समात् गोवर्धनदास नबीरा खुद से वसूल हुआ है उसका मसरफ हस्ब जेल होगा । मुबलिग 150 रूपया मिनमुकिर की मौर मैय्यत यानी अदाई रसूम मैय्यत इब्तिदा ता इन्तहा यानी बरसीतक और गंगाजली के खोले जाने में सर्फ होगा और ये काम नारायणदास वल्द भोगचंद जो मेरा भतीजा होता है । बमशबरा मुस्समात सौआ बाई मिनमुकिर करेगें । और ये रूपया बतौर अमानत मुस्समात सौआ बाई के पास छोडता हूँ । बाकी मुबलिग 175 रूपया के मिनजुमला मुबलिग 50 रूपया मिनमुकिर ने अपने हाथ से धर्म के काम में खर्च कर दिये हैं । और मुबलिग 125 रूपया हस्ब मुन्दरजा जेल लोगों को अपने हाथ से ईनायत न दे दिया है । गोवर्धनदास नबीरा खुद 25 रूपया गोकलदास नबीरा खुद 25 रूपया मुस्समात सरस्वती बाई नवासी मिनमुकिर 25 रूपया मुस्समात् श्यामाबाई दुख्तर नारायणदास 25 रूपया पिसर नारायणदास 25 रूपया ।

3. मुस्समी गोवर्धनदास को जरिये हजा हिदायत की जाती है कि वो कर्जेजात् याफ्तनी वसूल करके दादनी कर्जेजात् जिम्मगी मिनमुकिर अदा करदे ताकि बार कर्जे से मिनमुकित को सुभग दोषी हासिल हो । लिहाजा ये वसीयतनामा बमबाजय वल्लभदास वल्द गप्पूलाल जी लक्ष्मीनारायण वल्द कल्हैयालाल जी गुट्टुलाल वल्द सिताराम जी नारायणदास वल्द भोगचंद जी बहक मुस्समात सौआ बाई दुख्तर व मुस्समी गोवर्धनदास नबीरा खुद तहरीर कर दिया है के सनद् हो और वक्त जरूरत के काम आये ।

...."

27. It is apparent from the aforesaid paragraph 1 the house was bequeathed to defendant in his exclusive ownership while as per paragraph 2 some cash amount was bequeathed to Saoubai with some direction. Accordingly the house was given to defendant and some case was given to Saoubai. In continuation of paragraph 1 and 2 the last paragraph 3 was written with a direction that aforesaid Will was executed in favour of defendant and Saoubai. The language of this paragraph is very clear and does not have any ambiguity mere reading of this paragraph reveals that Will is executed in favour of Saoubai and defendant but for different properties mentioned in paragraph 1 and 2. It does not reflect that testator directed contrary to earlier paragraphs of the Will in last paragraph. Therefore, section 88 of Succession Act is not helping to the plaintiff.

28. Therefore, it is held that the trial court has committed grave error in holding that disputed house was given in equal share to the defendant and his mother Saoubai and on demise of Saoubai her half share inherited by the plaintiff and defendant accordingly plaintiff has ¼ share in the disputed house while defendant has ¾ share in the same. In such premises the judgment and decree of the trial court being perverse is not sustainable under the law.

29. In view of the aforesaid the defendant is found as beneficiary of the Will executed by Chhotulal in respect of the house. When the house had been bequeathed through testamentary document the Will (Ex.D.4) then the question of natural succession in view of general principle of Hindu law at the time of death of Chhotulal does not require any consideration. Hence, proposed amendment in the plaint by the plaintiff through I. A. No. 9726/07 is not necessary to adjudicate this appeal. Hence, the I. A. is hereby dismissed.

30. Under the aforesaid premises, by allowing F. A. No.110/92 filed by the legal representatives of deceased defendant the impugned judgment and decree is hereby set aside and the F. A. No.111/92 filed by the plaintiff being devoid of any merits is hereby dismissed. Resultantly suit of the plaintiff is also dismissed.

31. In the facts and circumstances of the case parties shall bear their own costs.

32. F. A. No.110/92 is allowed and in pursuance of it F. A. No.111/92 is dismissed as indicated above.

F. A. No.110/92 Appeal allowed

I.L.R. [2007] M. P., 1656

APPELLATE CIVIL

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

14 September, 2007

M.P. FRUIT PRODUCT .... Appellant*

Vs.

M.P. STATE AGRO INDUSTRIES DEVELOPMENT CORPORATION LTD., BHOPAL, ... Respondent

Arbitration Act, Indian (X of 1940) - Section 30(a) - Misconduct - Tender for leasing out Canning Unit at Bhopal was floated - Offer by appellant was accepted - Appellant did not pay rent and raised certain disputes- Six Arbitrators were changed one after the other - First Three arbitrators were to be changed - Fourth arbitrator submitted resignation - Fifth arbitrator expressed his inability to continue - Award was passed by Sixth Arbitrator - Court had fixed fee of arbitrator at Rs. 10,000 - Respondent filed application for decision on counter claim also and was ready to pay fee fixed by arbitrator - Arbitrator fixed fee of Rs. 11,000 payable in equal proportion by both parties -Appellant refused to pay - Entire additional fee was paid by respondent - Held - There was no secret deliberation made by arbitrator with any of parties- Although proper course was to seek Court's order with respect to the fee payable on counter claim - However, it cannot be said to be misconduct effecting merit of decision - It was irregularity committed by arbitrator but award cannot be set aside.

In the backdrop of the aforesaid discussion coming to the facts of the instant case, we find that there were no secret deliberation made by the Arbitrator with any of the parties. There was dispute with respect to applicability of the provisions of the Act of 1996. Provisions of the Act of 1996 enable the Arbitrator to fix the fee. In the instant case Arbitrator himself did not decide the fee for counter claim but an application was filed on behalf of the Corporation pointing out that it wanted decision on the counter claim also and was ready to pay the fees fixed by the Arbitrator. On that the Arbitrator fixed the fee, though the objector firm did not agree to make the payment of fee, oral refusal in that regard was made. It was paid in entirety by the Corporation as mentioned by the Arbitrator also in the order sheet. The Court has fixed the fee of the Arbitrator on 7.7.2000, however, there was no reference to the counter claim when the fee was fixed by the Court, with the consent of the counsel for the parties. In our opinion, it was proper for the Arbitrator to seek the Court's order with respect to the fee payable on the counter claim. In the circumstances of the case it could not be said to be a misconduct effecting the merit of the decision. No doubt it was an irregularity committed by the Arbitrator but the award cannot be set aside on this ground.

(Para 14)

*Misc. Appeal No. 2717/2003 (J)

M.P. Fruit Product vs. M.P. State Agro Industries Development Corporation Ltd., Bhopal, 2007

Cases Referred :

Shambhu Dayal and others Vs. Pt. Basdeo Sahai; AIR 1970 Allahabad 525, *Ardeshwar Irani Vs. The State of M.P.;* AIR 1974 MP 199, C.C. *Subbaraya Setty Vs.C.V. Ananthaqnarayana Setty and others;* AIR 1996 Karnataka 41.

B.B.Dubey, for the appellant.

Pradeep Bhargav, for the respondent.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred under section 39 of the Arbitration Act, 1940 by the lessee aggrieved by judgment dated 20.11.2003 passed by Fifth Additional District Judge, Bhopal in the case RSC No. 97-A/01.

2. The facts giving rise to the appeal are that on 22.11.1985 the appellant firm M.P. Food Products Ltd. entered into a lease agreement with the M.P. Agro Industries Development Corporation Ltd., Bhopal (hereinafter referred to as the Corporation). The Corporation has floated tender for leasing out its Canning Unit at Bhopal. The offer made by the appellant to obtain it on the rent of Rs. 6663.33/- per month, was accepted. Initially the period of lease was 5 years, on 1.4.1986 the possession was given. The rent was not paid and certain disputes were raised by the appellant. One after the other six Arbitrators were appointed. First three Arbitrators had to be changed, fourth Arbitrator Shri S.S.Sharma submitted resignation after recording of the evidence. Fifth Arbitrator Shri D.N.Dixit after working for sometime expressed his inability to continue. Sixth Arbitrator Shri M.M.Dubey has passed the impugned award dated 30th June, 2001directing payment of agreed rent w.e.f. 1.10.87 without any increase for subsequent years, less the amount already paid and also less the rent of the period for which the appellant firm was kept out possession and also after deducting the security deposit amount, if forfeited, and after adjusting the bank guarantee amount, if encashed. As regards the counter claim which mainly consists of claim on account of interest, the Corporation has been given the liberty to determine the tenancy or the lease of the appellant firm after due notice under the provisions of the Transfer of Property Act and take possession of the leased unit and the property attached to it. No other ancillary claim or counter claim was sustainable. The amount payable by the appellant firm, if paid on or before the determination of its lease and delivery of possession back to the Corporation, shall carry interest @ 6% per annum and in default, the interest payable from the date of default would be @ 12% per annum. The parties shall bear their own costs.

3. The appellant firm assailed the award before the Court below mainly on the ground that the Court has fixed the fee to be paid to the Arbitrator of Rs. 10,000/-. The Arbitrator had demanded a sum of Rs. 11,000/- as fee for counter claim made by

the Corporation. The objector firm declined to make the payment of the additional fee demanded by the Arbitrator to adjudicate the counter claim. The sum fixed for adjudication of the counter claim was paid by the Corporation. The demand of the additional fee by the Arbitrator amounted to the misconduct. The second objection raised by the firm was that the award was not passed within the period of four months fixed by the Court. The third objection was that on 5.5.2001 order sheet was written in the absence of counsel of the firm. On 19.5.2001 the Court was approached, Court had issued the notice to the Arbitrator, the notice was received by him, but still he did not stay the proceedings. The Advocate of the firm did not appear on 26.5.2001, arguments were heard on 27.5.2001 and thereafter the award was passed. The objector further submitted that the machinery supplied was not proper, telephone, water connection, compound wall, furniture were not provided, that caused loss to the firm. For certain period Unit remained closed. The firm prayed for appointment of new Arbitrator. The firm also prayed for initiating action to prosecute the Arbitrator as he committed the misconduct.

4. The Corporation in its reply denied the objections. The award passed by the Arbitrator is with regard to the payment of agreed rent and rejection of the exaggerated flimsy claims of the firm, was proper. The effort of the firm right from beginning was not to pay the rent and was to delay the case. Thus, the award be made rule of Court.

5. The Court below as per impugned judgment has ordered that the award be made rule of Court. The objections preferred by the appellant have been rejected, consequently the appeal has been preferred by the appellant.

6. Shri B.B.Dubey, learned counsel appearing on behalf of the appellant firm has submitted that the Arbitrator has committed misconduct in fixing the additional fee of Rs. 11,000/- for adjudicating upon the counter claim . The same amounts to illegal gratification to pass the award, he could not have demanded the fee over and above the fee fixed by the Court, thus the award is liable to be set aside on this ground alone. Secondly the Arbitrator ought to have stayed the proceedings when an application was filed by the appellant firm for his removal before the Court. Inspite of receiving the notice the award was passed; hence there was misconduct on the part of the Arbitrator. Thirdly the rejection of the claims made by the appellant firm with respect to the loss caused due to non providing of telephone, water connection, furnitures, machinery and plants, by the Arbitrator were not proper. The amount had to be spent in repairing of machinery and plant by the firm, that ought to have been adjusted beside there was failure to provide additional plants and machinery. The claims ought to have been allowed.

7. Shri Pradeep Bhargav, learned counsel appearing on behalf of Corporation has submitted that the Arbitrator did not commit any misconduct. The award passed by the Arbitrator is proper. The Arbitrator has simply awarded the agreed rate of rent. As to

the counter claim the fee was rightly fixed by the Arbitrator, an order was passed in writing in that regard there was refusal to make the payment of fee by the objector firm. The Corporation had paid the fee with right to recover proportionate fees from the objector firm. There was no stay by the Court and the Arbitrator Shri M.M.Dubey was required to hear the arguments, arguments on behalf of appellant firm were already head at length, thereafter they did not appear before the Arbitrator, consequently after conclusion of the arguments on behalf of Corporation proper award on merit has been passed. The claims made by the firm were not tenable, consequently rightly rejected by the Arbitrator assigning the reasons for rejection. Hence, appeal be dismissed.

8. First we take up the third submission that on merits the award passed by the Arbitrator, is proper or not, as this would have relevant bearing on the question whether the Arbitrator had committed irregularity, if any in demanding the fee for adjudicating upon the counter claim. The objector firm has submitted that it is not liable to make the payment of agreed rent in the agreement owing to failure on the part of the Corporation to carry out its obligations. The counsel has submitted that telephone facility, furniture and compound wall were not provided, similarly plants and machinery were not in the shape as assured, amount had to be spent by the firm to make the machinery work. Proper machineries, water connection were also not provided. In C.R. No. 3/89 decided by this Court on 20.2.1989 the Arbitrator was required to consider the sickness of the plant, lack of water supply, non supply of furniture, utensils, telephone, storeroom etc. and thereafter to pass the award. The award has been passed in contravention to the said order dated 20.2.1989.

9. In order to find out the merit of the aforesaid submission, we have gone through the agreement dated 22.11.1985 entered into between the parties. The agreement contains following important clauses :-

> 2) The second party shall pay to the Corporation a sum of Rs. 19,990.00 (Rs. Nineteen Thousand Nine Hundred Ninety) only in advance, equivalent to three months rent within 7 days from the date of agreement which shall be adjustable on the handing over of satisfactory possession to the party No. 1. Further, this advance will remain with the party No. 1 without any interest and the party No. 2 shall be bound to pay the rent every month by first week for the preceding month.
>
> 3) The party No. 2 shall have no right to make any MATERIAL alteration, addition etc., in machinery as well in premises whatsoever, leased out without prior and proper permission of the competent authority of the Corporation in writing. However, on written request of the party No. 2, the Corporation may think over the proposals and consider such requests on the terms and conditions as may be mutually agreed upon.

4) The repairs of machineries and building etc. if required, shall be the sole responsibility of party No. 2 and the expenditure thereon shall be borne by them.

6) The machineries are in proper working condition and the party No. 2 shall be responsible and liable to keep the machineries in proper working order. The second party shall also ensure that no damages to machinery or building etc. take place. In case of any damages, it will be the responsibility of party No. 2 to get it repaired to the full satisfaction of the Corporation/Party No.1.

9) It shall be the responsibility of party No. 2 to ensure timely payments of power and water charges etc. In case of any default in this regard, the responsibility for losses, if any, shall be of party No. 2, Further, if any agreement is required in these respects, it shall be the responsibility of party No. 2 to ensure compliance accordingly.

15) The party No. 2 shall be at liberty to use the brand name "MAGFA; during the course of lease period for which the party No. 1 will not recover any charges. Further the party No. 2 shall ensure the maintenance of good will of the product.

21) The extension in lease period shall be further considered on the terms and conditions mutually agreed. The request for extension shall have to be made in writing by party No. 2 at least three months prior to the expiry of lease period.

In clause 6 it is mentioned that machineries are in proper working condition and party No. 2 shall be responsible and liable to keep the machineries in proper working order. Clause 4 provides that the repairs of machineries and building etc. if required, shall be the sole responsibility of party No. 2. In view of the aforesaid conditions of the agreement the objector firm could not have claimed the amount spent on repairs, if any or to keep the machineries working. In the agreement it was not mentioned that telephone has to be provided at the cost of Corporation and water connection etc. had also been dealt with by the Arbitrator in the award thus :-

19) As regards the plea that the plant(s) were old, and not found to be fully equipped and a room was retained and furniture and telephone facility were not provided, are such items that the applicant-firm should have taken care of, at the time of taking over possession. It is to be remembered that the lease in question was put through after a considered negotiation and re-negotiation and there, therefore, is no scope for arguments that there was any fraud, undue influence, mistake or the like on the part of the respondent-corporation. The applicant-firm would be deemed to have entered into the lease-agreement with

open eyes. The claim on these counts are, therefore, liable to be rejected and are hereby rejected.

20) The amount spent over improving the plant must have been for the applicant-firm's own benefits and under no coercion from the respondent-corporation. This is obvious from the fact that the applicant-firm got the lease period renewed for a further period of five years and still wishes to cling the leased units for which there is no compulsion. It consistently kept on renewing its food processing licence regularly. Had the leased unit been an unprofitable concern or a concern giving diminishing return, the applicant-firm could have opted out and determined the lease agreement. On the other hand, the respondent firm is keen to get out of the lease agreement and the legal bettle in which it finds itself involved now. The applicant firm would, in my view, better had recourse to the provisions of the Sick Industries (Special Provisions) Act, if they could be made applicable to it with advantage. I after consideration of the claim on this count also unable to make an award granting it.

21) Repairs to the running unit and its machinery and amount spent for additional water supply obviously suggest that the units were being run with advantage. In any case, discounting any theory of unsustainable loss. The claim for expenditure on improvement and water charges is also therefore rejected.

22) It was no part of the obligation of the respondent-firm to arrange for banking facilities for the applicant-firm or for financial assistance under the agreement of lease of even on humanitarian grounds or on the basis of alleged solemn promises which are not ground enforceable in law. The claim in this regard is also, therefore, rejected.

23) The claim by the petitioner firm has, with passage of time, swelled to Rs. 2,47,32,600.00 {two crores forty seven lacs thirty two thousand six hundred only} and the counter claim of the respondents- firm has gone up to the tune of Rs. 24,15,97,000.00 {Twenty four crores, fifteen lacs ninety seven thousand only). These bloated claims are being mentioned only to be rejected as wholly unsustainable in absence of acceptable proof.

24) It may not be out of place to mention here, that a lessee will always remain a lessee and a lessor and they can not exchange places by any law during subsistence of there lease. In other words, the owner of the units will remain an owner and the lessee cannot make himself richer by making claim more than the value of the unit leased to him running profit apart.

The Arbitrator has given the reasons to reject the claims made by the appellant firm and in view of the agreement has found the claims not to be tenable, though it was not for us to examine the merits of the award passed but we have done so and looked into the agreement also so as to find out whether award passed could be the only award in the circumstances of the instant case.

In our opinion the claims made by the appellant-firm have been rightly rejected by the Arbitrator. On the one hand the objector firm is running the business and on the other hand no rent has been paid for the last more than approximately 20 years, though it has not been disputed at bar that objector firm is running the Unit at present.

10. Coming to the main submission that Arbitrator has committed misconduct in demanding the fee for adjudicating upon the counter claim. The Court appointed Shri M.M.Dubey as sixth Arbitrator. Shri M.M. Dubey was appointed as the Arbitrator on 7.7.2000 as Shri S.S.Dixit, Fifth Arbitrator had expressed his inability to continue the arbitration, thus with the consent of the parties the Court appointed Shri M.M. Dubey. The Court fixed the fee at Rs. 10,000/- to be paid to Shri M.M. Dubey in equal proportion by the parties. The Arbitrator commenced the proceedings on 20.11.2000. The fee as fixed by the Court was ordered to be deposited. The case was fixed for the arguments on 9.12.2000. The fee was not deposited by the Corporation and an application was filed under section 38 of Arbitration and Conciliation Act, 1996 on 9.12.2000 for decision on counter claim also. The Arbitrator ordered that counter claim to be valued for legal fee separately which and value on the said amount of fee. as the claim i.e. at Rs. 11,000/- payable half and half by each party. The parties to pay the fee on counter claim before the next date by which date the Corporation to pay his part of fee on claim also. On 15.12.2000 a fee of Rs. 16,500/- was paid through cheque to the Arbitrator. As there was refusal on the part of the objector firm to make the payment of fee for counter claim, payment was made by the Corporation. On 9.12.2000 an application was moved by the Corporation for deciding their counter claim along with the reference. In the application it was offered by the Corporation that the Arbitrator may settle the reasonable fees for counter claim and Corporation was willing to pay separate fees for counter claim in addition to reference fees. Learned counsel for appellant firm has also pointed out the order sheets at page 166 and 167. As the objector firm orally refused to further deposit the counter claim fee, the counsel of Corporation had advised it to make the payment of entire fees fixed by the Arbitrator for counter claim. No doubt about it, it is clear that the objector firm has declined to make the payment of the fees for counter claim as fixed by the Arbitrator. After deposit of the fee on 16.12.2000 the counsel for appellant firm did not appear. Case was posted on 17.12.2000 on that date Shri B.B. Dubey appeared with Shri S. Dubey, arguments were commenced by him. Arbitrator recorded that arguments commenced by Shri B.B.Dubey, to continue from day to day as far as practicable, next date fixed was 18.12.2000. On 18.12.2000 also Shri B.B.Dubey was heard, arguments remained

incomplete, case was put up for 23,12,2000, Shri B.B.Dubey firm's counsel resumed the arguments which remained incomplete, next date fixed was 6.1.2001, again Shri Dubey continued the arguments which remained incomplete, next date fixed was 20.1.2001. Counsel further argued, arguments could not be completed, next date was 27.1.2001 case was again taken up for 3 hours, still firm counsel's arguments remained incomplete. The Arbitrator observed that as arguments are taking quite a long time the Advocates were advised and reminded of the four months' time for decision of the case. Advocates were advised to complete the arguments by the end of February, 2001. Next date fixed was 3.2.2001 but again though the case was heard for two and half hears, the arguments on behalf of counsel for firm remained incomplete. The case was adjourned to 10.2.2001. Shri S. Dubey, has argued the matter further as Shri B.B. Dubey was sick. Case was adjourned as per joint request on 24.2.2001 to 17.3.2001 again arguments were made on behalf of the appellant firm but could not be concluded. Case was fixed for further arguments on 7.4.2001, again time was prayed by the appellant's counsel on 15.4.2001, the arguments remained incomplete, next date was 22.4.2001 again arguments remained un-concluded, on 29.4.2001 again arguments were continued on behalf of firm's counsel but remained incomplete. On 5.5.2001 appellant's counsel applied for adjournment owing to his mother's operation. The case was fixed for 27.5.2001 there appears to be overwriting on the date. It appears that it was initially posted for 23.5.2001, later it was changed to 27.5.2001. On 27.5.2001 the arguments on behalf of Corporation were heard and case was closed for award on 30.6.2001. Award was prepared. Copies of award were given to the counsel on 10.7.2001 and the award was sent to the Court by the Arbitrator.

11. A perusal of the order dated 7.7.2000 appointing Shri M.M.Dubey as Arbitrator indicates that the Court has fixed the fee of Rs. 10,000/- with the consent of the parties. On 9.12.2000 an application was made before the Arbitrator by the Corporation pointing out that it had filed the counter claim and prayed for fixation of separate fee so as to adjudicate the counter claim. It was also submitted before the Arbitrator that as per Arbitration and Conciliation Act, 1996 it was open to the Arbitrator to fix the separate fee for counter claim, consequently the Arbitrator passed an order in writing as reflected in order dated 9.12.2000, though the applicability of the Act of 1996 was objected to by the appellant firm and it was expressed orally that the firm was not willing to make the payment and to share the Arbitrator's fee of the counter claim, however, thereafter, the counsel on behalf of the firm has argued the case on number of dates, the Arbitrator was required to hear the arguments and to decide the case finally, he was the sixth Arbitrator appointed. As the dispute was going w.e.f. 1987, arguments were advanced on number of dates by the firm's counsel, at that stage no objection was raised on behalf of the firm that they were not having the confidence in the Arbitrator due to fixation of fees on counter claim. For several months case was argued on behalf of firm, when the case reached unending tail of arguments, it appears

that when the Arbitrator had advised to cut down the arguments and to finish it at an early date considering the time constraint, it was only thereafter an application was made before the Court for change of Arbitrator by the firm.

12. Before dilating further on the aforesaid aspect of realization of additional fee by the Arbitrator, we deem it appropriate to deal with the case law cited on behalf of appellant firm. Counsel has relied upon the Full Bench decision in *Shambhu Dayal and others Vs. Pt. Basdeo Sahai* - AIR 1970 Allahabad 525, in which while dealing with the question of misconduct, the Court has observed the question of enhancement of the fee of the Arbitrator is a matter of utmost importance. The Court has observed that the Arbitrator has to act throughout with complete fairness, candour and probity and there should be no element whatsoever of pressure, persuation, importunity, manipulation or secrecy in the conduct of the arbitrator in relation even to the fixation or enhancement of his fee nor should there by any attempt on his part to charge a fee disproportionate to the work done by him or to take advantage of his position as an arbitrator. If the fee of the arbitrator has originally been fixed by an order of the court it is undeniably proper and desirable that an order of enhancement of the fee be obtained from the Court and the enhancement should receive its sanction. But, if it is clear that the parties to the reference had agreed to an enhancement in the fee and it is also clear that the conduct of the arbitrator in relation to enhancement was not tainted by any of the vices indicated above, the acceptance of the enhanced fee would not amount to misconduct and would not vitiate the award. After making the aforesaid observation the Court proceeded to examine the merit of the submission of realization of additional fee of Rs. 100/- by the Arbitrator. The Court had fixed the fees at Rs. 100/- to be paid in equal proportion by the parties. The proceedings protracted, the Arbitrator maintained the proceedings. In view of the proceedings, fee of Rs. 100/- was found to be inadequate. The Arbitrator mentioned in the award that parties had paid him Rs. 100/- each on account of his fees. The Court observed that although the advisable course for the arbitrator was to obtain an order for enhancement of his fee from the Court he was not guilty of misconduct in accepting an extra amount of Rs. 50/- from each of the two parties as his remuneration for arbitration.

The appellant's counsel has also relied upon a decision of Division Bench in *Ardeshar Irani Vs. The State of M.P.* - AIR 1974 M.P. 199, in which in Para-11 the Court has referred to Hulsbury's law and Russel on Arbitration and observed thus :-

> 11. The expression 'misconduct' occurring in clause (a) of Section 30 of the Arbitration Act has not been defined. This expression in relation to arbitration proceedings is incapable of any precise meaning and it has always been understood to have the same meaning which it has acquired under the English law. The history of legislation shows that the words 'or the proceedings' occurring in clause (a) of Section 30 were not present initially in the corresponding earlier law and in the

English law also they were introduced only by amendment in 1934. The reason for the amendment was to include within the ambit of misconduct even those cases where no turpitude on the part of the arbitrator was alleged. Such cases of technical misconduct have come to be known as those, which even though do not attribute any turpitude against the arbitrator yet clearly fall within the ambit of this expression.

In Halsbury's Laws of England, Third Edition, Volume 2, para 126 at page 57, it is stated as follows:-

"What constitutes 'misconduct'-It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator or umpire. The expression is of wide import, including on the one hand bribery and corruption and on the other a mere mistake as to the scope of the authority conferred by the agreement of reference or a mere error of law appearing on the face of the award."

In Russell on Arbitration, 17th edition, at page 307, it is stated-

"The term 'misconduct' here would appear to be used in its widest sense perhaps even including mistake (in law or fact) admitted by the arbitrator."

It is further stated at page 331 as under :-

"Misconduct justifying intervention by the court may take place at any stage between appointment and entering upon the reference, during the reference, or in the making of the award."

At page 332, it is stated as under :-

"The more difficult question, however is whether the extent of that irregularity is such as to justify interference by this court either by way of setting aside the award or remitting the award. The determination of that issue ..... depends upon whether the Court is satisfied that there may have been - not must have been- or that this irregularity may have caused not must have caused - a substantial miscarriage of justice that would be sufficient to justify the setting aside or remitting of the award. Unless those resisting the setting aside or remission could show that no other award could properly have been made than that which was in fact made, notwithstanding the irregularity.

The Irish Courts have perhaps an even stricter approach; "When once they enter on an arbitration, arbitrators must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on their

part had in fact upon the result of their proceedings, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on their part, the award was unaffected by it, and was in reality just:arbitrators must not do anything which is not in itself fair and impartial." (underlining is by us).

In London Export Corpn. Ltd. v. Jubilee Coffee Roasting Co. Ltd. (1958) 1 WLR 661 at p.665, Jenkins. L.J., explains the meaning of misconduct as follows:-

"'Misconduct' is, of course, used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort."

(emphasis in the report itself)

What has been emphasized by the Court is that arbitrators must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on their part had in fact upon the result of their proceedings, but of what effect it might possibly have produced. The court has examined the merit of the case in view of the admitted fact that the fee demanded by the Arbitrator was exorbitant, was the common case of the parties. The plaintiff paid the whole amount, yet they had themselves thereafter made such an allegation and requested the Court to determine a reasonable amount payable to the Arbitrator. The conduct of the plaintiff was considered and as per plaintiff fee demanded by the Arbitrator was exorbitant and still it was paid by the plaintiff. There was some talk between the Arbitrator and the plaintiff which was not in writing and was behind the back of the defendant as mentioned in Para-16 of the judgment. Thereafter, when the Court was approached under section 38 of the Act for fixation of the fees, the Arbitrator passed the award. This Court in *Ardeshar Irani Vs. The State of M.P.* (supra) has laid down in Para-21 of the judgment thus :-

21. In the passage at page 332 of Russell, on Arbitration already quoted above, the test indicated is whether the irregularity may have caused and not necessarily must have caused a substantial miscarriage of justice that would be sufficient to justify the setting aside of the award unless it could be shown that no other award could properly have been made notwithstanding the irregularity. In order to see whether the award can be allowed to stand notwithstanding the irregularity, the contents of the award have to be seen and unless it is possible to conclude that the award actually made is justified on the facts, the award will have to be set aside. Unfortunately in the present case there are no reasons given by the arbitrator for his decision nor are there any other particulars to indicate the process by which the

> arbitrator reached his conclusion. The award contains only the conclusion, that is, the amount which was to be paid by the defendant to the plaintiffs. There is nothing even to indicate how that amount was calculated. It is, therefore, not possible for us in the present case to examine whether the award could be justified on the facts of this case notwithstanding the irregularity already dealt with at length by us. The possibility of sustaining the award notwithstanding the above position by applying this test is, therefore, not available to us in the present case. It is no doubt true, as settled by the Supreme Court relying on an earlier Privy Council decision, that an arbitrator need not give any reasons for the award and where no reasons are given in the award the same cannot be set aside by the Court on the ground of any error on the fact of the award itself. It has been held that an error on the fact of the award cannot be discovered by attributing some reason to the arbitrator by a process of inference and argument where, in fact, no reasons have been given by the arbitrator himself (See *Bungo Steel Furniture v. Union of India,* AIR 1967 SC 378.) Those decisions, however, are no authority for the proposition that the absence of reasons in an award cannot be taken notice of even for the purpose of applying the test indicated above in a case like the present. In all those cases the question for determination was whether an award disclosed an error on its fact on account of its containing no reasons. It was in that context that the Privy Council and the Supreme Court took that view. That however, does not indicate that the absence of reasons is of no Consequence even in a case like the present where the award is challenged on the ground of misconduct or being 'otherwise invalid'. In our opinion the absence of reasons in the award is relevant in a case like the present atleast as indicating that there is nothing to show that no other award could properly have been made than that which was in fact made notwithstanding such an irregularity.

Thus, the Division Bench in *Ardeshar Irani Vs. The State of M.P.*(supra) has laid down that the Court is required to see whether miscarriage of justice has taken place. As reasons were not mentioned by the Arbitrator, the Court came to the conclusion that it could not be said that no other award could properly have been made than that which was in fact made notwithstanding such an irregularity.

13. In *C.C.Subbaraya Setty Vs. C.V.Ananthanarayana Setty and others* - AIR 1996 Karnataka 41, it has been held in the backdrop of the fact that remuneration of the Arbitrator and expenses had been paid by respondents No. 4 and 5 and that they were entitled to recover the share from the appellant. Decision in Akshoy Kumar Nandi's case (AIR 1935 Cal 359) and *Ardeshar Irani Vs. The State of M.P.*(supra)

and *Shambhu Dayal and others Vs. Pt. Basdeo Sahai* (supra) have been referred to. The Court has observed that a question of misconduct would arise only when the Arbitrator accepts fee from one of the parties without the knowledge of the other party and there is some dispute in that regard. Thus Court observed thus :-

> 28. In *Jeevan Industries (P) Ltd. Vs. Haji Bashiruddin Madhusudan Dayal,* AIR 1975 Delhi 215 a Division Bench has dissented from the judgment of a single Judge reported in AIR 1856 Punj 239, which was relied on by the learned counsel for the appellant, and has held as hereunder with regard to the mode of payment of fee:
>
> "It is not correct to say that Sections 14(2) and 38 provide only two remedies for recovering arbitrator's fee because voluntary mode of payment is an accepted mode and the aforesaid provisions do not miltiate against voluntary payments made by parties to the arbitrator so long as they are not objected to and are reasonable and have not caused any bias in favour of or against any party."
>
> The above authorities show that there is no bar for the parties voluntarily paying the fee to the arbitrators by a mutual arrangement without reference to the provisions under Section 14(2) and 38. A question of misconduct would arise only when the arbitrator accepts fee from one of the parties without the knowledge of the other party or when there is some dispute in that regard. But if by mutual arrangement of the parties fee is paid by one of them and the arbitrator accepts the same then that would not amount to mis-conduct on the part of the arbitrator. Why I have referred to these aspects is to point out that from the mere fact that the award shows that respondents 4 and 5 have paid the remuneration of the arbitrators and the expenses for the document, it cannot straight away be held that the arbitrators are guilty of mis-conduct. The appellant had to plead that the arbitrators accepted the remuneration from the respondents 4 and 5 without his knowledge and without a demand being made on him in which event the respondents would have had an opportunity to plead and prove the existence of any agreement between the parties in that regard. Such a plea not having been taken by the appellant in his objections the same cannot be allowed to be raised, nor can it be held on the basis of the material on record that the arbitrators are guilty of misconduct by accepting their fee and expenses from respondents 4 and 5.

14. In the backdrop of the aforesaid discussion coming to the facts of the instant case, we find that there were no secret deliberation made by the Arbitrator with any of the parties. There was dispute with respect to applicability of the provisions of the Act of 1996. Provisions of the Act of 1996 enable the Arbitrator to fix the fee. In the

instant case Arbitrator himself did not decide the fee for counter claim but an application was filed on behalf of the Corporation pointing out that it wanted decision on the counter claim also and was ready to pay the fees fixed by the Arbitrator. On that the Arbitrator fixed the fee, though the objector firm did not agree to make the payment of fee, oral refusal in that regard was made. It was paid in entirety by the Corporation as mentioned by the Arbitrator also in the order sheet. The Court has fixed the fee of the Arbitrator on 7.7.2000, however, there was no reference to the counter claim when the fee was fixed by the Court, with the consent of the counsel for the parties. In our opinion, it was proper for the Arbitrator to seek the Court's order with respect to the fee payable on the counter claim. In the circumstances of the case it could not be said to be a misconduct effecting the merit of the decision. No doubt it was an irregularity committed by the Arbitrator but the award cannot be set aside on this ground as held by the Division Bench of this Court in *Ardeshar Irani Vs. The State of M.P.*(supra) that it has to be seen by the Court before setting aside the award that whatever other award could have been passed in the circumstances of the case and merely on the basis of irregularity award need not be set aside, thus in our opinion, the award need not be set aside in the instant case as we have found that the claims made by the firm were dealt with by a reasoned award passed by the Arbitrator. The Arbitrator has given the reasons and apart from that in view of the aforequoted terms of the agreement, in our opinion, no other award could have been passed in the circumstances of the case. It was a case of dispute between the lesser and lessee and lessee was required to make the payment of agreed rent as per agreement, that's what has been ordered and awarded by the Arbitrator. The award passed in our opinion was fully justified on merits and could be the only award passed by a person of reasonable prudence.

17. Coming to the submission raised by Shri B.B.Dubey, learned counsel for the appellant that the Arbitrator ought to have stayed the hands when the application was moved and notice was received by the Arbitrator on 14.6.2001. Sometimes in the month of May, the application was filed before the Court for removal of the Arbitrator. It was filed after participation for several months before the Arbitrator and as apparent from the order sheets the Arbitrator had heard the arguments on behalf of appellant on several dates. It is surprising that arguments though commenced on 17.12.2000, continued on 18.12.2000, thereafter remained unconcluded on 22.12.2000, 6.1.2001, 20.1.2001, 27.1.2001, on 27.1.2001 counsel for the parties were advised to conclude the arguments by the end of February, on 3.2.2001 arguments were again continued on behalf of the appellant, again on 17.3.2001 arguments were heard on behalf of appellant, thereafter on 7.4.2001, 15.4.2001, 22.4.2001 and 29.4.2001 still the arguments were not concluded as if it were an unending arguments made, thereafter, counsel for the appellant applied for adjournment and did not appear thereafter. In our opinion, the Arbitrator had heard the arguments on behalf of the appellant sufficiently. There was an effort made not to conclude the arbitration. Shri M.M. Dubey was the sixth Arbitrator

who was appointed by the Court, thereafter the Arbitrator heard arguments on behalf of the Corporation and award was passed. No stay was granted by the Court. Though the Arbitrator could have waited for the Court's order but considering the overall circumstances in the instant case we are not inclined to make interference on the aforesaid ground as the Arbitrator was the sixth Arbitrator and we have found the award to be justified on the merit of the case in the light of the decision in *Ardeshar Irani Vs. The State of M.P.* (supra). We find that it could not be said to be a case of undue haste on the part of the Arbitrator. It was an unending story of appointment and removal of the Arbitrators and lastly the Arbitrator who was appointed, had heard the arguments on so many dates, in our opinion, the case has been prolonged unnecessarily, thus we find that no case for interference on merit in the appeal is made out.

18. Resultantly, we find that appeal deserves to be dismissed, same is hereby dismissed. However, we leave the parties to bear their own costs as incurred.

Appeal dismissed.

I.L.R. [2007] M. P., 1670
APPELLATE CRIMINAL
Before Mr. Justice Arun Mishra & Mr. Justice K.S.Chauhan,
6 August, 2007

BABLOO .... Appellant*
Vs.
STATE OF M.P. .... Respondents

Penal Code, Indian (XLV of 1860) - Sections 304(I), 302 - Murder or Culpable Homicide not amounting to murder - Altercation took place between deceased and appellant in the noon - Deceased was going on a scooter along with his companions - Scooter was stopped after seeing that appellant is standing - Appellant tried to escape into a narrow lane - Appellant was followed by deceased and his companions - Appellant inflicted two blows with big needle on chest of deceased - Held - It appears that deceased and his companions wanted to take revenge of incident which had taken place in earlier hours of day - It was on sudden provocation that accused inflicted on chest of deceased - Case falls under exception (1) of Section 300 - Appellant acquitted under Section 302 of I.P.C. but convicted under Section 304(I) of I.P.C. - Appellant sentenced for period already undergone.

The story as unfolded by Mohd. Muin (PW-1) the complainant who lodged dehati-nalishi on the basis of which FIR had been recorded by the police. In dehati nalishi it was mentioned that he came to know that there was altercation between deceased Munna and accused Babloo, while he was sitting he saw Bobby, Shekhar

*Cr.A. No. 960/1998.

Nai and deceased Munna going on the scooter, he also followed them, when they reached near the house of Lakhan Nai, Babloo came there and started scuffling with Munna, however, in the statement recorded in the Court Mohd. Muin (PW-1) has given a different version. He has clearly stated in Para -6 of cross examination that Shekhar asked Munna to stop the scooter as accused Babloo was standing. In Para - 7 he has further deposed that as soon as Babloo saw that Munna, Shekhar Nai and Bobby came on the scooter, he approached towards narrow lane, he was followed by deceased, Munna, Shekhar Nai and others. Then deceased Munna and Shekhar Nai asked the accused to stop and talk with them, there a part scuffle took place betwen the deceased and accused and in the course of scuffling accused inflicted two blows with the help of a big needle on the chest of Munna. Men may lie but circumstances do not, it was clear from the circumstances projected by this witness that it was not the intention of accused Babloo to quarrel with deceased Munna, Shekhar etc., he wanted to escape into a narrow lane and he has proceeded towards the same but the scooter on which deceased Munna, Shekhar Nai and Bobby were traveling was stopped, Mohd. Muin (PW-1) was also following them, it appears that all of them had followed the accused and when he wanted to escape asked him to stop. It appears that they wanted to take the revenge of the incident that had taken place in the earlier hours of the day and wanted to teach a lesson to accused Babloo. It was on sudden provocation that accused had inflicted two blows with big needle on the chest of Munna resulting in his death. Two other eye witnesses namely Shekhar Nai (PW-9) and Bobby (PW-10) did not support the prosecution case, they had been declared hostile, thus prosecution was left with the aforesaid version of Mohd. Muin (PW-1) and we are of the considered opinion in view of his statement that it was not the case of murder punishable under section 302 of IPC. The case falls under exception (1) of Section 300 of IPC, thus it was punishable under section 304 Part I of IPC. (Para 8)

Alok Tapikar, for the appellant.
S.K.Rai, G.A. for the State.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA J.:–The appeal has been preferred by the appellant Babloo aggrieved by his conviction under section 302 of IPC and sentence of rigorous imprisonment for life imposed by First Additional Sessions Judge Chhatarpur in S.T. No. 123/94 as per judgment dated 12.3.1998.

2. Prosecution case in short is that on 2.5.94 an altercation took place in the noon between Riyaz Baksh @ Munna Khan and accused Babloo, the report of the same (P-13) was lodged by Maiyadeen (PW-12), thereafter the deceased Munna Khan was going on a scooter driven by Bobby Ahuja, Munna was sitting in the middle and Shekhar Nai was also on the scooter. Mohd. Muin (PW-1) had also followed them, he

was relative of the deceased, when they reached near house of Lakhan Nai, they met with Babloo. Babloo and Munna scuffled, Mohd. Muin and Shekhar intervened, in the course of scuffling Babloo took out a big needle and inflicted two blows on the chest of Munna Khan and ran away. Munna Khan was taken to the hospital by Bobby, Shekhar Nai and Muin where he was declared dead. Munna Khan died as a result of the injuries inflicted by the accused. Dehati-nalishi was drawn, that was taken from hospital by Laxmi Prasad (PW.5) to the police station, on that crime was registered and the FIR was reduced in writing. Seizure of big needle was made at the instance of Munna, seizure memo (P-3) was drawn in the presence of Mohd. Muin (PW-7), accused was charged for committing the offence under section 302 of IPC.

3. The accused abjured the guilt and contended that he was innocent and had been falsely implicated in the case.

4. The prosecution has examined in all 14 witnesses. No witness in defence has been examined. Aggrieved by the conviction and sentence imposed by the Trial Court, this appeal has been preferred by the accused Babloo.

5. Shri Alok Tapikar, learned counsel appearing for the accused appellant has submitted that it is a case where appellant was not aggressor. It appears from the statement of Mohd. Muin (PW-1) that in order to take revenge of the altercation that had taken place on the same day, accused Babloo was chased by the deceased and his companions and when accused was going away on seeing them, the scooter on which deceased was travelling was stopped, Munna Khan got down and other companions also followed him. In the circumstances of the case there was right of private defence of person available with the appellant. Alternatively he has submitted that it was due to sudden provocation that injuries were inflicted by the accused as an effort was made to surround him by the deceased and his companions, thus it was the case falling under exception to section 300 not punishable under section 302 and conviction could have been recorded under section 304 Part I or II of IPC. He has also submitted that in their statement other eye witnesses Shekhar Nai (PW-9) and Bobby (PW-10) did not support the prosecution case. Even the report of Serological examination has not been filed as such the corroborating evidence was also missing. In the facts and circumstances of the case accused be acquitted or alternatively his conviction be converted under section 304 of IPC as accused has undergone the sentence of more than 12 years, he was arrested on 2.5.1994, consequently appellant be released.

6. Shri S.K.Rai, learned Govt. Advocate has submitted that in the noon also the altercation had taken place between the deceased Munna and accused Babloo of which report (P-13) was lodged which was recorded in general diary, thereafter, when deceased Munna was going back he was again attacked by the accused Babloo and with a big needle on the vital part of the body i.e. chest, two injuries were inflicted by the accused. Injuries were sufficient in ordinary course of nature to cause death, consequently conviction of appellant under section 302 of IPC was proper. There was

nothing to disbelieve version of Mohd. Muin (PW-1). Thus no case for interference in the appeal was made out.

7. In the instant case prosecution has examined three eye witnesses Mohd. Muin (PW-1), Shekhar Nai (PW-9) and Bobby Ahuja (PW-10). Mohd Saeed (PW-2) and Mohd. Dawood (PW-3) are the witnesses of inquest. Lakshmi Prasad (PW-5), Constable took Dehati-Nalishi from the hospital to the police station, on that case was registered by G.L.Tiwari (PW-8) and FIR was reduced in writing. Gajraj Singh Patel (PW-6) was examined to prove the spot map. So as to prove seizure of big needle Ayub Khan (PW-7) had been examined. Gajraj Singh (PW-11) Constable took the body to the hospital and brought back to the clothes of the deceased after post mortem was performed by Dr. Hari Agrawal (PW-14). Beside P.L.Ahirwar (PW-13) Investigating Officer, had also been examined on behalf of prosecution.

8. First coming to the ocular evidence and circumstances leading to the incident. It is not in dispute that in the noon altercation had taken place between deceased Munna and accused Babloo on the date of incident itself of which the report was lodged by deceased Munna, it was recorded in the general diary (P-13) at 4:25 PM on 2.5.1997 by Maiyadeen (PW-12). It was recorded in the general diary that when deceased was sitting in the Watch Repairing Shop, accused was also sitting in the shop of General Stores of Kanhaiya since Babloo was the driver of shop keeper, Babloo was drunk and had abused brother in law of Munna, on that Munna intervened, accused also hurled abuse to him and brought lathi and caused injury on the elbow of right hand. When accused Babloo ran towards him with knife he ran away and went to the police station and lodged report (P-13). It was found to be a case of non-cognizable nature, it was mentioned in general diary that there was no visible injury on the right elbow of Munna. It appears that thereafter, deceased Munna was going on the scooter along with two other companions, driven by Bobby (PW-10), Munna was sitting in the middle and Shekhar Nai (PW-9) was also the pillion rider. The story as unfolded by Mohd. Muin (PW-1) the complainant who lodged dehati-nalishi on the basis of which FIR had been recorded by the police. In dehati nalishi it was mentioned that he came to know that there was altercation between deceased Munna and accused Babloo, while he was sitting he saw Bobby, Shekhar Nai and deceased Munna going on the scooter, he also followed them, when they reached near the house of Lakhan Nai, Babloo came there and started scuffling with Munna, however, in the statement recorded in the Court Mohd. Muin (PW-1) has given a different version. He has clearly stated in Para -6 of cross examination that Shekhar asked Munna to stop the scooter as accused Babloo was standing. In Para - 7 he has further deposed that as soon as Babloo saw that Munna, Shekhar Nai and Bobby came on the scooter, he approached towards narrow lane, he was followed by deceased, Munna, Shekhar Nai and others. Then deceased Munna and Shekhar Nai asked the accused to stop and talk with them, there a part scuffle took place betwen the deceased and accused and in the course of scuffling accused inflicted two blows with the help of a big needle on the chest of

Munna. Men may lie but circumstances do not, it was clear from the circumstances projected by this witness that it was not the intention of accused Babloo to quarrel with deceased Munna, Shekhar etc., he wanted to escape into a narrow lane and he has proceeded towards the same but the scooter on which deceased Munna, Shekhar Nai and Bobby were traveling was stopped, Mohd. Muin (PW-1) was also following them, it appears that all of them had followed the accused and when he wanted to escape asked him to stop. It appears that they wanted to take the revenge of the incident that had taken place in the earlier hours of the day and wanted to teach a lesson to accused Babloo. It was on sudden provocation that accused had inflicted two blows with big needle on the chest of Munna resulting in his death. Two other eye witnesses namely Shekhar Nai (PW-9) and Bobby (PW-10) did not support the prosecution case, they had been declared hostile, thus prosecution was left with the aforesaid version of Mohd. Muin (PW-1) and we are of the considered opinion in view of his statement that it was not the case of murder punishable under section 302 of IPC. The case falls under exception (1) of Section 300 of IPC, thus it was punishable under section 304 Part I of IPC.

9. When we consider seizure, its memo that has been proved by Ayub Khan (PW-7), spot map has been proved by Gajraj Singh Patel (PW-6), Maiyadeen (PW-12) has proved the report (P-13) recorded in general diary which was lodged by deceased Munna, Inquest has been proved by Mohd. Saeed (PW-2) and Mohd. Dawood (PW-3). Statement of Maqbool Baksh is of no value as he has not witnessed the incident he was informed later on. Lakshmi Prasad (PW-5) took dehati nalishi to the police station. FIR was proved by G.L.Tiwari (PW-8). Other part of investigation has been proved by P.L.Ahirwar (PW-13), Investigating Officer. In the facts and circumstances of the case not filing of the report of FSL could not be said to be causing dent in the prosecution case with respect to the aforesaid offence committed by the accused.

10. Consequently, we acquit the appellant for commission of offence under section 302 of IPC and convict him under section 304 (I) and sentence him for a period already undergone. The accused be set at liberty in case he is not required in any other offence.

11. Resultantly, the appeal is allowed in Part to the aforesaid extent.

Appeal allowed in part

I.L.R. [2007] M. P., 1675

APPELLATE CRIMINAL

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

7 August, 2007

LATORA .... Appellant*

Vs.

STATE OF M.P. .... Respondent

Evidence Act,Indian (I of 1872)–Section 32, Penal Code, Indian 1860, Section 302 - Dying Declaration - Deceased married with someone else, later on accepted accused to be her husband - Accused used to met out ill treatment to deceased - Accused inflicted injuries on deceased by baka while she was returning after answering call of nature - Witnesses reached on the spot after hearing her hue and cry - Oral dying declaration made by deceased to witnesses - Deceased taken to police station where she lodged F.I.R. - Dying Declaration also recorded by Naib Tahsildar in Hospital - Held - Five incised wounds were inflicted on deceased - F.I.R. was lodged promptly within 1 ½ hours of incident- Naib Tahsildar recorded dying declaration - Doctor certified at the beginning that deceased was in fit state to make statement - Doctor again certified that deceased remained conscious while her statement was recorded - Dying declaration which was recorded with promptitude finds corroboration by medical evidence - Nothing has been brought on record with the help of medical evidence that deceased not in position to make dying declaration - No motive attributed to Doctor and Naib Tahsildar that why they would make any wrong statement - Dying Declaration reliable - Conviction of appellant under Section 302 of I.P.C. proper - Appeal dismissed.

Main question for consideration is whether dying declaration of Kambai has been proved and it can be said to be reliable. Incident has taken place in the morning at about 7 AM. Several incised wounds were inflicted on Kambai, PS-Sleemnabad was situated from the place of incident at a distance of about 4 kms. Kambai was taken in a bullock cart to the Police Station and the report had been lodged with promptitude at 8.30 AM. Report had been lodged by deceased herself, lodging of report by Kambai within 11/2 hour of incident indicates that FIR was lodged promptly and in case she was not in a position to speak, someone else would have lodged the report, there was no reason for her lodging the report in case she was unconscious, other family members could have lodged the report. We find absolutely nothing to doubt that report (P/11) had been lodged by Kambai herself, thereafter her dying declaration (P/12) had been recorded by C.R.Jatav (PW/11), in the dying declaration at the beginning Dr.S.K.Pathak (PW.1) has certified that Kambai was in the fit state to make the statement, at the conclusion of dying declaration it had been again certified by the doctor that deceased

*Cr.A. No. 2083/1997 (J)

remained conscious while her statement was recorded. She has stated in the dying declaration that her husband inflicted injuries with the help of Baka on her head, waist and hand. She had gone to answer the call of nature, at the time, when her husband inflicted injuries, none else was present.

We find that it has been proved by aforesaid evidence that dying declaration (P/12) had been recorded by C.R.Jatav, when we come to reliability of the same, it has been recorded with promptitude and statement of deceased finds corroboration by medical evidence that injuries were inflicted with the help of Baka, five incised wounds were found on her person in certificate (P/1). Beside, we find that she had made oral dying declaration also as stated by Sukbariabai (PW.5), mother of deceased, that Latora had inflicted injuries.

we find that Dr.R.D.Namdeo (PW.10) has clearly stated that whether Kambai was in a position to give dying declaration or not could be opined by the doctor who had examined her first; person would reach in semi conscious condition or not on infliction of such an injury would depend upon the resistance of body, he could not opine with precision that whether it would be possible for a person to speak if injury was caused by cutting of peritoneum or due to cutting of parietal lobe. He has specifically denied the suggestion that due to cutting of peritoneum, it would not be possible for a person to speak. When we consider to the statement of Dr.S.K.Pathak (PW.1), he has also clearly stated that deceased was in the position to speak, no doubt he could not definitely opine that whether due to cutting of peritoneum, it would be possible for a person to speak. Thus, it has not been brought on record with the help of medical evidence that deceased was not in the position to speak or to give dying declaration. No motive was attributed to these witnesses C.R.Jatav, Dr.S.K.Pathak and Dr.R.D.Namdeo why they would make any wrong statement or to side with the complainant, they had no grudge against accused as such we find that dying declaration of Kambai to be reliable one and recording of it has also been established. When dying declaration itself has been proved, it need not be corroborated.

Cases Referred : (Paras 7, 8 & 10)

Muthu Kutty and another Vs. State by Inspector of Police; T.N. (2005) 9 SCC 113, *Vishram and others Vs. State of M.P.;* AIR 1993 SC 250, *State of Rajasthan Vs. Teja Ram and others;* AIR 1999 SC 1776, *Sohanlal @ Sohan Singh and others Vs. State of Punjab;* AIR 2003 SC 4466.

S.K.Tiwari, for the appellant.
S.K.Rai, GA for the State.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred by the appellant aggrieved by his conviction and sentence under Section 302 of IPC recorded by Addl. Sessions Judge,

Sihora, Jabalpur in ST No.1030/92 as per judgment dated 12.8.97, accused/appellant has been sentenced to undergo R.I. for life and a fine of Rs.500 was imposed, in default of payment of fine, appellant to undergo further R.I. for two months for committing murder of his wife Kambai on 12.6.92 at about 7 AM at village-Chhetapahari. It appears that she died on the same day at about 7.45 PM. Accused Latora inflicted injuries on the person of deceased Kambai with the help of a Baka, a sharp edged weapon.

2. As per prosecution case, Kambai marriage was performed with someone else, later on she accepted the accused to be her husband, accused used to met out ill treatment to the deceased and wanted to set her ablaze by pouring kerosene as such she came to her parental house prior to three days of the incident. Accused was not doing any kind of work, that was the reason for altercation between husband and wife, before the date of accident accused came to the village Chhetapahari, parental village of the deceased. In the morning about 7 AM when Kambai was returning after answering call of nature, accused came armed with a Baka and inflicted injuries on the head, waist, etc., Kambai raised hue and cry, while inflicting injuries accused uttered to the deceased that why she did not perform the work and had involved the elders unnecessarily, on hearing hue and cry raised by Kambai, Pyarelal (PW.7),Chhuttan (PW.3), Mohanlal (PW.6),Bharoselal (PW.4) and Sukbariabai (PW.5) reached to the spot, accused Latora ran away from the spot, Kambai informed the incident to the aforesaid witnesses, she was taken to PS- Sleemnabad, she herself lodged FIR (P.11) at PS-Sleemnabad, it was reduced in writing by Pawan Dev Singh (PW.9)and the offence at Crime No. 93/92 was registered, she was medically examined by Dr.S.K.Pathak (PW.1) at Sleemnabad. He has found five incised wounds, first and second incised wound were found on the head whereas third incised wound was on waist region, fourth incised wound was on the back lower part on Rt side back at the level of T12- L1 area, injury no. 5 was on the index finger of right hand. Injuries were caused by sharp cutting object and were dangerous to the life, thereafter her dying declaration was recorded by C.R.Jatav (PW.11) , Dr. S.K.Pathak (PW.1) has certified that deceased was in fit state when her dying declaration (Ex.P/12) had been recorded by C.R.Jatav, Executive Magistrate cum Naib Tahsildar. After the treatment meted out by Dr.S.K.Pathak at Sleemnabad, Kambai was referred to Jabalpur for further treatment, she came to Jabalpur at about 3.35 PM and was admitted in Ward No.2, she died at 7.45 PM on 12.6.92 itself as mentioned in report (P/2) with respect to death of Kambai. Statements of witnesses were recorded, inquest and spot map were prepared, postmortem was performed, accused was arrested, from his possession weapon of offence i.e. Baka was also seized as per seizure memo (P/6). Articles were sent for serological examination except on the control soil, on other articles presence of blood was found . Accused had been charge sheeted for commission of an offence under Section 302 IPC.

3. Accused abjured the guilt and contended that he had been falsely implicated for commission of offence.

4. The prosecution in all has examined 11 witnesses, in defence 3 witnesses have been examined. The trial Court has convicted the appellant, consequently the appeal has been preferred.

5. Shri S.K.Tiwari, learned counsel appearing for appellant has submitted that none of the eye-witnesses infact have witnessed the incident. Deceased Kambai was not in a position to give dying declaration as her parietal lobe had been cut up to the depth of 1/2 Inch as stated by DR.R.D.Namdeo (PW.10) who had performed postmortem. Dr.S.K.Pathak (PW.1) has stated that in case parietal lobe including peritoneum of the brain is cut and injured comes to the state of shock may not be in a position to speak and would become unconscious, thus, learned counsel has submitted that there was no possibility for Kambai to give aforesaid dying declaration. He has also submitted that it was unusual that it was recorded in front of PS-Sleemnabad. C.R.Jatav (PW.11) had reached Sleemnabad by chance. Thus, his statement does not inspire confidence. On the dying declaration recorded left hand thumb impression had been obtained whereas it was mentioned in FIR that her right hand thumb impression was obtained as left hand of Kambai had been injured in the incident. Thus, obtaining the left hand thumb impression in the dying declaration makes it doubtful. Deceased was not in a position to put her left hand thumb impression on the dying declaration (P/12) . He has further submitted that there was Chhod-Chhutti as stated by defence witnesses and by the accused in his statement recorded under Section 313 of Cr.P.C., that was the reason for false implication of accused appellant, thus, guilt of appellant has not been proved beyond periphery of reasonable doubt, thus, appellant be acquitted.

6. On the contrary, Shri S.K.Rai, learned GA appearing for State has submitted that in this case there are two dying declarations of the deceased in the shape of FIR (P/11) and another dying declaration recorded by C.R.Jatav (PW.11), Executive Magistrate cum Naib Tahsildar, that has been supported by Dr.S.K.Pathak (PW.1),who has clearly stated that deceased was in the fit state, counsel has further submitted that Dr.S.K.Pathak has clearly opined that it would have been possible for an injured to talk even after parietal lobe was cut, he could not give definite opinion whether after cutting of peritoneum of brain, it would be possible to talk,in view of his statement, it could not be said that deceased Kambai was not in a position to lodge the report and make the dying declaration. He has also submitted that there were other witnesses supporting the involvement of accused, he had ran away from the spot after inflicting injuries, there was no reason for the wife to implicate her husband falsely, dying declaration was sufficient to sustain the conviction as not only it has been proved, but it contains truthful version as to incident and has been substantially corroborated by medical and other ocular evidence on record. Consequently, he has submitted that no case for interference in this appeal was made out.

7. Main question for consideration is whether dying declaration of Kambai has been proved and it can be said to be reliable. Incident has taken place in the morning at about 7 AM. Several incised wounds were inflicted on Kambai, PS-Sleemnabad

was situated from the place of incident at a distance of about 4 kms. Kambai was taken in a bullock cart to the Police Station and the report had been lodged with promptitude at 8.30 AM. Report had been lodged by deceased herself, lodging of report by Kambai within 11/2 hour of incident indicates that FIR was lodged promptly and in case she was not in a position to speak, someone else would have lodged the report, there was no reason for her lodging the report in case she was unconscious, other family members could have lodged the report. We find absolutely nothing to doubt that report (P/11) had been lodged by Kambai herself , thereafter her dying declaration (P/12) had been recorded by C.R.Jatav (PW/11), in the dying declaration at the beginning Dr.S.K.Pathak (PW.1) has certified that Kambai was in the fit state to make the statement , at the conclusion of dying declaration it had been again certified by the doctor that deceased remained conscious while her statement was recorded. She has stated in the dying declaration that her husband inflicted injuries with the help of Baka on her head, waist and hand. She had gone to answer the call of nature, at the time, when her husband inflicted injuries, none else was present. She had come to parental house prior to 2-3 days as her husband wanted to kill her by setting her ablaze by pouring kerosene oil, that was the reason she came to her parental house, she was having one daughter, she could not state why her husband inflicted injuries on her. However, husband had stated while inflicting injuries why she did not perform the work and had involved the elders in between them.

C.R.Jatav (PW.11) has stated that he had received an information from PS-Sleemnabad to record a dying declaration, he had recorded the dying declaration at about 11.15 AM on 12.6.92, doctor had certified that she was fit in order to give statement, he had put the questions which were answered by deceased Kambai, he has corroborated recording of statement as per version of the deceased. He has further stated that he has received intimation at Sleemnabad itself for recording the statement, he had gone to Sleemnabad for some work. He had received intimation at about 11.00 AM. Kambai was in a position to give statement. Merely by the fact that C.R.Jatav (PW.11) has received intimation at Sleemnabad itself for recording of dying declaration could not be said to be doubtful circumstance as C.R.Jatav (PW.11) had stated that he had come to Sleemnabad in connection with some other work , being Naib Tahsildar of the area, i.e., Sleemnabad, it was not unusual presence of him at Sleemnabad itself, he received the information for recording dying declaration. Recording of dying declaration has also been proved by Dr.S.K.Pathak (PW.1). He appears to be truthful and is not shown to be interested in any manner with the complainant. He has clearly opined that deceased was in a fit state to make statement when her dying declaration (P/12) was recorded by C.R.Jatav.

8. We find that it has been proved by aforesaid evidence that dying declaration (P/12) had been recorded by C.R.Jatav, when we come to reliability of the same, it has been recorded with promptitude and statement of deceased finds corroboration by medical evidence that injuries were inflicted with the help of Baka, five incised

wounds were found on her person in certificate (P/1). Beside, we find that she had made oral dying declaration also as stated by Sukbariabai (PW.5), mother of deceased, that Latora had inflicted injuries.

9. Now coming to the evidence of the witnesses, Chhuttan (PW.3) has stated that he was sitting at about 50 meters away from the mango tree, he heard hue and cry of Kambai, on that he rushed towards the spot and saw Latora was inflicting the injuries, may be that this witness has reached the spot when injuries had already been inflicted by accused Latora on the person of Kambai, as it was only after raising hue and cry, he had moved to the spot, he was at a considerable distance of 50 meters away.

Bharoselal (PW.4), father of deceased, has stated that Kambai had gone to answer the call of nature, he heard hue and cry raised, he went to the spot and saw accused running towards the forest, he was unable to give any reason why injuries were inflicted by accused. It appears that this witness had seen the accused running away from the spot. In cross-examination the suggestion was given whether he had seen accused inflicting injuries, he had answered in positive but his examination-in-chief appears to be more reliable that he had seen the accused running away from the spot towards the forest.

Sukbariabai (PW.5) has stated that when she saw Kambai she was speaking and had made oral dying declaration, in the dying declaration she had stated the name of accused Latora to be the assailant. However, in examination in chief she did not state that she had seen the incident, but in cross examination again a suggestion was made that whether she had seen the accused inflicting injuries, she had answered in positive. However, her statement in examination in chief appears to be correct that when she had reached, she found Kambai lying in injured condition and Kambai had made oral dying declaration to her.

Mohanlal (PW.6) has stated that before hearing hue and cry, he went towards the spot, he came to answer the call of nature,he saw Latora inflicting injuries on Kambai, he stopped at some distance due to fear of Latora, however, this statement does not inspire confidence, it appears that he had also reached the spot after the injuries were already inflicted and hue and cry was raised by Kambai.

Pyarelal (PW.7) also reached the spot on hearing hue and cry, he had also stated that he had seen Latora inflicting injuries on Kambai, injuries were inflicted on head, waist and hand. He saw from a distance of 40 fts., he made no attempt to catch hold of accused Latora , it appears that he had also reached after hue and cry as mentioned in FIR by Kambai that all these witnesses came to spot after injuries were inflicted by her husband on her person. She has clearly mentioned in FIR that Pyarelal, Chhuttan, her father and Mohan came to the spot, by that time her husband had run away. She has disclosed the incident to them, consequently, we find that the aforesaid witness lends support to the extent that the oral dying declaration was made and as discussed above some of them had seen the accused running away from the spot, thereafter bullock cart was arranged and Kambai was taken to PS-Sleemnabad.

10. In the postmortem report performed by Dr.R.D.Namdeo (PW.10), aforesaid five incised wounds were found, caused by sharp cutting weapon. Cause of death was due to injury on the head. When we consider the submission raised by Shri Tiwari that deceased was not in the position to give dying declaration, we find that Dr.R.D.Namdeo (PW.10) has clearly stated that whether Kambai was in a position to give dying declaration or not could be opined by the doctor who had examined her first, person would reach in semi conscious condition or not on infliction of such an injury would depend upon the resistance of body, he could not opine with precision that whether it would be possible for a person to speak if injury was caused by cutting of peritoneum or due to cutting of parietal lobe. He has specifically denied the suggestion that due to cutting of peritoneum, it would not be possible for a person to speak. When we consider to the statement of Dr.S.K.Pathak (PW.1), he has also clearly stated that deceased was in the position to speak, no doubt he could not definitely opine that whether due to cutting of peritoneum, it would be possible for a person to speak. Thus, it has not been brought on record with the help of medical evidence that deceased was not in the position to speak or to give dying declaration. No motive was attributed to these witnesses C.R.Jatav, Dr.S.K.Pathak and Dr.R.D.Namdeo why they would make any wrong statement or to side with the complainant, they had no grudge against accused as such we find that dying declaration of Kambai to be reliable one and recording of it has also been established. When dying declaration itself has been proved, it need not be corroborated as held by Apex Court in *Muthu Kutty and another vs. State by Inspector of Police,* T.N. (2005) 9 SCC 113 thus:-

> "15. Though a dying declaration is entitled to great weight, it is worth while to note that the accused has no power of cross-examination. Such a power 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 the 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 *Paniben v. State of Gujarat,* (1992) 2 SCC 474 : 1992 SCC (Cri) 403 : AIR 1992 SC 1817 (SCC pp.480-81, paras 18-19)

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja v. State of M.P.*, (1976) 3 SCC 104 : 1976 SCC (Cri) 376 : (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 U.P. v. Ram Sagar Yadav*, (1985) 1 SCC 552 : 1985 SCC (Cri) 127 : AIR 1985 SC 416 and *Ramawati Devi v. State of Bihar*, (1983) 1 SCC 211 : 1983 SCC (Cri) 169 : 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 vs. Public Prosecutor* (1976) 3 SCC 618 : 1976 SCC (Cri) 473 : AIR 1976 SC 1994.

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg vs. State of M.P.* (1974) 4 SCC 264 : 1974 SCC (Cri) 426.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh vs. State of M.P.* (181 Supp SCC 25 : 1981 SCC (Cri) 645 : AIR 1982 SC 1021.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath vs. State of U.P.* (1981) 2 SCC 654 : 1981 SCC (Cri) 581).

(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 vs.Krishnamurti Laxmipati Naidu* 1980 Supp SCC 455 : 1981 SCC (Cri) 364 : 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 Ojha vs. State of Bihar* 1980 Supp SCC 769 : 1979 SCC (Cri) 519 : 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 eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram vs. State of M.P.* 1988 Supp SCC 152 : 1988 SCC (Cri) 342 : 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. vs. Madan Mohan* (1989) 3 SCC 390 : 1989 SCC (Cri) 585 : 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 vs. State of Maharashtra* (1982) 1 SCC 700 : 1982 SCC (Cri) 334 : AIR 1982 SC 839."

In *Vishram and others vs.State of M.P.* AIR 1993 SC 250 , the Apex Court has observed that when an oral dying declaration had been given to interested witnesses, in the FIR lodged by father of deceased son after admitting him to the hospital , it was mentioned that dying declaration had been given and necessary details were also given, the Apex Court held that possibility of false implication had been ruled out in the case.

In *State of Rajasthan vs. Teja Ram and others* AIR 1999 SC 1776 , on the basis of evidence, it was held that after sustaining the kind of injuries which were caused to the deceased , it was extremely unsafe to place any credence on such a statement as brain functions of injured could have been impaired, but in the instant case the medical evidence is to the contrary that Kambai was in fit state to give statement in the morning and ultimately was referred to Jabalpur where she died in the evening, she reached to Jabalpur at 3.35 PM, thus, we find no merit in the submission raised by Shri Tiwari that she was not at Sleemnabad about 11.15 AM when her dying declaration had been recorded. Distance between Jabalpur and Sleemnabad is stated to be 65 kms.when she was taken to Jabalpur and reached there at 3.35 PM, obviously it would have taken approximately two hours to travel the distance, thus, presence of deceased at Sleemnabad at the time when her dying declaration had been recorded could not be doubted.

In *Sohanlal alias Sohan Singh and others vs. State of Punjab* AIR 2003 SC 4466 it has been opined that certificate of doctor as to fitness of deponent in dying declaration is not necessary when dying declaration has been recorded by Executive Magistrate and Magistrate has testified that deceased was in a fit condition to give statement, no circumstances had been brought on record to suspect his bona fides, nothing was brought out to show as he was interested in fabricating a case against accused, absence of doctor's certificate on declaration itself does not make declaration unreliable. In the instant case, certificate was given , even if there had been no such certification or it being doubtful, we find the statement of Executive Magistrate to be quite reliable, apart from that Dr.S.K.Pathak (PW.1) has supported in the instant case that deceased was fit to give dying declaration .

12. Coming to the submission raised by Shri Tiwari that on the dying declaration

impression of left hand thumb was obtained whereas in the FIR impression of right hand thumb was obtained for the reason that there was injury on the left hand thumb of deceased. When we consider nature of injuries on the left hand of Kambai, left hand thumb was not injured, injury no. 5 was in the shape of incised wound of 4" x 2" x 1" on the dorsal of right hand below the base of index finger, obliquely placed. Considering the fact that there was no incised wound on left hand thumb,aforesaid injury inspite of it was possible to obtain left hand thumb impression on the dying declaration and obtaining of right hand thumb impression on the FIR was due to perception of person obtaining the impression, however, it appears that due to aforesaid injuries on the dorsal of the right hand, on the FIR, right hand thumb impression of deceased had been obtained and on dying declaration recorded by Executive Magistrate cum Naib Tahsildar,as there was possibility to obtain left hand thumb impression it had been obtained, and we do not find this to be a doubtful circumstance so as to discard dying declaration to be doubtful and subsequently prepared one.

13. Coming to the submission that there was Chhod Chhutti between Kambai and accused, question of Chhod Chhutti was not of much relevance, even if it was there, we find oral and written dying declarations of Kambai to be quite reliable , there was no reason for Kambai to implicate the accused falsely in the case and to spare the actual assailant if actual assailant was someone else.The strained relationship could have been the motive to commit the offence.

14. Thus, the conviction and sentence imposed under Section 302 IPC are found to be proper. We find no merit in the appeal, appeal is devoid of merit, it is hereby dismissed.

Appeal dismissed.

I.L.R. [2007] M. P., 1684
APPELLATE CRIMINAL
Before Mr. Justice A.K. Mishra & Mr. Justice S. A. Naqvi.
10 September, 2007

VEER SINGH and others .... Appellants*
Vs.
STATE OF M.P. .... Respondent

Penal Code, Indian (XLV of 1860) - Sections 302, 304 (II) - Culpable Homicide not amounting to murder - Some altercation took place between Accused and complainant party in earlier hours of day - While complainant party was going to lodge FIR in the noon, appellants intercepted them and gave axe and lathi blows on the person of deceased by means of axe and lathis - Deceased sustained several contusions and abrasions on non vital parts of the body - Three ribs were found fractured - Held - One accused armed with axe but gave

*Cr.A. No. 1077/97 (J)

axe blow from blunt side of axe on the backside of chest of deceased - Rest of the accused persons gave lathi blows on non-vital parts of body of deceased - If intention was to kill then accused shall have used sharp side of axe - Others should have assaulted on vital part of the body of deceased - It can be inferred that appellants were having knowledge that they can cause death of deceased - Offence committed by appellants is not under Section 302 but it falls under Section 304 (II) of I.P.C. - Appellants sentenced to undergo 10 years Rigorous Imprisonment - Appeal Partly allowed.

It is clear from the evidence of prosecution witnesses that at about 9:00 a.m. some altercation took place between Veer Singh and complainant party. In the noon Harinarayan, Vishal (deceased) and others were going to lodge FIR of the incident. On the way to Police Station, appellants intercepted them and gave axe and Lathi blows on the person of Vishal. Appellant Veer Singh was armed with axe but he gave axe blow from the blunt side of the axe on the backside of the chest of deceased Vishal, and rest of the appellants gave Lathi blows on the non-vital parts of the body of deceased Vishal. It is pertinent to note that none of the appellants assaulted on the vital part of the body of deceased Vishal. Even appellant Veer Singh did not assault by sharp side of axe on the person of Vishal. If their intention would be to kill or murder Vishal then appellant Veer Singh shall have used sharp side of axe on the person of deceased, and rest of the appellants also should have assaulted on the vital part of the body of Vishal. At any stretch of imagination it cannot be gathered that appellant Veer Singh or other appellants were having intention to cause death and that if they will assault on the back of deceased Vishal, the ribs of Vishal would be fractured and penetrate in both lungs of Vishal which shall be fatal to cause his death. Looking to the evidence, facts and circumstances of the case at the most it can be inferred that appellants were having knowledge that by their assault they can cause death of vishal and consequently they assaulted on the person of Vishal and he died, where the accused causes bodily injury on the knowledge to commit death or with intention to cause such bodily injury as is likely to cause death. The provisions of section 304 part II IPC comes into play when death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of accused person either to cause death or to cause such bodily injury as is likely to cause death. Intention and knowledge to cause the death is relevant. (Para 13)

Cases Referred :

Shankar Singh Vs. State of M.P.; 1997 (I) MPWN 140, *Subran @ Subramanian and others Vs. State of Kerala;* (1993) 3 SCC 32, *Ranjha and another Vs. State of Punjab;* AIR 1996 SC 2741, *Sarwan Singh and others Vs. State of Punjab;* AIR 1978 SC 1525, *Anwarun Nisha Khatoon Vs. State of Bihar and others;* AIR 2002 SC 2959, *Gangadhar Behera and others Vs. State of Orissa;* AIR 2002 SC 3633, *Laxmi Singh and others Vs. State of Bihar;* AIR 1976 SC 2263,

Jayraj Vs. The State of Tamil Nadu; AIR 1976 SC 1519, *Chuttan and others Vs. State of M.P.;* AIR 1994 SC 1398, *Virsa Singh Vs. State of Punjab;* AIR 1958 SC 465, *Sita Ram and others Vs. State of U.P.;* AIR 1993 SC 350, *Ramesh Kumar Vs. State of Bihar;* AIR 1993 SC 2317, *Karam Singh Vs. State of Punjab;* 1993 Cr.L.J. 3673, *Thangaiya Vs. State of Tamil Nadu;* AIR 2005 SC 1142, *Prakash Singh Badal and another Vs. State of Punjab;* AIR 2007 SC 1274.

S.C. Datt, with *Siddharth Datt,* for the appellants.
R. S. Patel, Additional A.G. for the respondent/State.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **S.A. Naqvi, J:**–Appellants have preferred this appeal being aggrieved by impugned judgment dated 16.5.1997 passed by Additional Sessions Judge, Khurai District Sagar in Session Trial No. 45/97, whereby appellant Veer Singh has been convicted under Sections 148, 302/149 IPC and sentenced to undergo one year R.I. and fine of Rs.500/- in default R.I. for two months and life imprisonment with fine of Rs.1,000/- respectively, rest of the appellants were convicted under Sections 147 & 302/149 IPC and sentenced to undergo one year R.I. each and fine of Rs.500/- in default R.I. for two months and life imprisonment with fine of Rs.1,000/- each in default six months R.I.

2. Accused Makhan has been acquitted of charges under Sections 147, 148 and 302 read with Section 149 IPC. No appeal has been preferred by State against their acquittal.

3. Prosecution case in short is that on 18.12.96 at 9:00 a.m. Harinarayan alongwith Sarman Yadav took irrigation pump on the bank of river. He has to irrigate his Khoontawala Khet, Vishal and Chhotelal accompanied them. They were installing pump at the agricultural field. Appellant Veer Singh came and obstructed them to install pump, he told that field belongs to him. Harinarayan told Veer Singh that field belongs to him and he shall install pump in his field, they want to irrigate their crops. An altercation took place. Resultantly Harinarayan alongwith others accompanied him and came back to village. On the same day at about 1:00 p.m. Harinarayan, Vishal, Mamta Rani, Sarman Yadav and Pappu were going to lodge FIR of morning incident. Vishal was having a bicycle and he was ahead of others. They reached near Khezrahar village Bamnoura, near Ramsahay's field at about 1:30 p.m., appellant Veer Singh armed with an axe, accused Dhaniram, Somnath, Kunwar Singh, Makhan, Kundan, Kallu, Rattu and Bhoore armed with Lathi met their. On seeing complainant party, appellant Veer Singh exhorted other accused persons, that they are going to lodge FIR and asked to decide their fate. Veer Singh gave an axe blow to Vishal, which landed over his left leg, Vishal fail down. Thereafter, Veer Singh assaulted Vishal by blunt side of axe and other accused persons assaulted him by Lathi. Vishal shouted, then Harinarayan, Sarman Yadav and Pappu ran to rescue him. Accused appellant fled

away from the spot. Vishal sustained various injuries on his back and other parts of the body. Vishal died on the spot. Harinarayan lodged FIR (Ex.P/1) in Police Station Bandri. Investigation set motion. Spot map (Ex.P/3) was prepared. As per seizure memo (Ex.P/4) an axe was seized from Veer Singh, a Lathi was seized from Bhoore as per Ex.P/5, a Lathi was seized from Kallu as per Ex.P/6, a Lathi was seized from Dhaniram Ex.P/7, a Lathi was seized from Makhan as per Ex.P/8, a Lathi was seized from Makhan as per Ex.P/9, a Lathi was seized from Rattu as per Ex.P/10 and a Lathi was seized from Kundan as per Ex.P/11. Inquest memo of the dead body (Ex.P/13) has been prepared. The postmortem of dead body of deceased Vishal was conducted by Dr. K.K. Jain (PW-4) he found following injuries on the person as per postmortem report Ex.P/12.

(i) On right arm- a contusion 2" x 2"..2" above the elbow, a contusion 1" x 1"- 3" above the wrist. 1/2" x 1/6" on the wrist. Abrasion 1/4" x 1/4" on left arm. A swelling 3" x 2"- 4" above the elbow, a swelling 2" x 1" on the palm.

(ii) On right thigh- a contusion each 6" x 4" and a abrasion 1/4" x 1/4" on the anterior aspect, two abrasion 3" x 1/2" and 2" x 1/2" on the posterior aspect.

(iii) On the left thigh- three contusions each 4" x 1/2" in the middle obliquely placed, a contusion in the area of 4" x 6" on the posterior aspect.

(iv) On right leg- an abrasion 1" x 1", 3" below the knee.

(v) On the left leg- an abrasion 2" x 1", 4" below the knee, a incised wound 2" x 1" x 1/2" above the abrasion.

(vi) On the back of the chest- four abrasion each 1/2" x 1/4" on the right soldier, an abrasion 1/2" x 1/4" on the left soldier and three contusions each 6" x 1" longitudinally placed on the right side, a contusion in the area of 6" x 4" on the left side.

(vii) On the loin- a abrasion 6" x 4".

Right fourth, fifth, sixth ribs were found fractured. On the left lobe of right lung a contusion measuring 2" x 1/2" inch was found. A contusion also found in the lower lobe of left lung measuring 1 x 1 inch. All the injuries were ante mortem caused by hard and blunt object. Death of Vishal was caused due to shock, due to concussion of chest as a result of blows on the chest the death of Vishal was homicidal. Statements were recorded under Section 161 Cr.P.C. After completion of investigation appellants were charge-sheeted the case was committed to Court of Session for trial.

4. Learned trial Court framed charges under sections 147, 148, 302 read with

Section 149 IPC against all the accused. Appellants abjured the guilt and they pleaded innocence and false implication due to enmity. The defence of appellants is that they were busy in agricultural operation in the field. They were not involved in commission of offence.

5. Prosecution examined six witnesses. Defence did not examine any witnesses.

6. After hearing both the parties and perusing the evidence and material on record, learned trial Court convicted appellant Veer Singh under Sections 148 and 302 read with Section 149 IPC and other appellants under Sections 147 and 302/149 IPC and sentence them as aforementioned.

7. Aggrieved by the impugned judgment appellants have preferred this appeal on the ground that learned trial Court committed error and perversity in convicting and relying upon the evidence of prosecution witnesses. The conviction of appellants is bad, improper and incorrect. There is no eyewitness adduced by prosecution. All witnesses are chance witnesses. Learned counsel for the appellants prayed to allow appeal and set aside the impugned judgment of conviction and sentences and acquit all of them from the charges levelled against them.

8. Learned Public Prosecutor supported impugned judgment and he prayed to dismiss the appeal.

9. We have heard both the parties perused the impugned judgment, evidence and material on record.

10. At the outset learned counsel for the appellants does not press the facts that the prosecution witnesses are truthful witnesses, the presence of eye witnesses is established fact, appellants were armed with axe and Lathis and assaulted Vishal. Vishal succumbed to the injures. Learned counsel for the appellants also does not challenge the fact that the death of Vishal is homicidal in nature. Consequently, we deem it proper not to appreciate the evidence of eyewitnesses, Harinarayan (PW-1), Pappu (PW-2) and Sarman Yadav in detail in this respect. On going through the evidence of these witnesses and evidence of Dr. K.K.Jain (PW-4) and Ashok Pandey (PW-5), we are of the firm view that these witnesses are truthful witnesses and their evidence is reliable and prosecution has proved beyond doubt that appellant Veer Singh assaulted on Vishal by blunt side of axe and rest of the appellants assaulted on the person of Vishal by Lathis and caused injuries on the person of Vishal as enumerated in postmortem report (Ex.P/12). Evidence of these witnesses have not been controverted by learned counsel for the appellants during the course of argument.

11. Relying on *1997 part I MPWN 140 Shankar Singh Vs. State of M.P., 1993 vol. 3 SCC 32 Subran @ Subramanian and others Vs. State of Kerala, AIR 1996 SC 2741 Ranjha and another Vs. State of Punjab, AIR 1978 SC 1525 Sarwan Singh and others Vs. State of Punjab, AIR 2002 SC 2959 Anwarun Nisha Khatoon Vs. State of Bihar and others, AIR 2002 SC 3633 Gangadhar Behera and others*

Vs. State of Orissa, AIR 1976 SC 2263 Laxmi Singh and others Vs. State of Bihar, AIR 1976 SC 1519 Jayraj Vs. The State of Tamil Nadu, AIR 1994 SC 1398 Chuttan and others Vs. State of M.P., AIR 1958 SC 465 (V 45 C 71) Virsa Singh Vs. State of Punjab, AIR 1993 SC 350 Sita Ram and others Vs. State of U.P., AIR 1993 SC 2317 Ramesh Kumar Vs. State of Bihar and others, 1993 CRI. L.J. 3673 Karam Singh Vs. State of Punjab, AIR 2005 SC 1142 Thangaiya Vs. State of Tamil Nadu and AIR 2007 SC 1274 Prakash Singh Badal and another Vs. State of Punjab vehemently argued that injures on the person of Vishal are non-vital part, injuries are not sufficient to cause death in ordinary course of nature. The common object of unlawful assembly was only to be laboured him. Appellant Veer Singh used axe from blunt side, no essential ingredient under Section 300 IPC is proved. The intention of appellant was not to cause death of Vishal. Consequently, the case of appellants falls under Section 304 part I of IPC or at the most 304 Part I IPC and does not fall under Section 302 IPC read with Section 149 IPC. Learned counsel for the appellants also contended that in connection with common unlawful assembly expression "in prosecution of common object" have to be strictly construed as equivalent "in order to attain the common object". Word "knew" used in second branch of Section 149 IPC implies something more than possibility and it cannot be bear sense of "might have known". Offence committed in prosecution of common object, would generally be the offence, which members of unlawful assembly knew was likely to be committed in prosecution of common object.

12. He has also contended that all murder are culpable homicide but not vice-versa. He also contended that the ingredient under Section 300 IPC are fulfilled then only an act shall be murder and thereafter exception to Section 300 IPC comes to play. If ingredient of Section 300 IPC are not fulfilled then the act of accused persons cannot be turned as murder and it may be culpable homicide under Section 299 IPC. Ultimately the arguments of learned counsel for the appellants are that the case act of appellants falls under Section 304 Part II IPC are at the most under Section 304 IPC. Learned trial Court committed error in convicting appellants under Section 302 read with Section 149 IPC. Contrary to that learned Public Prosecutor relying upon *AIR 1991 SC 1069 Prabhu and others Vs. State of M. P., JT 2007 (8) SC 540 Ambaram Vs. State of M.P., JT 2007 (6) SC 13 Sheikh Rafi Vs. State of Andhra Pradesh and another, JT 2007 (9) SC 274 State of Punjab Vs. Sanjiv Kumar @ Sanju and others, and 2006 SAR (Criminal) 114 Subhash Shamrao Pachunde Vs. State of Maharshtra* argued that appellants committed offence under Section 302/149 IPC and leaned trial Court rightly convicted them for murder of Vishal and they cannot be convicted under Section 304 part I IPC or under Section 304 part II IPC because every members of unlawful assembly was having intention or knowledge to commit murder of Vishal. We have gone through the citations put forth by the parties and arguments advanced by learned counsel for the parties and material on record. We have also minutely gone through the principle laid down by the Apex Court in aforementioned citations.

13. It is clear from the evidence of prosecution witnesses that at about 9:00 a.m. some altercation took place between Veer Singh and complainant party. In the noon Harinarayan, Vishal (deceased) and others were going to lodge FIR of the incident. On the way to Police Station, appellants intercepted them and gave axe and Lathi blows on the person of Vishal. Appellant Veer Singh was armed with axe but he gave axe blow from the blunt side of the axe on the backside of the chest of deceased Vishal, and rest of the appellants gave Lathi blows on the non-vital parts of the body of deceased Vishal. It is pertinent to note that none of the appellants assaulted on the vital part of the body of deceased Vishal. Even appellant Veer Singh did not assault by sharp side of axe on the person of Vishal. If their intention would be to kill or murder Vishal then appellant Veer Singh shall have used sharp side of axe on the person of deceased, and rest of the appellants also should have assaulted on the vital part of the body of Vishal. At any stretch of imagination it cannot be gathered that appellant Veer Singh or other appellants were having intention to cause death and that if they will assault on the back of deceased Vishal, the ribs of Vishal would be fractured and penetrate in both lungs of Vishal which shall be fatal to cause his death. Looking to the evidence, facts and circumstances of the case at the most it can be inferred that appellants were having knowledge that by their assault they can cause death of vishal and consequently they assaulted on the person of Vishal and he died, where the accused causes bodily injury on the knowledge to commit death or with intention to cause such bodily injury as is likely to cause death. The provisions of section 304 part II IPC comes into play when death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of accused person either to cause death or to cause such bodily injury as is likely to cause death. Intention and knowledge to cause the death is relevant. Under clause Thirdly of section 300 IPC sufficiency of injury to cause death in ordinary course of nature has to be determined objectively and is unrelated to intention of the offender. On going through evidence and injury caused on the person of deceased Vishal and on medical opinion that injuries caused on the person of Vishal were not sufficient to cause death in ordinary nature. The provisions of Section 300 and its exception from firstly to fourthly are not attracted in this case. Certainly the death of Vishal is culpable homicide is defined under Section 299 of IPC and since the intention and common object of appellant was not to murder or kill Vishal their object was to inflict injuries on the person of Vishal with the knowledge that injuries which would be caused by them, may cause death of Vishal. We are of the firm view that offence committed by appellants is not under the purview of Section 302/149 IPC but it falls under Section 304 Part II IPC. We are the view that learned trial Court committed error in convicting appellants under Section 302/149 IPC. Consequently we set aside conviction of appellant under Section 302 IPC read with Section 149 IPC and convict all the appellants under Section 302 IPC read with Section 149 IPC. The conviction of appellant Veer Singh under Section 148 IPC and all other appellants under Section 147 IPC is affirmed.

14. As per above discussion, appeal has some merit. Appeal is partly allowed. All the appellants are convicted under Section 304 part II read with Section 149 IPC instead under Section 302 IPC read with Section 149 IPC. Appellants are sentenced to undergo 10 years R.I. and fine of Rs.2,000/- each and in default they will undergo six months R.I. The sentence awarded under Section 148 IPC to appellant Veer Singh and under Section 147 IPC to all other appellants is hereby affirmed. Appellant Veer Singh is in jail and rest of the appellants is on bail. They should surrender forthwith before the trial Court to undergo remaining part of jail sentence, if they will not surrender, learned trail Court is directed to issue non-bailable warrants against appellant Nos. 2 to 8 and sent them to jail to undergo remaining part of jail sentence. If some of the appellants is released on probation, learned trial Court is directed to proceed against him according to law.

Appeal partly allowed.

I.L.R. [2007] M. P., 1691
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice Rakesh Saksena
21 September, 2007

JHAM SINGH .... Appellant*
Vs.
STATE OF M.P. .... Respondent

A. Penal Code, Indian (XLV of 1860) - Sections 34, 302 - Common Intention - Murder- One accused assaulted the deceased by an axe - Appellant assaulted the deceased by lathi - Main cause of death was injury caused by another accused - Held - Both accused persons assaulted simultaneously - Both left the spot together after causing injuries - Injury caused by appellant on skull of deceased had resulted into fracture of mandible - It cannot be held that there was no prior concert between both accused persons.

Placing reliance on the case of *Jarnail Singh* (supra) learned counsel for the applicant submits that in the circumstances of the case appellant cannot be convicted with the aid of section 34 of the I.P.C. as the main cause of death of the deceased was the injuries caused by accused Raman Singh. We are not in clined to accept this submission made by learned counsel for the appellant. There is clear evidence of Pohap Singh (PW-2) that both the accused persons had a ssaulted simultaneously and had left the spot together after causing injuries to deceased. From the manner in which the offence was committed it cannot be held that there was no prior concert between both the accused persons. In the case of *Jarnail Singh* (supra) the Apex Court did not find possible

*Cr.A. No. 2762/1998 (J)

to convict appellant Jarnail Singh for the offence under section 302 read with section 34 of the I.P.C. since there was no pre-concert between the co-accused and the appellant nor it was reflected that there was a meeting of minds between them before the offence took place. In the present case, the circumstances clearly indicate the pre-concert between the two accused persons before the assault took place. The ratio of the case of *Babubhai Ranchodbhai Patel* (supra) is also not applicable in the circumstances of the present case because in that case the incident had happened out of a sudden quarrel and one accused had caused vital injury and other accused inflicted only a simple injury. In the case in hand, the present appellant had caused injuries by lathi on the skull of the deceased, which had resulted into fracture of mandible. This act was simultaneous with the act of co-accused, who had inf licted three blows by sharp side of an axe on the skull of deceased. (Para 13)

B. Evidence Act, Indian (I of 1872) - Section 3 - Witness - It is not the number quantity but quality that is material.

14. In the case of *Dashrath* (supra) the Apex Court observed :

> "It is clearly established by the evidence of these witnesses that the appellants assaulted the deceased in pursuance of their common intention to cause his death. Appellant-1 was armed with a kulhari and he inflicted serious injuries on the head of the deceased, as is clear from the evidence of Dr. Khare, who performed the post-mortem examination. It is no doubt true that the other two appellants were merely armed with lathis but the medical evidence shows that lathi blows were also given on the head of the deceased and it is evidence that these two appellants shared common intention with appellant-1 to cause the death of the deceased Each of the appellants must, therefore, be held to be guilty of the offence under Section 302 read with Section 34 of the Indian Penal Code."

In the case of *Sunil Kumar* (supra) the Apex Court held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. But, if there are doubts about the testimony the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honored principle is that evidence has to be weighed and not counted. In this case it was also held that where accused gave several knife blows on the person of the deceased while another accused merely caught hold of him to facilitate the assault, section 34 was clearly attracted. (Para 14)

Cases Referred :

Jarnail Singh Vs. State of Punjab; AIR 1982 SC 70, *Babubhai Ranchodbhai Patel Vs. State of Gujarat;* AIR 1994 SC 1400, *Dashrath Singh Vs. State of M.P.;* (1997) 1 SCC 197, *Sunil Kumar Vs. State Govt. of NCT ofDelhi;* (2003) 11 SCC 367.

Siddharth Datt, for the appellant .

S. Pandit, Panel lawyer, for the State.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :-- Appellant has filed this appeal against the judgment dated 12- 10 -1998 passed by Second Additional Sessions Judge, Seoni , in Sessions Trial No. 40 of 1997, convicting the appellant for the offence under section 302 read with section 34 of the Indian Penal Code and sentencing him to imprisonment for life.

2. In short, the prosecution case is that on 6-2-1997 at about 9.15 A. M. in village Khamariya Raiyat, Teeju Gond (deceased) was going to Nursery on a cycle. When he reached in front of the house of Gyani Gond, accused Raman Singh and Jhamsingh (appellant) assaulted him by an axe and lathi. It is said that accused Raman Singh, inflicted 3-4 blows of axe on neck and head of Teeju whereas Jhamsingh assaulted him by lathi. Teeju fell down at the spot. Mother of Teeju viz., Chamribai (PW-4) saw the incident from her house and went at the spot. Pohap Singh Ahir (PW -2), who was also there, asked accused persons not to assault Teeju. Several other people of the village reached at the spot to whom Chamri Bai narrated the incident. Chamribai went to the house of Ganaram, Sarpanch (PW-1) and informed him about the incident. Ganaram, after viewing the spot went to police station Kanhiwada and lodged the first information report (Ex.P/1) on the same day at about 11.45 A.M. Police reached at the spot, prepared in quest and spot map (Ex.P/3) and sent the dead body to Primary Health Centre, Kanhiwada, where Dr.K.K. Sevte (PW-5) performed the post mortem examination of the dead body and gave his report (Ex.P/5). He found three incised wounds on the head of the deceased, one lacerated wound and one blunt injury on the right side of his forehead. Skull bones and mandible bone were found fractured. Some of the teeth had also fallen out from the jaw. In his opinion, deceased died due to shock and haemorrhage mainly due to injury No.3. The injuries were caused by hard cutting object and hard and blunt object. The injuries were ante-mortem in nature. After investigation charge sheet was filed and the case was committed for trial.

3. Appellant and accused Raman Singh were charged for the offence under section 302 read with section 34 of the I.P.C. They abjured their guilt and pleaded false implication due to past enmity.

4. Prosecution examined seven witnesses viz., Ganaram (PW-1), Pohap Singh (PW-2), Shivatiya Bai (PW-3), Chamribai (PW-4), Dr. K.K. Sevte (PW-5) Gangaram (PW-6) and K.S. Bhatiya, Investigating Officer (PW-7). Witnesses Chamribai, Shivatiyabai and Pohap Singh were examined as eye-witnesses. Dr. K.K. Sevte was examined to prove injuries found on the body of the deceased. Learned Additional Sessions Judge relying upon the evidence of aforesaid witnesses held both the accused persons guilty for the offence under section 302 read with section 34 of the I.P.C. and convicted and sentenced them as mentioned above.

5. Both the appellants filed their appeal before this Court. However, during the pendency of the appeal accused Raman Singh died, as such his appeal stood abated.

6. Shri Siddharth Datt, learned counsel for the appellant Jhamsingh, submits that though witnesses Pohap Singh, Shivatiya and Chamri Bai purported to be eye-witnesses, but in fact they had not witnessed the occurrence. According to him their evidence is not reliable. There are material contradictions in the statements of Chamribai and Shivatiya Bai which render their testimony untrustworthy. Fromthe evidence of witness Chamri Bai, presence of witness Pohap Singh becomes doubtful. He submits that from the evidence on record it is not established that both the accused persons had assaulted the deceased in furtherance of the common intention, as such the appellant is not liable to be convicted with the aid of section 34 of the IPC. He further submits that no evidence about any motive on the part of the appellant has been produced. On the strength of the aforesaid grounds counsel submits that the conviction of appellant deserves to be set aside. He placed reliance on the decisions rendered in the case of *Jarnail Singh v. State of Punjab* (AIR 1982 SC 70) and *Babubhai Ranchod bhai Patel v. State of Gujarat* (AIR 1994 SC 1400).

7. On the other hand, learned panel lawyer for the State Shri S. Pandit submits that the evidence of eye-witnesses viz., Pohap Singh and Chamribai is reliable. Their evidence is corroborated by the medical evidence of Dr. K.K. Sevte. He submits that participation of the appellant is established from the evidence of eye-witnesses, which is corroborated by medical evidence. He submits that in the case of direct evidence proof of motive is not essntial. Learned panel lawyer in support of his argument cited the case of *Dashrath Singh v. State of M.P.* [(1997) 1 SCC 197] and *Sunil Kumar v. State Govt. of NCT of Delhi* [(2003) XI SCC 367].

8. PW-3 Shivatiya, wife of deceased, deposed that about 3-4 months before when her husband had gone out her house for labour work, she was sitting in the courtyard along with her mother-in-law Chamribai. Chamribai shouted that Jhamsingh and Raman Singh have killed Teeju. She and her mother-in-law went

at the spot and found Teeju lying at the spot with injuries on his neck and head. Though in cross examination she stated that she had seen Raman Singh and Jhamsingh assaulting her husband, but this fact is not found in her statement recorded by police under section 161 of the Cr.P.C. The fact that she was sitting in the courtyard along with her mother-in-law is also found missing from her police statement. Thus, her evidence does not help the prosecution in incriminating the appellant.

9. Chamribai (PW-4), mother of deceased, deposed that deceased was going to forest. When he reached near the house of Gyan Bhoi, Raman Singh assaulted him with an axe and appellant Jhamsingh assaulted him by lathi. Raman Singh in flicted 3-4 blows of axe causing injuries on his neck and head. Teeju fell down there. When she shouted, accused persons ran away towards the lane. She reached at the spot and found her son dead. She started weeping then called village people and asked Kotwar and Mukaddam to report the incident to police. In cross-exami nation she stated that in her courtyard she was sitting alone and nobody was there. When she had went at the spot, nobody was there and his son was lying alone. She admitted that from her house, the house of Gyansingh is too far away and the house of Gyansingh is not visible from her house. She had not heard the cries of Teeju. She also admitted that accused persons had also not shouted. She stated that she had informed her daughter-in-law Shivatiya Bai about the death of Teeju when she was inside the house with her child. According to her, it was she, who had informed about the incident to Ganaram, Pohap Singh and Rambharose then only they had come to know about the incident. She stated that Teeju had reached at such a distance that he was not visible from her courtyard and because of her bad eye sight she could not see well. When people of the village shouted that her son was killed by accused persons then only she came to know and reached at the spot where she found her son lying dead. She had found axe and lathi lying on the spot. In the last, she stated that she had seen accused persons going in the street with axe and lathi, therefore, she thought that accused persons would have killed her son. Taking into consideration the inconsistencies and discrepancies in her evidence, her testimony as an eye-witness does not appear to be worthy of credence. Though she stated in the examination-in-chief that she witnessed the incident, but in the cross-examination she admitted that she came to know about the incident only when it was informed by the village people. Thus, her evidence does not appear to be reliable.

10. On examining the evidence of witness Pohap Singh (PW-2) it is seen that he deposed that when he was going to Nursery, deceased was coming behind him. When deceased had reached in front of the street of Gyani, appellant assaulted him with the lathi and accused Raman Singh assaulted him with an axe. Both had inflicted blows by their respective weapons on his head. Teeju had died at the spot. On his asking the accused persons to refrain from assaulting, they went

away. Though this witness in cross-examination admitted that he had been at a long distance from the deceased and he had seen the incident from the distance of about a furlong, but in view of the fact that he is a rustic villager, it cannot be held that he had not seen the incident. In para 3 of his evidence he categoric ally denied the suggestion that he was at such a distance that he could not have seen the incident. Though he was ahead of the deceased but he had looked back when he had heard the sounds of axe and lathi.

11. On closely scrutinizing the evidence of this witness there appears no thing to render his testimony unreliable. From the evidence of Dr. K. K. Sevte (PW-5) it is established that he had found three incised wounds on the head of deceased :

(1) Incised wound 5"x3/4"x2-1/4" on right side of skull on parieto occipital region.

(2) incised wound 3-1/2"x3/4"x1-3/4" on left parietal region.

(3) Incised wound 6"x1/4"x4-1/4" on skull extending fro m left occipital region to vertebral column (cervical).

(4) Lacerated wound 2-1/2" 3/4"x1/2" 1-1/2"above right eye brow on the forehead.

(5) Blunt injury causing fracture of mandible resulting in falling out of teeth.

In his opinion, the incised wounds were caused by hard and sharp cutting object whereas injuries No. 4 & 5 were caused by hard and blunt object. All the injuries were ante-mortem in nature and the deceased had died due to shock and haemorrhage.

12. On proper scrutiny with care and caution of the testimony of Pohap Singh (P.W-2) and finding it corroborated by medical evidence, we find ring of truth in it and find his testimony acceptable and reliable. Not even a remote possibility has been suggested as to why he should speak lie for implicating the appellant. He appears to be an independent and reliable witness.

13. Placing reliance on the case of *Jarnail Singh* (supra) learned counsel for the applicant submits that in the circumstances of the case appellant cannot be convicted with the aid of section 34 of the I.P.C. as the main cause of death of the deceased was the injuries caused by accused Raman Singh. Weare not inclined to accept this submission made by learned counsel for the appellant. There is clear evidence of Pohap Singh (PW-2) that both the accused persons had assaulted simultaneously and had left the spot together after causing injuries to deceased. From the manner in which the offence was committed it cannot be held that there was no prior concert between both the accused persons. In the case of *Jarnail*

Singh (supra) the Apex Court did not find possible to convict appellant Jar nail Singh for the offence under section 302 read with section 34 of the I.P.C. since there was no pre-concert between the co-accused and the appellant nor it was reflected that there was a meeting of minds between them before the offence took place. In the present case, the circumstances clearly indicate the pre-concert between the two accused persons before the assault took place. The ratio of the case of Babubhai Ranchodbhai Patel (supra) is also not applicable in the circumstances of the present case because in that case the incident had happened out of a sudden quarrel and one accused had caused vital injury and other accused inflicted only a simple injury. In the case in hand, the present appellant had caused injuries by lathi on the skull of the deceased, which had resulted into fracture of mandible. This act was simultaneous with the act of co-accused, who had inflicted three blows by sharp side of an axe on the skull of deceased.

14. In the case of *Dashrath* (supra) the Apex Court observed :

> "It is clearly established by the evidence of these witnesses that the appellants assaulted the deceased in pursuance of their common intention to cause his death. Appellant-1 was armed with a kulhari and he inflicted serious injuries on the head of the deceased, as is clear from the evidence of Dr. Khare, who performed the post-mortem examination. It is no doubt true that the other two appellants were merely armed with lathis but the medical evidence shows that lathi blows were also given on the head of the deceased and it is evidence that these two appellants shared common intention with appellant-1 to cause the death of the deceased. Each of the appellants must, there fore, be held to beguilty of the offence under Section 302 rea d with Section 34 of the Indian Penal Code."

In the case of *Sunil Kumar* (supra) the Apex Court held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. But, if there are doubts a bout the testimony the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honored principle is that evidence has to be weighed and not counted. In this case it was also held that where accused gave several knife blows on the person of the deceased while another accused merely caught hold of him to facilitate the assault, section 34 was clearly attracted.

15. Taking into consideration the aforesaid circumstances, we are of the view that the trial Court has considered and appreciated the evidence of witness Pohap Singh in proper perspective and has rightly come to finding of guilt of the appellant.

We see no illegality in the impugned judgment requiring any interference therein. Accordingly, the appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2007] M. P., 1698
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice Rakesh Saksena
25 September, 2007

LILLI @ SURENDRA PANDEY and another .... Appellants*
Vs.
STATE .... Respondent

(A) Penal Code, Indian (XLV of 1860)– Section 302, Evidence Act, Indian1872, Section 3 - Murder - Reaction of witness- Brother of deceased witnessed the assault on his brother by appellants while he was returning home - Brother immediately lodged F.I.R. - Held - Every witness reacts in his own way - Merely because brother of deceased did not try to rescue him will not make his statement unreliable.

We are not impressed by the submission made on behalf of appellants that the conduct of Ram Kishan (P.W.8) in not coming forward to rescue Shiv Kumar when he was in the clutches of assailants was unreal and, therefore, his evidence deserves to be discarded. In our considered view the conduct of Ram Kishan (P.W.8) was not unnatural at all because the moment he saw the appellants stabbing Shiv Kumar he shouted at them and when the appellants seeing him fled from the place of incident, he rushed to Shiv Kumar but Shiv Kumar died immediately. Moreover, in *Rana Pratap and others Vs. State of Haryana* AIR 1983 SC 680 the Supreme Court has held that everyone reacts in his own special way and there is no set rule of natural reaction and to discard the evidence of a witness on the ground that he did not react in a particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

(Para 12)

(B) Evidence Act, Indian (I of 1872)–Section 3 -Evidence - Murder trial - 'Independent witnesses'- Evidence of - Incident took place on road - Incident could have been witnessed by independent witnesses - Cannot be discredited merely because they are chance witnesses.

We are also not in agreement with the submission that as Subhash Kumar Garg (P.W.1) and Umed Singh (P.W.2) were chance witnesses and not named in the report of Ram Kishan (P.W.8) as witnesses, reliance cannot be placed on their evidence. The incident took place on the road and, therefore, the incident could have been witnessed by the persons going on that road. Subhash Kumar Garg (P.W.1) and Umed Singh

*Cr.A. No. 2878/1999

(P.W.2) were going on that road at the time of incident and though they would be technically chance witnesses but that fact by itself would not be enough to discredit their evidence. (Para 13)

(C) Criminal Procedure Code, (1973 (II of 1974)-Section 174 - Inquest report - Absence of names of appellants - Cannot be inferred that their names were not disclosed as murderers till panchnama was completed - No requirement that inquest panchnama should contain name of accused.

It is true that in the inquest report, Ex. P10, the names of appellants are not mentioned but now it is well settled that merely because of the absence of name of accused in inquest report, it cannot be inferred that his name was not disclosed as murderer till Panchnama was completed as there is no requirement of law that inquest Panchnama should contain the name of accused (See *Shaikh Ayub Vs. State of Maharashtra* AIR 1998 SC 1285). The appellants are, thus, not entitled for any benefit on the ground of absence of their names in the inquest report. (Para 15)

Cases Referred :

Rana Pratap and others Vs. State of Haryana; AIR 1983 SC 680, *Sheikh Ayub Vs. State of Maharashtra;* AIR 1998 SC 1285.

Ahadullah Usmani, for the appellants
R.S.Patel, Addl. Adv. General for the State.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by AJIT SINGH, J.:–Appellant no.1 Lilli alias Surendra Pandey and appellant no.2 Pappu alias Pradeep Kumar Dubey have been convicted under section 302/34 of the Indian Penal Code and sentenced to rigorous imprisonment for life imprisonment and a fine of Rs. 2000/- each with default stipulation by the impugned judgment dated 13.10.1999 passed in Sessions Trial No. 314/1996 by the Additional Sessions Judge, Sihora, District Jabalpur.

2. The victim of the incident was deceased Shiv Kumar Tiwari.

3. According to the prosecution case, on 24.2.1996 at about 1:30 p.m. Ram Kishan (P.W.8), while returning home during lunch hours on a motorcycle of his Deputy Ranger, received information that his younger brother Shiv Kumar was being beaten up. Ram Kishan (P.W.8) immediately rushed to save Shiv Kumar and on reaching Majhgawan Road he saw appellant no. 2 dragging Shiv Kumar and appellant no. 1 repeatedly stabbing in his chest and stomach with a knife. Appellant no. 2 then fell Shiv Kumar on the road and struck many blows on his neck with a "Gupti". Ram Kishan (P.W.8), on seeing the incident, shouted at the appellants but they fled on their two wheeler towards Umaria Road. Ram Kishan (P.W.8) immediately went to Shiv Kumar who died in

agony before him. The incident took place in front of the house of appellant no. 2. Ram Kishan (P.W.8) rushed to Police Chowki, Khitola, and lodged the report, Ex. P5, at 2:35 p.m. about the incident which was recorded by Town Inspector K.C. Bajpai (P.W.15). The distance of police chowki from the place of incident is three kilometers. The report of Ram Kishan (P.W.8) was later recorded as first information report, Ex. P6, at Police Station, Sihora, District Jabalpur by Sub Inspector D.S. Chouhan (P.W.11). Ram Kishan (P.W.8) in his report, Ex. P5, categorically named the appellants as the assailants of Shiv Kumar. Ram Kishan (P.W.8) also mentioned in the report that the incident was witnessed by other persons. K.C. Bajpai (P.W.15) came to the place of incident and prepared the spot map and Inquest report, Ex.P10, of deceased Shiv Kumar. He also recorded the statements of witnesses.

4. Dr. S. P. Tiwari (P.W.10) conducted the post mortem examination on the date of incident itself and found as many as 14 ante-mortem stab and incised wounds mostly in stomach, chest and neck region of the body of Shiv Kumar. He in his post mortem report, Ex. P1, opined that the cause of death of Shiv Kumar was due to haemorrhage and shock as a result of injuries on vital organs of the body. He also opined that the time passed since death to post-mortem was within 24 hours.

5. Sub-Inspector B. D. Pandey (P.W.16) arrested the appellants on 27.2.1996. He recovered a "Gupti" from the possession of appellant no. 2 vide Ex. P13, on the basis of his statement Ex.P15, and a knife vide Ex. P14 from the possession of appellant no. 1 pursuant to his statement, Ex. P16.

6. Dr. R. K. Jain (P.W.14) examined the appellants on 27.2.1996 and found five incised wounds mostly on the left palm of appellant no. 1 which were simple in nature. Dr. R. K. Jain (P.W.14) opined in his injury report, Ex. P22, that the duration of these injuries was between 72 to 96 hours and were caused by a sharp edged object., He also found two simple incised injuries on the palms of appellant no. 2 and their duration too was between 72 to 96 hours. The injury report of Dr.R.K.Jain (P.W.14) in this regard is Ex. P23.

7. Sub-Inspector B.D.Pandey (P.W.16) after completing the investigation filed a charge sheet against the appellants for an offence under section 302/34 of the Indian Penal Code.

8. The defence of the appellants before the trial court was that they had been falsely implicated due to enmity and the eye witnesses, relied upon by the prosecution, had actually not seen the incident. They also examined five witnesses in support of their defence. The appellants in their statements under section 313 of the Code of Criminal Procedure, 1973, explained that injuries on their person were caused by the police after they were arrested.

9. The trial court, relying upon the evidence of eye witnesses Subhash Kumar Garg (P.W.1), Umed Singh (P.W.2) and Ram Kishan (P.W.8), convicted and sentenced

the appellants as aforesaid. The trial court also relied upon the post mortem report, Ex. P1, prepared by Dr. S. P. Tiwari (P.W.10) and the evidence of seizure of weapons used in the offence from the possession of appellants. The trial court after appreciating the evidence of defence witnesses rejected the defence of appellants.

10. The learned counsel for appellants has argued that witnesses Subhash Kumar Garg (P.W.1), Umed Singh (P.W.2) and Ram Kishan (P.W.8) were perjured and the trial court committed an illegality in relying upon their evidence. He also submitted that Ram Kishan (P.W.8), being a brother of deceased Shiv Kumar, is an interested witness and, therefore, no reliance can be placed on his evidence. He further argued that as Subash Kumar Garg (P.W.1) and Umed Singh (P.W.2) were chance witnesses and not named in the report, Ex. P5, of Ram Kishan (P.W.8), as witnesses, their evidence cannot be relied. The learned Government Advocate, on the other hand, defended the appreciation of these witnesses by the trial court in holding the guilt of appellants.

11. It is now well settled that the evidence of witness cannot be disregarded merely because of his relation with the victim. It only requires close scrutiny by the courts and, if found truthful, it can be relied upon. Ram Kishan (P.W.8) has testified that on 24.2.1996 at about 1:30 p.m. during lunch hours, while returning home on a motorcycle, he was informed by a person at railway crossing that Shiv Kumar was being beaten up. He has categorically deposed that as he reached the place of incident, he saw appellant no. 2 dragging Shiv Kumar and appellant no. 1 repeatedly stabbing in his chest and stomach with a knife. He has further testified that appellant no. 2 then fell Shiv Kumar on the road and struck many blows on his neck with a "Gupti". According to the evidence of Ram Kishan (P.W.8), appellants fled on their two wheeler when he shouted at them. Ram Kishan (P.W.8) has further deposed that on seeing Shiv Kumar dead he immediately rushed to police chowki where he lodged the report, Ex. P5, against the appellants. Ram Kishan (P.W.8) has categorically denied the suggestion made by the appellants in his cross examination that he had falsely implicated them at the behest of persons with whom they had ennical relations. The evidence of Ram Kishan (P.W.8) is fully corroborated by his report, Ex. P5, which was lodged soon after the incident at 2:35 p.m. The post mortem report, Ex. P1, also corroborates the evidence of Ram Kishan (P.W.8) regarding the injuries received by Shiv Kumar. Subhash Kumar Garg (P.W.1) and Umed Singh (P.W.2) have fully corroborated the evidence of Ram Kishan (P.W.8) against the appellants. Both these witnesses have clearly testified that they saw the appellants stabbing Shiv Kumar with knife and "Gupti" and when Ram Kishan (P.W.8) reached the place of incident on a motorcycle during the assault, he shouted at the appellants, but they fled on their two wheeler. Ram Kishan (P.W.8), Subhash Kumar Garg (P.W.1) and Umed Singh (P.W.2) have stood firm in their evidence that the appellants had repeatedly stabbed Shiv Kumar with a knife and "Gupti" on the road. Nothing has been brought on record to disregard their evidence. It is true that Ram Kishan (P.W.8) has stated in his cross examination that he made the report at police chowki within 10 minutes from the date of incident but for this exaggerated statement

alone, we are not inclined to hold that his report, Ex.P5, is delayed rendering the prosecution story suspicious. It is to be noted that Ram Kishan (P.W.8) has also clarified that he did not wear a watch at the time of incident. The distance of police chowki is three kilometers. Thus, Ram Kishan (P.W.8) could not have reached the police chowki within 10 minutes from the time of incident under any circumstances. Report, Ex.P5, was in fact made promptly at 2.35 p.m.

12. We are not impressed by the submission made on behalf of appellants that the conduct of Ram Kishan (P.W.8) in not coming forward to rescue Shiv Kumar when he was in the clutches of assailants was unreal and, therefore, his evidence deserves to be discarded. In our considered view the conduct of Ram Kishan (P.W.8) was not unnatural at all because the moment he saw the appellants stabbing Shiv Kumar he shouted at them and when the appellants seeing him fled from the place of incident, he rushed to Shiv Kumar but Shiv Kumar died immediately. Moreover, in *Rana Pratap and others Vs. State of Haryana* AIR 1983 SC 680 the Supreme Court has held that everyone reacts in his own special way and there is no set rule of natural reaction and to discard the evidence of a witness on the ground that he did not react in a particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

13. We are also not in agreement with the submission that as Subhash Kumar Garg (P.W.1) and Umed Singh (P.W.2) were chance witnesses and not named in the report of Ram Kishan (P.W.8) as witnesses, reliance cannot be placed on their evidence. The incident took place on the road and, therefore, the incident could have been witnessed by the persons going on that road. Subhash Kumar Garg (P.W.1) and Umed Singh (P.W.2) were going on that road at the time of incident and though they would be technically chance witnesses but that fact by itself would not be enough to discredit their evidence. It is also to be noted that report, Ex. P5, of Ram Kishan (P.W.8) was made within an hour from the time of incident. In the report, Ex. P5, Ram Kishan (P.W.8) has clearly mentioned that the incident was witnessed by other persons. Apparently, Ram Kishan (P.W.8) was in hurry to see that the appellants who had fled were immediately arrested. Thus, merely because Ram Kishan (P.W.8) did not mention the names of Subhash Kumar Garg (P.W.1) and Umed Singh (P.W.2), in his report, their evidence cannot be disbelieved more so, when no enmity against these witnesses has been established by the appellants.

14. The learned counsel for appellants has argued that, despite there being number of houses around the place of incident, the police did not examine a single witness of that locality which creates a doubt in the prosecution story. K. C. Bajpai (P.W.15) has clearly explained in paragraph 19 of his cross examination that he had approached the residents of that locality but none claimed to have seen the incident and, therefore, he did not make them witnesses. K. C. Bajpai (P.W.15) has also testified that he even made an entry of this fact in the police case diary. As already stated above, the incident took place in front of the house of appellant no. 1 and the possibility of the residents of

that place not coming forward to spoil their relations with him cannot be ruled out. Subhash Kumar Garg (P.W.1) and Umed Singh (P.W.2) have also testified that but for Ram Kishan (P.W.8) they did not see any one at the time and place of incident. We, therefore, reject this argument of the learned counsel for appellants.

15. It is true that in the inquest report, Ex. P10, the names of appellants are not mentioned but now it is well settled that merely because of the absence of name of accused in inquest report, it cannot be inferred that his name was not disclosed as murderer till Panchnama was completed as there is no requirement of law that inquest Panchnama should contain the name of accused (See *Shaikh Ayub. Vs. State of Maharashtra* AIR 1998 SC 1285). The appellants are, thus, not entitled for any benefit on the ground of absence of their names in the inquest report.

16. The learned counsel for appellants, relying upon the evidence of Dr. S. P. Tiwari (P.W.10) that rigor mortis was present on the body of Shiv Kumar at the time of post mortem lastly argued that Shiv Kumar died much prior to 1:30 p.m. which shows that the witnesses were perjured and not reliable. We are of the view that this argument is not well founded. Dr. S. P. Tiwari (P.W.10) has opined in the post mortem report, Ex. P1, that the time passed since death to post mortem was within 24 hours. Post mortem started at 4.30 p.m. on the date of incident itself. Onset of rigor mortis is quicker if the muscles are feeble and exhausted and in the case of cut throat injury, rigor mortis sets in much early. Modi too has mentioned in his book "Medical Jurisprudence And Toxicology" (15th edition, page 135) about occurring of cases in which rigor mortis developed and disappeared within an hour and half after death. The body of Shiv Kumar had as many as 14 stab and incised wounds mostly on neck, chest and stomach region. His trachea above thyroid cartilage and right carotid vessels were found cut. Early development of rigor mortis on the body of Shiv Kumar, therefore, cannot be ruled out. Rigor mortis is only a rough guide for determining the time of death. Thus, it cannot be held that the time of death of Shiv Kumar was much prior to 1:30 p.m. on the date of incident and the witnesses were unreliable only for the reason they stated that the incident took place at about 1.30 p.m.

17. The learned counsel for the appellants could not point out any illegality in the appreciation of evidence of defence witnesses by the trial court for rejecting the defence of appellants. We too have perused the evidence of defence witnesses and we find no ground to hold that eye witnesses Subhash Kumar Garg (P.W.1), Umed Singh (P.W.2) and Ram Kishan (P.W.8), had any reason to falsely implicate the appellants.

18. For these reasons, we do not find any merit in the appeal. The appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2007] M. P., 1704

APPELLATE CRIMINAL

Before Mr. Justice Ajit Singh & Mr. Justice Rakesh Saksena

3 October, 2007

KANHAIYA LAL and others .... Appellants*

Vs.

STATE .... Respondent

A. Penal Code, Indian (XLV of 1860) - Sections 302, 304 - Murder or Culpable Homicide not amounting to murder - Complainant lodged F.I.R. mentioning that he was informed by witnesses that accused persons have assaulted the deceased and injured - When complainant reached on the spot he saw the deceased and his son lying there - One accused had farsi and three had sticks in their hands - Complainant came back and lodged report - Police recorded dehati nalishi made by injured - 26 injuries caused by hard and blunt object were found on the body of deceased - Held - 26 injuries on various parts of her body were found- 5 ribs of left side were found fractured - Deceased died due to syncope resulted by excessive haemorrhage and injuries to lungs and lever - Keeping in view the number and nature of injuries found on body of deceased it cannot be said that accused persons had no intention to cause death.

In the present case, Shaitan Bai (deceased) had suffered as many as 26 injuries on various parts of her body. There were injuries on face, neck, head and back. On internal examination her 4th, 5th, 6th, 7th and 8th ribs of left side were found fractured. Her diaphragm was found ruptured. 2-3 litres of blood was present in her abdominal cavity. Deceased had died due to syncope resulted by excessive haemorrhage and injuries to lever and lungs.

Keeping in view the number and nature of injuries found on the body of deceased, we are not inclined to accept the argument advanced by the learned counsel for the accused that accused persons had no intention to cause death of Shaitan Bai. Similarly, the facts of the case of *Radha Mohan Singh @ Lal Saheb and others v. State of Uttar Pradesh* (AIR 2006 SC 951) are not similar to the facts of the present case. (Para 18)

B. Evidence Act, Indian (I of 1872) - Sections 3, 45 - Ocular and Medical Evidence - Acquitted persons alleged to have caused injuries by means of sharp edged weapons - 26 injuries were found which were caused by hard and blunt object - This discrepancy creates serious doubt about participation of acquitted accused persons - Trial Court rightly acquitted accused persons who allegedly caused injuries by sharp edged weapons.

On perusal of impugned judgment it is found that the trial Court, keeping in view

*Cr.A. No. 1252/2000 (J)

the fact that all the aforesaid witnesses are relatives and interested witnesses, has critically and cautiously scrutinized their evidence. In our opinion, trial court has rightly found that the presence and participation of accused Bapulal, Parwati Bai and Dilip Singh has not been established beyond doubt. The aforesaid witnesses specifically deposed that accused Bapulal and Parwati Bai were armed with farsi and Darata respectively and had assaulted the injured and the deceased by those weapons. This fact is not corroborated by the evidence of Dr. K. K. Chaturvedi (PW-4) and Dr. R. C. Gupta (PW-5). All the 8 injuries found by Dr. K. K. Chaturvedi on the body of Devkaran were caused by hard and blunt object. Similarly, all the 26 injuries found on the body of Shaitan Bai, by Dr. R. C. Gupta, were caused by hard and blunt object. No crush injury, which could have been caused by running over of the tractor on them, was found on their bodies. Similarly, not a single injury which could have been caused by a sharp edged weapon was found on the bodies of both the victims. This discrepancy creates a serious doubt about the participation of accused Bapulal and Parwati Bai in the incident. Besides that in Rojnamcha report (Ex.D/1), recorded on the information of Bhagirath (PW-9), it was not mentioned that Bhagirath saw accused Bapulal, Parwati Bai and Dilip at the spot. He named only Kanhaiyalal, Shivnarayan, Ambaram and Kishore, who according to him, were standing at the spot with sticks. The fact as mentioned in Ex. D/1 that Ramsingh had informed Bhagirath that Bapulal had also assaulted Devkaran and Shaitan Bai, was inadmissible as hearsay evidence in the absence of evidence of Ram Singh. (Para 15)

Cases Referred :

Deoka and others Vs. State of Maharashtra; 1993 Suppl. (1) SCC 447, *Prabhu and others Vs. State of Madhya Pradesh;* AIR 1991 SC 1069, *Radha Mohan Singh @ Lal Saheb and others Vs. State of Utter Pradesh;* AIR 2006 SC 951, *Ishwar Singh Vs. The State of Utter Pradesh;* AIR 1976 SC 2423, *Shaikh Ayub Vs. State of Maharashtra;* AIR 1998 SC 1285.

S. K. P. Verma, for the appellants.
S. Pandit, P. L. for the State

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by RAKESH SAKSENA, J.:–Since both the appeals arise out of a common judgment passed on 11-4-2000 by Additional Sessions Judge, Ashta, district - Sehore in Sessions Trial No. 117 of 1999, they are being disposed of by this common judgment.

2. Seven accused viz., Bapulal Malviya, Kanhaiyalal, Kishore, Shivnarayan @ Shivlal, Ambaram, Smt. Parwati Bai and Dilip Singh were charged and tried for the offences under sections 148, 302 in alternative 302/149 and section 307 in alternative 307/149 of the I.P.C. Trial Court by the impugned judgment acquitted accused Bapulal Malviya, Smt. Parwati Bai and Dilip Singh of all the charges, but convicted accused

Kanhaiyalal, Kishore, Shivnarayan @ Shivlal and Ambaram under section 302/34 and 325/34 of the I.P.C. and sentenced them to imprisonment for life with fine of Rs. 2,000/- and rigorous imprisonment for five years with fine of Rs. 500/- on each count respectively.

3. Criminal Appeal No. 1252 of 2000 has been filed by appellants Kanhaiyalal, Kishore, Shivnarayan @ Shivlal and Ambaram against their conviction and sentence, whereas Criminal Appeal No. 1990 of 2000 has been filed by the State against the acquittal of all the accused persons under section 307 in alternative 307/149 of I.P.C. and acquittal of accused Bapulal, Smt. Parwati Bai and Dilip Singh under section 148, 302 in alternative 302/149 of the I.P.C. also.

4. In short, facts of the prosecution case are that Bhagirath (PW-9) lodged a report with the police Ashta that when he was at his threshing floor, his nephew Ramsingh informed him that Kanhaiyalal, Bapulal, Ambaram, Shivnarayan and Kishore have assaulted Devkaran and Shaitaniya (deceased), who are lying in front of the house of Kanhaiyalal. When he went there, he saw his son Devkaran and his daughter-in-law Shaitan Bai lying there. Kanhaiyalal and Kishore told him that they would do away with him also. Kanhaiyalal had a farsi and Shivnarayan, Ambaram and Kishore had sticks in their hands. Out of fear Bhagirath (PW-9) returned back and with his son Meharban went to lodge the report. This report (Ex.D/1) was recorded by police Ashta on 8-4-1999 at 8.00 o'clock in the morning in General Diary (Rojnamcha) No. 543. On this report Station House Officer of Police Station Ashta reached at the spot in village Arolia. There he also recorded 'Dehati-Nalishi' (Ex.P/18) made by injured Devkaran at 9.35 A.M. According to Dehati-Nalishi, Devkaran had been sleeping in his house and his wife Shaitan Bai had gone at the hand pump, at about 6.30 A.M., to fetch water. Kanhaiyalal, Bapulal, Kishore, Shivnarayan, Dilip, Ambaram and Parwati Bai stopped Shaitan Bai and assaulted her in front of the house of Kanhaiyalal. On her crying they tied her at the Myal of Kanhaiyalal's house. Then all the accused persons came to the house of Devkaran and took him to the house of Kanhaiyalal where they assaulted him and Shaitan Bai by sticks. Thereafter Kishore trampled them by his tractor. At the time of occurrence Prem Balai, Chain Singh, his mother Resham Bai and father Bhagirath had come there. Kamla Bai and Radheshyam Sarpanch had also witnessed the incident. The dead body of Shaitan Bai was lying there. She had died due to injuries caused by accused persons. On this Dehati-Nalishi, police registered an offence at police station Ashta under sections 147, 148, 149, 302 & 307 of the I.P.C.

5. The dead body of Shaitan Bai was sent to Government Hospital, Ashta, where Dr. R. C. Gupta, Block Medical Officer (PW-5) performed the post-mortem examination of the body. Vide his report (Ex.P/9) he found 26 injuries on her body, all caused by hard and blunt object. In his opinion, she had died due to syncope caused by excessive bleeding from the injuries and the injuries caused to her lever and left lung. Injuries of

Devkaran were examined by Dr. K. K. Chaturvedi (PW-4), who found 8 injuries on his body. All injuries were caused by hard and blunt object like lathi. No crush injury, which could have been caused by treading of tractor, was found on his body. Injury report is Ex. P/5. Devkaran was admitted in the District Hospital, Sehore, for treatment. On 9-4-1999 he was sent for x-ray examination. Vide x-ray report (Ex.P/34) he was found to have suffered fractures of radius bone of his right hand, tibia and fibula bones of left leg and femur of left thigh. These injuries were grievous in nature. After investigation charge sheet was filed before the Court of Judicial Magistrate First Class, Ashta, and the case was then committed for trial.

6. Trial Court framed charges under sections 148, 302, 302/149, 307, 307/149 of the I.P.C. All the accused abjured their guilt and pleaded false implication due to enmity. According to the accused Bapulal and Kanhaiyalal, they were not present in village Arolia at the time of the incident.

7. Prosecution examined 19 witnesses in proof of its case. Trial Court relying upon the evidence of PW-8 Devkaran, PW-9 Bhagirath, PW-10 Meharban, PW-11 Radheshyam, PW-16 Mukesh, PW-4 Dr. K. K. Chaturvedi, PW-5 Dr. R. C. Gupta and PW-19 Jairam Raghuwanshi Investigating Officer, held accused Kanhaiyalal, Kishore, Shivnarayan and Ambaram guilty of the offences under sections 302/34 and 325/34 of the I.P.C. and not finding guilty, acquitted accused Bapulal Malviya, Smt. Parwati Bai and Dilip Singh.

8. Shri S. K. P. Verma, learned counsel for the appellants in Cr. Appeal No. 1252 of 2000 and for respondents in Cr. Appeal No. 1990 of 2000, submits that the evidence of alleged eye-witnesses viz., Devkaran, Bhagirath, Meharban, Radheshyam and Mukesh is not reliable. None of the aforesaid witnesses had seen whole of the incident. There are contradictions and omissions in their evidence which render their testimony unreliable. Independent witnesses Chain Singh and Premlal have not supported the case of the prosecution. Alleged eye-witnesses are relatives of deceased and inimical to accused persons. Devkaran and Shaitan Bai were criminals. Number of cases were pending against them. Shaitan Bai had also lodged false reports against the accused persons. He further submits that the incident had occurred suddenly and there was no motive or intention to cause death of Shaitan Bai. At the most it could be an offence under section 304 Part-II of the I.P.C.

9. Learned Panel lawyer for the State, Shri Shreyas Pandit, on the other hand, submits that the evidence of eye-witnesses is reliable. Devkaran (PW-8) is an injured witness, his presence cannot be doubted. There is no reason to disbelieve him. Learned counsel while justifying the finding of conviction recorded by the trial Court against accused Kanhaiyalal, Kishore, Shivnarayan and Ambaram, however, submits that the trial Court committed error in acquitting accused Bapulal Malviya, Smt. Parwati Bai and Dilip Singh. He submits that all the accused are liable to be convicted for the offence under section 148, 307/149 and 302/149 of the I.P.C.

10. It is now well settled that the evidence of a witness cannot be discarded merely on the ground that he is a relative and/or inimical witness, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case, it is paramount duty of the Court to be more careful in the matter of scrutiny of the evidence of such witness. If on such scrutiny it is found that the evidence on record of such a witness is worth credence, the same would not be discarded on that ground. Similarly, prosecution's non production of one or two independent witnesses by itself cannot be taken to be a circumstance to discredit the evidence of interested witnesses and disbelieve the prosecution case.

11. PW-8 Devkaran has testified that while he was sleeping at his house, his wife Shaitan Bai had gone to fetch water from the hand pump located in front of the house of Bapulal. On hearing cries of Shaitan Bai when he got up and started proceeding towards hand pump, Kanhaiyalal, Kishore, Shiv and Ambaram came to his house and carried him dragging in front of the house of Bapulal Malviya and started beating him by sticks. He saw his wife tied by a rope at the Myal of Bapulal Malviya. They untied her and dragged and dropped her near him. All the accused then again assaulted her. On the exhortation of Bapulal Malviya they assaulted him also. Kishore brought a tractor and ran it over them. According to him, Parwati Bai assaulted his wife by a Darata (sharp edged weapon). Shaitan Bai died at the spot. Prem Singh, Chain Singh, Bhagirath, Resham Bai and Radheshyam had witnessed the incident. After some time police reached there and he got a Dehati-Nalishi recorded at the spot. In respect of accused Dilip Singh he deposed that he was merely standing there. He named him because he suspected that he might have assaulted Shaitan Bai. According to him, at the time of occurrence Bapulal Malviya had a farsa and Parwati Bai had a Darata. All the other accused persons were armed with lathis. In cross-examination this witness admitted that number of criminal cases were pending against him and his wife Shaitan Bai. Accused Bapulal Malviya had committed rape on Shaitan Bai but police had found that report false. Though in cross-examination this witness was confronted with his report (Ex.P/18) and police statement (Ex.P/19) on various facts but such omissions do not appear to be material, affecting his credibility in respect of all the accused persons. It is true that it was not possible for this witness to have seen what had transpired with Shaitan Bai when he was inside his house but he did witness that part of the incident which occurred before his eyes. Though he has been contradicted with Ex. P/18 and Ex. P/19 to the effect that he did not mention therein that the accused persons assaulted and dragged Shaitan Bai but on perusal of Ex. P/18 and Ex. P/19 it is found mentioned that accused persons assaulted Shaitan Bai. The fact that he was badly assaulted is corroborated by the evidence of Dr. K. K. Chaturvedi (PW-4), who examined his injuries and found 8 injuries on various parts of his body caused by hard and blunt object. It was also established by the evidence of Dr. R. C. Gupta (PW-5) that he had suffered fractures of the bones of his hands and legs.

12. Evidence of Devkaran (PW-8) finds corroboration from the evidence of Bhagirath

(PW-9), Meharban (PW-10) and Radheshyam (PW-11). Witness Bhagirath deposed that at about 6.30 A.M. Chain Singh s/o Ramsingh came to him and informed that Bapulal, Kanhaiyalal, Ambaram, Shivnarayan and Parwati Bai were beating Devkaran and Shaitan Bai by lathis in front of the house of Bapulal. When he reached there, he saw aforesaid accused persons assaulting them. Accused Dilip was not there. Shaitan Bai and Devkaran were lying there unconscious. When he and his son Meharban reached there, accused Kanhaiyalal threatened him, therefore, he ran away and with Meharban on his cycle, went to police station – Ashta and lodged the report. He had reached police station at about 8-9 o'clock in the morning. Station House Officer Jairam Raghuwanshi (PW-19)recorded the report and came alongwith him in the village. Dead body of Shaitan Bai was lying at the spot but Devkaran was not present there. On confronting him with his report (Ex. D/1), it was found that the name of Parwati Bai was not mentioned therein. In cross-examination he stated that accused Kanhaiyalal had dropped farsi, which was picked up by accused Bapulal and then Bapulal had assaulted them by farsi. He was also confronted with his police statement (Ex. D/2) where he did not mention that when he reached at the spot, accused persons were beating Devkaran and Shaitan Bai.

13. Meharban (PW-10) deposed that his son Fateh Singh came to him and informed him that accused persons were assaulting Devkaran and Shaitan Bai whereupon he reached at the spot and saw accused Bapulal Malviya, Ambaram, Shiv, Kishore and Parwati Bai beating Devkaran and Shaitan Bai. Bapulal Malviya had farsi and Parwati Bai had Darata. Dilip Singh was standing near them.

14. Radheshyam (PW-11) deposed that Ranjeet informed him that Devkaran and Shaitan Bai had been assaulted by Bapulal, Shivnarayan Kanhaiyalal and Ambaram and 5-6 other persons. When he asked him to report the matter to police, he informed that Bhagirath Chowkidar had gone to police station. When he was going towards the spot, he saw accused Bapulal going on a motor-cycle towards Ashta. When he reached at the spot, he found accused Kanhaiyalal, Ambaram, Shivnarayan, Kishore and Ambaram's wife standing there wielding sticks. Shaitan Bai was lying dead. Devkaran was also lying there.

15. On perusal of impugned judgment it is found that the trial Court, keeping in view the fact that all the aforesaid witnesses are relatives and interested witnesses, has critically and cautiously scrutinized their evidence. In our opinion, trial court has rightly found that the presence and participation of accused Bapulal, Parwati Bai and Dilip Singh has not been established beyond doubt. The aforesaid witnesses specifically deposed that accused Bapulal and Parwati Bai were armed with farsi and Darata respectively and had assaulted the injured and the deceased by those weapons. This fact is not corroborated by the evidence of Dr. K. K. Chaturvedi (PW-4) and Dr. R. C. Gupta (PW-5). All the 8 injuries found by Dr. K. K. Chaturvedi on the body of Devkaran were caused by hard and blunt object. Similarly, all the 26 injuries found on the body of Shaitan Bai, by Dr. R. C. Gupta, were caused by hard and blunt object. No

crush injury, which could have been caused by running over of the tractor on them, was found on their bodies. Similarly, not a single injury which could have been caused by a sharp edged weapon was found on the bodies of both the victims. This discrepancy creates a serious doubt about the participation of accused Bapulal and Parwati Bai in the incident. Besides that in Rojnamcha report (Ex.D/1), recorded on the information of Bhagirath (PW-9), it was not mentioned that Bhagirath saw accused Bapulal, Parwati Bai and Dilip at the spot. He named only Kanhaiyalal, Shivnarayan, Ambaram and Kishore, who according to him, were standing at the spot with sticks. The fact as mentioned in Ex. D/1 that Ramsingh had informed Bhagirath that Bapulal had also assaulted Devkaran and Shaitan Bai, was inadmissible as hearsay evidence in the absence of evidence of Ram Singh.

16. So far as Dehati-Nalishi (Ex.P/18), which is said to have been lodged by Devkaran (PW-8), is concerned, trial Court has rightly found it to be inadmissible as a first information report for the reason that report (Ex. D/1) was recorded by the police in Rojnamcha No. 543 at 8.00 A.M. on 8-4-1999, i.e. much before Dehati-Nalishi (Ex. P/18) was recorded. It is also apparent from the evidence of Bhagirath (PW-9) that after making report at the police station when he and Station House Officer Jairam Raghuwanshi went at the spot, he did not find Devkaran at the spot. Only the dead body of Shaitan Bai was lying there. Devkaran had been taken to Hospital. In para 14 of his evidence Bhagirath deposed that when he was going back to village in the police van, he had seen Devkaran on way. Devkaran was going in a police van. Jairam Singh Raghuwanshi (PW-19) contradicting Bhagirath stated that the information of occurrence was given by Bhagirath at police station, which was recorded by Head-constable Netram. When he alongwith Bhagirath and police force went to village Arolia, he found Devkaran lying seriously injured at the spot. He made an enquiry from Devkaran and on his report recorded Dehati-Nalishi (Ex.P/18). This contradiction assumes importance and creates doubt about the fact that the said Dehati-Nalishi (Ex.P/18) was recorded at the spot. When attention of Jairam Singh Raghuwanshi (PW-19) was drawn towards B to B part of Dehati-Nalishi wherein it was mentioned that the dead body of Shaitan Bai was lying at the spot, he tried to explain by saying that when he reached at the spot, Devkaran was not there. However, Devkaran was made to sit in flying squad and thereafter Ex. P/18 was recorded in the vehicle. In view of the inconsistencies appearing in the evidence of Bhagirath and Jairam Singh Raghuwanshi, Dehati-Nalishi (Ex.P/18) cannot be held to be a trustworthy document. The finding recorded by the trial Court in this regard is therefore fully justified.

17. Evidence of Devkaran so far as it relates to accused Kanhaiyalal, Kishore, Shivnarayan and Ambaram, is amply corroborated by the evidence of Bhagirath (PW-9), Meharban(PW-10) and Radheshyam (PW-11) and appears to be trustworthy.

18. Placing reliance on the case of *Deoka and others v. State of Maharashtra* {1993 Suppl. (1) SCC 447} learned counsel for the accused submits that since none of

the eye-witnesses had seen the entire incident from start to end and most of the injuries sustained by deceased were on non-vital parts of the body of the deceased, it cannot be held that the motive or intention of accused persons was to kill her. At the most it could be that of thrashing only. The circumstances of the present case are different than that appear in the case of Deoka (supra). In the present case, Shaitan Bai (deceased) had suffered as many as 26 injuries on various parts of her body. There were injuries on face, neck, head and back. On internal examination her 4th, 5th, 6th, 7th and 8th ribs of left side were found fractured. Her diaphragm was found ruptured. 2-3 litres of blood was present in her abdominal cavity. Deceased had died due to syncope resulted by excessive haemorrhage and injuries to lever and lungs. In the case of *Prabhu and others v. State of Madhya Pradesh* (AIR 1991 SC 1069) in a similar situation the Apex Court observed "The evidence of PW-4 Dr. C. K. Dafal, however, shows that the deceased was belaboured mercilessly. There were innumerable contusions on the entire body of the deceased from head to toe. The wrist, humerus, etc. were fractured and the whole body was full of rod marks. There were several contused lacerated wounds on the entire face and the left eye was bleeding. The totality of the injuries caused to the victim clearly supports the finding of both the courts below that the appellants went on belabouring the deceased till he died on the spot. In the circumstances, we do not think that we can uphold the contention that the appellants did not intend to cause the murder of deceased." Keeping in view the number and nature of injuries found on the body of deceased, we are not inclined to accept the argument advanced by the learned counsel for the accused that accused persons had no intention to cause death of Shaitan Bai. Similarly, the facts of the case of Radha Mohan Singh @ Lal Saheb and others v. State of Uttar Pradesh (AIR 2006 SC 951) are not similar to the facts of the present case.

19. Learned counsel for the accused submits that prosecution failed to examine the independent eye-witnesses, particularly the witness, whose names were mentioned in the first information report. In the case of *Ishwar Singh v. The State of Uttar Pradesh* (AIR 1976 SC 2423) it has been held that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be examined. Hence, where some of the eye-witnesses to the occurrence named in the F. I. R. who are important witnesses for the case are kept back without any explanation, the non-examination of these witnesses acquires a special significance in view of the discrepancy between the F.I.R. and the version of the occurrence given by the prosecution in the Court. In the present case, prosecution has examined injured Devkaran (PW-8), who himself is an injured witness. Besides that Chain Singh (PW-1) and Prem (PW-2) were also produced before the Court but they did not support the prosecution case and were declared hostile. Thus, it cannot be said that independent witnesses of the occurrence were kept back by the prosecution. We are not inclined to accept the argument advanced by learned counsel for the accused that since the names of accused persons were not mentioned in the inquest memo, they were roped in falsely. It is well settled that merely

because the names of accused persons have not been mentioned in the inquest memo, it cannot be inferred that their names were not disclosed by the time memo was recorded. There is no requirement of law that inquest memo should contain the names of accused. (See *Shaikh Ayub v. State of Maharashtra* (AIR 1998 SC 1285).

20. Learned counsel for the accused could not point out any illegality in the appreciation of evidence of defence witnesses by the trial Court for disbelieving them. On perusal of the evidence of defence witnesses we too not find any ground to hold that Devkaran (PW-8), Bhagirath (PW-9), Meharban (PW-10) and Radheshyam (PW-11) are wholly unreliable witnesses. Their evidence in respect to participation in the commission of the offence so far as by accused Kanhaiyalal, Kishore, Shivnarayan and Ambaram is concerned, is trustworthy and reliable. The finding of conviction in respect of them as recorded by the trial Court is therefore affirmed.

21. For the reasons discussed above we are of the opinion that the trial Court has rightly given benefit of doubt to accused Bapulal Malviya, Smt. Parwati Bai and Dilip Singh and acquitted them.

22. We are not in agreement with the submission made by learned counsel for the State that the accused persons ought to have been convicted under section 307/34 of the I.P.C. and that the trial Court erred in holding them guilty for the offence under section 325/34 of the I.P.C. On perusal of evidence of Dr. K. K. Chaturvedi (PW-4), who examined the injuries of Devkaran (PW-8), it is found that all the injuries found on his body were on non-vital parts. Though there were fractures on ulna, radius, femur, tibia and fibula bones but none of the injuries were dangers to life. No injury which could be said to have been caused by trampling him with a tractor was found on his body. Besides that even in the absence of any outside interference at the time of assault, accused did not beat him till his death and let him alive. In these circumstances, it cannot be held that the intention of accused persons was to cause his death. Thus, taking into consideration the evidence on record, the reasonings assigned by the trial Court and the findings recorded by it, we are of the view that the trial Court has considered the evidence, oral and documentary, on record in proper perspective and has rightly convicted the accused/appellants Kanhaiyalal, Kishore, Shivnarayan and Ambaram for the offences under section 302/34 and 325/34 of the I.P.C. and acquitted accused Bapulal Malviya, Smt. Parwati Bai and Dilip Singh. We see no illegality in the impugned judgment requiring any interference therein.

23. Accordingly, both the appeals (Cr. Appeal No. 1252 of 2000 filed by appellants and Cr. Appeal No. 1990 of 2000 filed by the State) are dismissed.

24. One copy of this order be kept in the record of Criminal Appeal No. 1990 of 2000.

Appeal dismissed.

I.L.R. [2007] M. P., 1712

CRIMINAL REVISION

Before Mr. Justice Rakesh Saksena

11 September, 2007

FAREED BAIG and others .... Applicants*

Vs.

STATE OF M.P. .... Non-applicant

Electricity Act, Indian (XXXVI of 2003)–Section 151, Electricity (Amendment) Act, 2007 - Cognizance - Retrospective Effect - Amendment made by Amendment Act, 2007 in respect of investigation of offences and procedure for their trial would operate retrospectively - Investigation conducted by police and cognizance taken by Court on report filed by police cannot be held to be illegal - Revision dismissed.

In view of the above proposition of law, I am of the opinion that the amendments made by the Amendment Act No. 26 of 2007, in respect of investigation of the offences under the said Act and the procedure for their trial, would operate retrospectively. As such the investigation conducted by the police and the cognizance taken by the Special Court on the report filed by police under section 173 of the Code of Criminal Procedure cannot be held to be illegal or without jurisdiction. In this view of the matter, there appears no substance in this revision. It is accordingly dismissed. (Para 11)

Cases Referred :

Manohar Dairy and Restaurant, Bhopal Vs. Employees State Insurance Corporation; 2007 (3) MPLJ 355, *Gurbachan Singh Vs. Satpal Singh and others;* (1990) 1SCC 445, *Hitendra Vishnu Thakur Vs. State of Maharashtra;* (1994) 4 SCC 602.

Ashok Chakravarti, for the applicants.

Pramod Choubey, Govt. Advocate, for the State.

Cur.adv.vult.

ORDER

RAKESH SAKSENA, J. :–Applicants have filed this revision against the order dated 24/5/2007 passed by Special Judge, Begamgunj, district-Raisen, in Special Sessions Trial No. 05 of 2007, framing charge against them under section 138 of the Indian Electricity Act besides section 429 of the I.P.C. and section 11 of the Cattle Trespass Act.

2. Learned counsel for the applicants submits that the learned Special Judge has committed illegality in taking cognizance against applicants for the offence under section 138 of the Indian Electricity Act, 2003, (hereinafter referred to as the 'said Act') on the basis of charge sheet filed by police before it. He submits that in view of the provisions of section 151 of the said Act no Court can take cognizance of an offence punishable under the said Act except upon a complaint in writing made by appropriate Government or appropriate Commission or any of their officers authorized

*Cr.R. No. 1253/2007 (J)

by them or a Chief Electrical Inspector or a Electrical Inspector or licensee or the generating Company as the case may be for the purpose. He submits that since the offence punishable under section 138 of the said Act is triable only by the Special Court, the Special Court cannot take cognizance directly without the case being committed to it by Magistrate. Referring to the provisions of Section 155 of the said Act learned counsel submitted that the provisions of the Code of Criminal Procedure in so far as they are not inconsistent with the provisions of the said Act, shall apply to the proceeding before the Special Court and for the purpose of the provisions of the said Act Special Court shall be deemed to be a Sessions Court.

3. Learned counsel for the State pointed out the amendments brought in force by the Electricity (Amendment) Act, 2007, i.e. Act No. 26 of 2007. This Amendment Act received assent of the President on 28th May, 2007.

4. On perusal of the provisions of Section 15 of the Amendment Act it is found that in section 151 of the Principal Act it has been added that the Court may also take cognizance of an offence punishable under the said Act upon a report of a police officer. For ready reference, section 15 of the Amendment Act is quoted hereunder :-

> **" 15. Amendment of Section 151.** - In section 151 of the principal Act, the following provisions shall be inserted, namely :-
>
> " Provided that the Court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under section 173 of the Code of Criminal Procedure, 1972 (2 of 1974):
>
> Provided further that a special court constituted under Section 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial."

5. In view of the amendment of section 151 of the said Act, the Special Court has been vested with the jurisdiction to take cognizance of the offence punishable under the said Act upon a report of the police office filed under section 173 of the Code of Criminal Procedure directly without the case being committed to it for trial.

6. By section 16 of the amendment Act new sections 151-A & 151-B have also been inserted after section 151 of the Principal Act. The said sections are as under :-

> **"151-A. Power of police to investigate.-** For the purposes of investigation of an offence punishable under this Act, the police officer shall have all powers as provided in Chapter-XII of the Code of Criminal Procedure, 1973 (2 of 1974)".
>
> **151-B. Certain offences to be cognizable and non-bailable.-** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under sections 135 to 140 or section 150 shall be cognizable and non-bailable."

Perusal of the aforesaid provisions indicates that the offences under

the Indian Electricity Act can be investigated by a police officer as provided in Chapter-XII of the Code of Criminal Procedure and the offences punishable under sections 135 to 140 or section 150 shall be cognizable and non-bailable.

7. Learned counsel for the applicants submits that the aforesaid provisions inserted by the Amendment Act, 2007, cannot be given retrospective effect. He placed reliance on the decision in the case of *Manohar Dairy and Restaurant, Bhopal Vs. Employees State Insurance Corporation* [2007 (3) M.P.L.J. 355] wherein it has been held that it is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations.

8. With due respect, the above proposition of law is not applicable in the present case, because in contrast to statutes dealing with substantive rights, statutes dealing with merely matters of procedure are presumed to be retrospective unless such a construction is textually inadmissible. As stated by Lord Denning : "The rule that an Act of Parliament is not to be given retrospective effect applies only to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure or the admissibility of evidence, or the effect which the courts give to evidence. If the new Act affects manners of procedure only, then, *prima facie*, it applies to all actions pending as well as future. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode."

9. The Apex Court in the case of *Gurbachan Singh v. Satpal Singh and others* (1990) 1 S.C.C. 445), while considering the application of Section 113-A of the Indian Evidence Act when inserted in the statute when inserted in the Statute book by Act No. 46 of 1983 observed :-

> "37. The provisions of the said section do not create any new offence and as such it does not create any substantial right but it is merely a matter of procedure of evidence and such it is retrospective and will be applicable to this case. It is profitable to refer in this connection to Halsbury's Laws of England, Fourth Edition, Volume 44 page 570 wherein it has been stated that :
>
> "The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature..."

38. It has also been stated in the said volume of Halsbury's Law of England at page 574 that :

"The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament."

10. In the case of *Hitendra Vishnu Thakur v. State of Maharashtra* [(1994) 4 S.C.C. 602] the Apex Court held :

"36. ..... From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows :

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

11. In view of the above proposition of law, I am of the opinion that the amendments made by the Amendment Act No. 26 of 2007, in respect of investigation of the offences under the said Act and the procedure for their trial, would operate retrospectively. As such the investigation conducted by the police and the cognizance taken by the Special Court on the report filed by police under section 173 of the Code of Criminal Procedure cannot be held to be illegal or without jurisdiction. In this view of the matter, there appears no substance in this revision. It is accordingly dismissed.

Revision dismissed.

I.L.R. [2007] M. P., 1717

CRIMINAL REVISION

Before Mr. Justice Rakesh Saksena

11 September, 2007

RAKESH RAI .... Applicant*

Vs.

STATE .... Non-applicant

Public Gambling Act, (III of 1867) - Sections 3,4,5,6 - Power to enter and authorize police to enter and search - House of applicant was searched after obtaining authorization from City Superintendent of Police - Applicant ran away from the house whereas several persons were found gaming - Playing Cards, money were seized - Applicant convicted by Courts below under Section 3 and 4 of Act, 1867 - Held - Authorization Warrant not proved in trial - City Superintendent of Police not examined - Un-exhibited Authorization warrant which is in on shows that warrant is a printed proforma - It means non application of mind by officer - Authorization Warrant has no force in the eyes of law - No presumption can be drawn under Section 6 of Act - Applicant acquitted.

Though on perusal of unexhibited document, it is seen that a printed form containing authorization is annexed in the file, but merely by its presence in the file, it cannot be accepted as a piece of evidence. Issuance of authorization warrant under Section 5 of the Act is an important exercise of power. Section 5 provides that if the Magistrate of a District or other officer invested with the full powers of a Magistrate or District Superintendent of Police, upon credible information, and after such enquiry as he may think necessary, has reason to believe that any house, walled enclosure, room or place, is used as a common gaming-house; he may either himself enter or by his warrant authorise any officer of police, not below such rank as the State Government shall appoint in this behalf to enter, by night or by day and by force, if necessary, any such house or room or place and may take into custody all persons whether or not then actually gaming and may seize money etc. The phraseology used by legislature in the provision clearly indicates that the matter of issuing authorization warrant is an important exercise of powers and it should be exercised with due care and caution after due application of mind.

If the search warrant is not proved or the warrant is a printed proforma warrant on which the authority has barely signed, it means that the authority has not used his reasoning power before signing the same.

(Paras 8,9)

Cases Referred :

Rambharti and others Vs. State of M.P.; 2006 (3) MPHT 176, *Parasram Vs. Emperor;* AIR 1930 Allahabad 740.

*Cr.R. No. 651/2006 (J)

Wakil Khan, for the applicant.
Smt. S. Paliwal, GA, for the State.

ORDER

RAKESH SAKSENA, J. :–Petitioner has filed this revision against the order dated 31st January 2006, passed by Vth Additional Sessions Judge, Sagar, in Criminal Appeal No. 275/05, affirming the judgment dated 31.8.2005, passed by Judicial Magistrate First Class, Sagar, in Criminal Case No. 2450/04 (Old No. 200/96), convicting the petitioner for the offence under Section 3 and 4 of Public Gambling Act and sentencing him to deposit fine of RS. 500/- on each count respectively. In default of payment of fine, simple imprisonment for 15 days on each count.

2. In short, the prosecution case is that on 25.2.1996 Sub Inspector Purshottam Lal Ahirwar of Police Station Motinagarh, Sagar, received information that some persons were gambling in the house of petitioner situated at Chandra Shekhar Ward, Sagar. He obtained authorization for search of the petitioner's house from City Supdt. of Police, Sagar, viz R.P. Singh and taking two independent witnesses viz Goverdhan Kori and Narayan Sahu and police force alongwith him reached at the house of petitioner. Goverdhan looked through a window in the house and saw several persons gaming in the room. On knocking door, petitioner opened the door. P.L. Ahirwar showed him the search warrant and entered the house. They found 9 persons gaming there. The persons, who were gaming, were nabbed, but petitioner, who had a container in his hand, started running. He got struck against door, as a result of which, container of his hand fell down. It was found that Rs. 1640/- were in the container, which he had collected by way of 'Naal Katai'. Petitioner, however, managed to run away from the spot. The container and the money was seized before the witnesses. Other accused persons viz Rajesh Keshwarwani, Manoj Jain, Sanjay Jadiya, Sunderlal Sahu, Mahesh Sahu, Aman Jain, Prahlad Hariyani and Dilip, who were playing cards with money, were arrested at the spot. An amount of Rs. 12,240/- was seized from the possession of those persons in the gambling den. Besides that, 52 cards, a carpet and electric bulb were also seized. Dehati Nalishi was recorded at the spot. On returning to police station, first information report was recorded.

3. Learned Magistrate charged the petitioner and other accused persons for the offence under Section 3/13 of the Public Gambling Act (hereinafter referred to as 'the Act') and explained the particulars.

4. The petitioner abjured his guilt and pleaded false implication due to political rivalry. According to him, he was called from his house and arrested at Moti Nagar Police Station. Police had seized Rs. 2000/- from his pocket.

5. The prosecution examined seven witnesses to substantiate the accusation against the petitioner. PW-1 Goverdhan Prasad, the only independent witness did not support the prosecution case. However, PW-2 R.P. Rawat, Sub Inspector, PW-3 D.R. Kohli, Police Inspector, PW-4 Om Prakash Rajput, Constable, PW-5 Rajpal Singh, Constable,

PW-6 Raj Kumar, Constable, PW-7 Nagendra Kumar Pateriya Police Inspector and PW-8 Purshottam Lal Ahirwar, Sub Inspector, Moti Nagar, Sagar, supported the prosecution case. Relying upon the evidence given by the aforesaid witnesses, learned Magistrate held the petitioner guilty for the offence under Section 3 and 4 of the Act and sentenced him to pay fine, as mentioned above.

6. Appeal preferred by petitioner before the Court of Sessions was dismissed by V Additional Sessions Judge, Sagar. Hence, this revision.

7. Learned counsel for the petitioner submits that the only witness Goverdhan did not support the prosecution case. Another independent witness of the raid viz Narayan Sahu was not produced by the prosecution. The case rested only on the evidence of police witnesses. He submits that though petitioner was not charged for the offence under Section 4 of the Act, but learned courts below convicted him for the said offence also. Counsel further submits that the conviction of the petitioner under Section 3 and 4 of the Act is illegal because the authorization warrant allegedly issued by the City Supdt. Of Police, R.P. Singh, was not proved. In the absence of proof that authority prescribed under Section 5 of the Act received any credible information and after enquiry thought it necessary or had reason to believe that any house of place was being used as a common gaming house, the issuing of warrant of authorization to a police officer would vitiate the conviction. Since in the present case concerned warrant of authorization itself was not proved, the conviction of petitioner for the offence under Section 3 as well as Section 4 of the Act is illegal and deserves to be set aside. Learned counsel placing reliance on the decision of this Court in *Rambharti and others vs. State of M.P.*- 2006 (3) MPHT 176 submits that merely recovery of the money, carpet and playing cards no presumption under Section 6 of the Act can be drawn and that if warrant is illegal, presumption under Section 6 of the Act cannot be drawn.

8. On perusal of record, it is found that except PW-1 Goverdhan, all the prosecution witnesses are police officers. Other independent witness of raid and seizure viz Narayan Sahu was not examined before the Court. Although all the police witnesses deposed that on receiving information from an informer, they went to the house of the petitioner and saw all the accused persons gaming and that petitioner ran out from the spot, but it has not established that Purshottamlal Ahirwar, Sub Inspector, had obtained a valid warrant of authorization for entering the house of petitioner. Though PW-8 Purshottamlal Ahirwar deposed that he had obtained a search warrant from City Supdt. of Police, Sagar, R.P. Singh, but no such warrant was proved by him before the Court. City Supdt. of Police, Sagar, R.P. Singh was not examined before the Court to prove that he issued such warrant.. Though on perusal of unexhibited document, it is seen that a printed form containing authorization is annexed in the file, but merely by its presence in the file, it cannot be accepted as a piece of evidence. Issuance of authorization warrant under Section 5 of the Act is an important exercise of power. Section 5

provides that if the Magistrate of a District or other officer invested with the full powers of a Magistrate or District Superintendent of Police, upon credible information, and after such enquiry as he may think necessary, has reason to believe that any house, walled enclosure, room or place, is used as a common gaming-house; he may either himself enter or by his warrant authorise any officer of police, not below such rank as the State Government shall appoint in this behalf to enter, by night or by day and by force, if necessary, any such house or room or place and may take into custody all persons whether or not then actually gaming and may seize money etc. The phraseology used by legislature in the provision clearly indicates that the matter of issuing authorization warrant is an important exercise of powers and it should be exercised with due care and caution after due application of mind.

9. If the search warrant is not proved or the warrant is a printed proforma warrant on which the authority has barely signed, it means that the authority has not used his reasoning power before signing the same.

10. In the case of *Rambharti* (supra), it has been observed that since such authorization warrant has no force in the eyes of law because it was issued without application of mind as routine work, no presumption can be drawn under Section 6 of the ACT. In the case of *Parasram vs. Emperor*-AIR 1930 Allahabad 740, it was held that if warrant is illegal, presumption under Section 6 of the Act cannot be drawn.

11. In view of the above proposition of law, merely by the fact that cards, carpet and money were found in the house of applicant, it cannot be presumed that petitioner used his house as a common gaming house. It is also important to note that the Sub Inspector Purshottam Lal Ahirwar, who conducted the raid, himself investigated the case. During investigation he did not make any attempt to collect the documents to establish that the house where the accused persons were found, belonged to petitioner or he was in occupation of that house. From the evidence of PW-5 Om Prakash and PW-8 Purshottamlal Ahirwar, it is apparent that at the time of occurrence petitioner was a Corporater. In the statement of petitioner, recorded under Section 313 Cr.P.C., he stated that he was falsely implicated due to political rivalry. In view of the above circumstances, I am of the view that it has not been established beyond doubt that petitioner was owning or keeping or having charge of a gaming house, as such his conviction under Section 3 as well as Section 4 of the Act does not appear to be justified.

12. Taking into consideration all the above circumstances, I am of the view that the courts below have committed error in holding the petitioner guilty. Accordingly, this revision is allowed. The judgment and order of conviction of the petitioner passed by the courts below is set aside. He is acquitted of the charge under Section 3 and 4 of the Act. The fine amount, if deposited by the petitioner, be returned to him.

Revision allowed.

I.L.R. [2007] M. P., 1720

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice B. M. Gupta

25 July, 2007

PRAKASH VYAS .... Applicant*

v.

SMT. KAMLESH CHAUHAN .... Non-applicant

A. Penal Code, Indian (XLV of 1860) - Section 500 - Defamation - Applicant posted as S.D.M. - Private complaint filed against applicant on allegation that son of complainant/respondent arrested by police under Section 151 of Cr.P.C. and produced before applicant - Applicant did not grant bail and directed to send him to jail - Respondent went inside the chamber of applicant to request for release of her son on bail - Applicant looked at her with evil eye and suggested her to do what he wants - On clarification applicant asked her to sleep with him - Complainant came out of the chamber and informed other persons - Held - Defamation can be committed by words or signs or by visible representation, makes or publishes any imputation intending to harm or knowing or having reason to believe that such imputation will harm that person - Alleged proposal was extended in chamber - It cannot be the intention of applicant that others should know it - As this important ground does not exist framing of charge under Section 500 I.P.C. erroneous.

Thus, it appears that a defamation can be committed by the words either spoken or intended to be read or by signs or by visible representation, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, that person. The main ingredient is that, the alleged act is to be done by the accused with intention that it is to be known by the others. Without this intention, offence of defamation punishable under section 500 of IPC is not made out. On perusal of the allegations as mentioned in the aforementioned relevant paragraphs of the complaint, this intention of the petitioner does not appear anywhere. As per the allegation, in the chamber of the petitioner, he extended alleged proposal which was not accepted by the complainant. Neither it can be the intention of the petitioner that others should know it, so that the respondent can be defamed nor can it be presumed in the matters of such alleged act. As this important ground does not exist, framing charge against the petitioner for the offence punishable under section 500 of the IPC appears erroneous. (Para 3)

B. Penal Code,Indian (XLV of 1860) - Section 220 - Commitment for trial or confinement by person having authority who know that he is acting contrary to law - Applicant had authority to commit the son of complainant to confinement under Section 151 of Cr.P.C. - Whether

*M.Cr.C. No. 5006/2004 (G1)

or not to release her son on bail was within discretion of the applicant - Whether demand of illegal favour from complainant can be termed as integral part of duty - Held - Demand of illegal gratification for passing an order or using discretion in favour of party can never be an act covered under duties of public servant - However, whether alleged act is covered under Section 220 of I.P.C. or not can be decided after recording of evidence during Trial - However Magistrate has committed an error in not paying attention to provisions of Sections 351/354 of I.P.C. - Magistrate may hear the parties and pass appropriate orders in this regard.

After this first part of the act of the petitioner, his second part came into existence. The son of the respondent was to be released or not to be released on bail, was a matter within the discretion of the petitioner and for this discretion he demanded from the respondent her favour as alleged. Whether this act of the petitioner can be termed as an integral part of his duty as such public servant? Whether, after completing the first part of his duty, as mentioned herein above, he kept the son of the respondent in confinement with this ulterior motive of getting the illegal favour of respondent. If the petitioner kept the son in the confinement with this ulterior motive, then further two questions arise (1) Whether this act of the petitioner is covered by the offence under section 220 of IPC, which is a question of fact and is to be decided by the court after trial. (2) Whether, this act of demanding the alleged favour from respondent, which is clearly illegal and undue, can be termed as an integral part of the official act of the petitioner as such public servant? My considered conscious is that no public servant, who is discharging his duties as such public servant, can be expected to demand such illegal gratification. Demanding illegal gratification for passing an order or using discretion in favour of a party, can never be an act covered under the duties of a public servant.

As observed hereinabove, whether the alleged act is covered under section 220 of IPC or not, the same can be decided after recording of the evidence during trial. No observation on this point is required at this stage. But in my considered opinion, the learned Magistrate has committed an error in not paying attention to the provisions of section 351/354 and 509 of IPC. On perusal of the allegation, prima facie, it appears that the offence under section 354 and 509 of IPC is also made out against the petitioner for the same he could have been charged. Learned Magistrate may hear the parties and to pass appropriate order in this regard. (Paras 5 & 10)

C. **Criminal Procedure Code, 1973 (II of 1974) - Section 197 - Sanction for prosecution - Alleged act of applicant has no reasonable connection or nexus with his official duty - Sanction under Section 197 Cr.P.C. not required.**

In the cases of *Centre for Public Interest Litigation and another Vs. Union of India* (2006) 1 SCC (Cri.) 23 & *K. Kalimuthu Vs. State* 2005 SCC (Cr.) 1291, the

Apex Court has observed that the test for seeking connection or nexus in the alleged act with the official duty, is whether omission or neglect to do that act could have been brought on him, the charge of dereliction of his official duties. Applying this test, had there been an omission of demand of such favour from respondent on the part of the petitioner, he would have not been charged for dereliction of his official duties. In view of this, neither the alleged act of the petitioner has a reasonable connection or nexus with the alleged act with his official duties nor sanction under section 197 of Cr.P.C. is required for taking cognizance. (Para 7)

D. Judges (Protection) Act, (LIX of 1985) - Section 3(1) - Additional Protection to Judges - Alleged act of applicant cannot be termed as same was done by him in acting or purporting to act in discharge of his official or judicial duty - Applicant not entitled for protection.

9A. Section 3(1) of [THE] JUDGES (PROTECTION) ACT, 1985 goes as under:

> 3. Additional protection to Judges.-(1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-section (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.
>
> (Emphasis Supplied)

Cases Referred : (Para 9A)

Centre for Public Interest Litigation & Another Vs. Union of India and another; (2006) 1 SCC (Cri) 23, *K. Kalimuthu Vs. State;* 2005 SCC (Cri) 1291, *Matajog Dobey Vs. H.C. Bhari;* AIR 1956 SC 44, *Somchand Sanghvi Vs. Bibhuti Bhusan Chakravarty;* AIR 1965 SC 588, *Inspection and Audit and others Vs. C.L. Subramaniam;* AIR 1995 SC 866, *Abdul Wahab Ansari Vs. State of Bihar and another;* (2000) 8 SCC 500, *State of Orissa through Kumar Raghvendra Singh and others Vs. Ganesh Chandra Jew;* (2004) 8 SCC 40, *Rakesh Kumar Mishra Vs. State of Bihar and others;* (2006) 1 SCC 557, *Sankaran Moitra VS. Sadhna Das and another;* (2006) 4 SCC 584, *Balram Vs. Aswani Kumar Yadav, Tahsildar;* 2001(2) MPWN 154.

A.S.Rathore, for the Applicant
V.D.Sharma, for the Non-applicant

ORDER

B. M. Gupta, J. :–The instant petition is for quashing the criminal proceeding in criminal case No.188/04 pending in the Court of JMFC, Kolaras which has been registered against the petitioner for the offence punishable under Sections 220 and 500 of IPC.

2. During the course of arguments, both the parties have admitted the following facts:-

A. That one private complaint has been filed by the respondent against the petitioner, who at the relevant time was posted as SDM/SDO at Kolaras, on the following allegation mentioned in para 2 & 3 of the complaint -

2. यह कि घटना दिनांक 17.8.95 साम 5.30 की है। कि प्रार्थिया लडके धर्मेंद्रसिंह को पुलिस बदरवास ने एक झूठे प्रकरण मे धारा 151 जा.फौ.में गिरफ्तार कर पुलिस द्वारा एस.डी.एम.कोलारस के यहां लाई थी चूंकि प्रार्थिया अपने बच्चे की जमानत बाबत कोलारस एस.डी.एम.कार्यालय उपस्थित हुई थी।

3. यह कि प्रार्थिया के बच्चे धर्मेंद की जमानंत एस.डी.एम. कोलारास द्वारा जानबूझकर विद्वेषवश नही ली व उक्त प्रकरण में धर्मेंद्रसिंह को एस.डी.एम.द्वारा जेल भेजने का आदेश कर दिया चूकि प्रार्थिया अपने बच्चे की जमानत हेतु निवेदन करने एस.डी.एम. महोदय के पास अंदर चेंबर में पहुंची तो कहा कि मै धर्मेंद्रसिंह की मां हूं। व मेरा लडका एक सीधा साधा सच्चारित्र है इसे जमानत पर छोडने का कष्ट करे किंतु एस.डी.एम. महोदय ने मेरे निवेदन व फरियाद पर मुझे बुरी नीयत से देखकर कहा कि मै तुम्हारे लडके को अब किसी भी हालत में नही छोड सकता यदि तुम्हे अपने लडके को छुडाना है तो मै जैसा चाहता हूं वैसा करना होगा तो मुझ फरियादिया ने कहा कि श्रीमान मै तुम्हारे शब्दो का कोई अर्थ नही समझ सकी मुझे स्पष्ट कहकर बताने का कष्ट करे इसके बाद उक्त आरोपी एस.डी.एम ने मेरे साथ बदसलूकी व बदनीयत व कुदृष्टि से देखकर कहा कि तुम्हे आंज मेरे पास रूकना होगा और मेरे साथ बिस्तर पर सोना होगा तो ही तुम्हारे लडके को बगैर जमानत के ही छोड सकता हूं। मै प्रार्थिया उक्त एस.डी.एम.श्री प्रकाश व्यास के व्यवहार व चाल चलन व मेरे साथ हुई घटना से व उसके बुरे इरादो से वाकिफ होकर घबडा गई व मुझे काफी मानसिक असंतुलन (पीडा) हुई मै घबडाकर व अपनी सलामती के लिये चेंबर से बाहर भागकर आई जहां पर मेरे साथ हुये हादसे की घटना मैने इंद्रसिंह यादव व संतोक सिंह यादव को बताई जो जिन्होने भी चेंबर की खिडकी के पास खडे थे ने भी सुनी है।

B. That after recording of the statements of the respondent/complainant and her 3 witnesses, vide order dated 30th October, 1995, the complaint was registered under the aforementioned offences.

C. That feeling aggrieved, aforementioned order was impugned by the petitioner and vide order dated 25th June, 1996 passed in criminal revision 93/95 by the Ist ASJ, Shivpuri, the revision was dismissed, however, an opportunity was given to the petitioner to raise the objection under Section 197 of Cr.P.C. before the learned Magistrate, if he so chooses.

D. That, thereafter an application was filed by the petitioner before the learned Magistrate under Section 197 of Cr.P.C. alongwith Section 3 of the Judges Protection Act, 1985 (hereinafter referred to as the Act). Vide order dated 21.5.04, the same was rejected by the learned JMFC on the ground that he has already passed an order and review of the same is not permissible.

E. That again feeling aggrieved by the aforesaid order, the petitioner

filed criminal revision which has also been dismissed by the IInd ASJ, Shivpuri vide impugned order dated 22.7.04 affirming the order passed by the learned Magistrate. Feeling aggrieved, the petitioner has filed the present petition.

3. The relevant part of the definition of defamation given in Section 499 of IPC goes as under:

> **"499.Defamation.**-Whoever, by words either spoken or intended to be read; or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person".
>
> (Emphasis supplied)

Thus, it appears that a defamation can be committed by the words either spoken or intended to be read or by signs or by visible representation, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, that person. The main ingredient is that, the alleged act is to be done by the accused with intention that it is to be known by the others. Without this intention, offence of defamation punishable under section 500 of IPC is not made out. On perusal of the allegations as mentioned in the aforementioned relevant paragraphs of the complaint, this intention of the petitioner does not appear anywhere. As per the allegation, in the chamber of the petitioner, he extended alleged proposal which was not accepted by the complainant. Neither it can be the intention of the petitioner that others should know it, so that the respondent can be defamed nor can it be presumed in the matters of such alleged act. As this important ground does not exist, framing charge against the petitioner for the offence punishable under section 500 of the IPC appears erroneous.

4. The offence of section 220 of IPC has been described as under:

> **220.-Commitment for trial or confinement by person having authority who knows that he is acting contrary to law**-Whoever, being in any office which gives him legal authority to commit persons for trial or to commitment, or to keep persons in confinement, corruptly or maliciously commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Admittedly, the petitioner was having authority to commit the son of the respondent to confinement under section 151 of Cr.P.C. It is also admitted that he committed the

son of the respondent to confinement under aforesaid provisions when he was presented before him by the police. It is not disputed that the petitioner, at the relevant time, was a public servant not removable otherwise than by the orders of the Govt. It is not disputed that this fact of sending the son of the respondent in confinement under section 151 of Cr.P.C. was done by the petitioner in the discharge of his official duty as it was integrally connected with the duty of the petitioner as such public servant and the same is having direct nexus to his public duties.

5. After this first part of the act of the petitioner, his second part came into existence. The son of the respondent was to be released or not to be released on bail, was a matter within the discretion of the petitioner and for this discretion he demanded from the respondent her favour as alleged. Whether this act of the petitioner can be termed as an integral part of his duty as such public servant? Whether, after completing the first part of his duty, as mentioned herein above, he kept the son of the respondent in confinement with this ulterior motive of getting the illegal favour of respondent. If the petitioner kept the son in the confinement with this ulterior motive, then further two questions arise (1) Whether this act of the petitioner is covered by the offence under section 220 of IPC, which is a question of fact and is to be decided by the court after trial. (2) Whether, this act of demanding the alleged favour from respondent, which is clearly illegal and undue, can be termed as an integral part of the official act of the petitioner as such public servant? My considered conscious is that no public servant, who is discharging his duties as such public servant, can be expected to demand such illegal gratification. Demanding illegal gratification for passing an order or using discretion in favour of a party, can never be an act covered under the duties of a public servant.

6. The Apex Court in the case of *Centre for Public Interest Litigation & Another Vs. Union Of India and Another,* (2006) 1 SCC (Cri) 23 as cited by Shri. Sharma, has observed in para 9 which is worth quoting:-

> "9. The protection given under section 197 is to protect responsible public servants against institutions of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the

official duty, the excess will not be a sufficient ground to deprive the public servant from the protection".

As observed by the Apex Court, while discharging duties, act done in excess, is also covered under section 197 of Cr.P.C, however, demanding illegal gratification in the shape of such alleged favour or otherwise can never be said that it is an excess committed by a public servant, while discharging his official duties. In the present case, had the petitioner continued the confinement for some more time or imposed certain exorbitant conditions for bail/bond, such act could have been termed as an excess committed by him and would have been protected under section 197 Cr.P.C. But demanding undue or illegal favour, as alleged, can neither be termed as integral part of the duties nor an act committed in excess in discharging of such duties by him.

7. In the cases of *Centre for Public Interest Litigation and another Vs. Union of India* (2006) 1 SCC (Cri.) 23 *& K. Kalimuthu Vs. State* 2005 SCC (Cr.) 1291, the Apex Court has observed that the test for seeking connection or nexus in the alleged act with the official duty, is whether omission or neglect to do that act could have been brought on him, the charge of dereliction of his official duties. Applying this test, had there been an omission of demand of such favour from respondent on the part of the petitioner, he would have not been charged for dereliction of his official duties. In view of this, neither the alleged act of the petitioner has a reasonable connection or nexus with the alleged act with his official duties nor sanction under section 197 of Cr.P.C. is required for taking cognizance.

8A. Shri. Rathore has sought support on the following judgments and vehemently argued that sanction under section 197 is very much required in this case:-

A. In the case of *Matajog Dobey Vs. H.C. Bhari reported in* (S) AIR 1956 SC 44 (V.43 C. 12 Jan.), during a raid, the police personnels collected the books and tied the bundles thereto. When it was objected by the complainant, he was assaulted. A complaint was filed against the police officers. In the facts of the case, it was observed that the police officers under the belief that they had right to get rid of obstruction then and there by binding down the books of the complainant or removing them from the place, might be mistaken, but surely it could not be said that their act was necessarily mala fide and so entirely divorced from or unconnected with the discharge of their duty.

B. In the case of *Somchand Sanghvi Vs. Bibhuti Bhusan Chakravarty* reported in AIR 1965 SC 588, the Assistant Commissioner of Police, while entertaining a bail application of an accused under section 420 and 420/120B of IPC refused the bail unless he settled the matter with the complainant and pay him his amount.

C. In the case of *Director of Inspection and Audit and others Vs. C.L. Subramaniam* reported in AIR 1995 SC 866 in the case of two writ petitions by subordinate officer. His senior officers filed counters with averment against him. A complaint was filed by the subordinate officer for defamation under section 500 of

IPC. It was observed that the act of the senior officers was in the discharge of their official duties.

D. He further relied on *Abdul Wahab Ansari Vs. State of Bihar and another* reported in (2000) 8 SCC 500. There was a dispute between two Muslim groups. One police officer wanted to remove encroachment as there was promulgation of an order under section 144 of Cr.P.C. Next day, a mob of persons armed with weapons started hurling stones. When situation became out of control, the police officer ordered for opening fire. One person died and some got injured. It was observed that the act of the police officer was in the discharge of his official duty.

E. In the case of *State of Orissa through Kumar Raghvendra Singh and others Vs. Ganesh Chandra Jew* reported in (2004) 8 SCC 40, police officers arrested the complainant on the charge that he was having elephant tusks. A complaint was filed by him under section 341, 323, 325, 506 and 386 of IPC on the allegation that during arrest he was assaulted by the police officers.

F. In the case of *Rakesh Kumar Mishra Vs. State of Bihar and others* reported in (2006) 1 SCC 557, police officers searched the house of the complainant. In search of his son who was an accused, no substantial material was found. Complaint was filed by the complainant that the search was based on malice.

G. In the case of *Sankaran Moitra Vs. Sadhna Das and another* reported in (2006) 4 SCC 584, during assembly elections, deceased, a member of one of the political parties, distributing food packets to the workers. The same was objected by the police personnels deputed therein. He was chased and beaten, hence, he died. In all aforementioned cases, it has been observed that the alleged act was done by the petitioners/accused in the discharge of their official duties.

8B. In some of the cases, it has been observed that although the action was, in excess than it was required, however, it was observed that sanction under section 197 of Cr.P.C was necessary before taking cognizance. The facts of the present case are totally different, hence, the observations made in the aforementioned cases cannot fruitfully be utilized in support of the contention of Shri. Rathore.

9A. Section 3(1) of [THE] JUDGES (PROTECTION) ACT, 1985 goes as under:

> 3. Additional protection to Judges.-(1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-section.(2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.
>
> (Emphasis Supplied)

As observed hereinabove, the alleged act of the petitioner cannot be termed as

the same was done by him in acting or purporting to act in the discharge of his official or judicial duty or function. The contention of Shri. Rathore, in this count is also negated.

9B. Shri. Rathore has drawn attention on a judgment delivered by another single Bench of this court in *Balram Vs. Aswani Kumar Yadav, Tahsildar* reported in 2001(2) MPWN 154 in which it has been observed that Nayab Tehsildar while passing an order under section 110(4) of M.P. Land Revenue Code is a judge and entitled to protection under section (3)(1) of the aforementioned act. In this case Nayab Tehsildar had passed an order under aforementioned provisions of the M.P. Land Revenue Code and the allegation against him was that he also added and abetted the crime committed by one Ramesh Kumar, the main accused. The facts, being different, this observation cannot help the contention of Shri. Rathore that the petitioner is also entitled to such protection.

10. As observed hereinabove, whether the alleged act is covered under section 220 of IPC or not, the same can be decided after recording of the evidence during trial. No observation on this point is required at this stage. But in my considered opinion, the learned Magistrate has committed an error in not paying attention to the provisions of section 351/354 and 509 of IPC. On perusal of the allegation, prima facie, it appears that the offence under section 354 and 509 of IPC is also made out against the petitioner for the same he could have been charged. Learned Magistrate may hear the parties and to pass appropriate order in this regard.

11. It would not be out of reference to mention, that despite reporting the matter by the respondent to the higher authorities supported by an affidavit, no appropriate steps were taken or made known to the respondent. Vide para 4 of the complaint, it appears that the respondent had sent a complaint in the shape of an application duly supported by an affidavit to higher administrative officers. Vide para 4 of the order dated 30.10.95, passed by the learned Magistrate, it also appears that the copies of the aforementioned complaint alongwith an affidavit on 17.08.05 were sent to the higher authorities but no action has been taken till date. Although these two documents have not been filed by any of the parties before this Court yet by this observation of the learned Magistrate, their existence does not remain in dispute. It is further observed by the learned Magistrate that this complaint was sent to the Chief Minister, Collector and other officers. The complaint, if it is made by the respondent to the aforementioned higher authorities with regard to the aforementioned alleged allegations by a woman against a responsible officer of the State, it was expected from the authorities to take effective steps by them and also to inform the respondent. Had there been effective steps taken by the authorities, there could have been chances of avoiding the complaint to the court.

12. On perusal of the copy of the order sheet dated 21.09.94, it appears that after recording the statement of the complainant, a report was called from the police station Kolaras. Vide order sheet dated 29.09.95, it appears that report was not sent by the police. By way of compulsion, it was directed by the learned Magistrate to write to the

Superintendent Of Police. However, it is not clear on record as to whether this communication was sent and/or received by the S.P. or not? However, in absence of the appropriate steps, the respondent has been compelled to involve herself in the litigation, to file the complaint and thereby increased the burden of the court also. To my surprise, despite writing the matter to the Superintendent of Police, the lawful order of the court was not complied with by the police authorities. On perusal of the provision of section 156(3) and 202 of Cr.P.C., a Magistrate is empowered to direct the police to investigate into the matter and to submit the report. At this stage, it is not required to observe as to whether the order dated 21.09.94 passed by the learned Magistrate directing the police to investigate and submit the report, was covered under section 156(3) or 202 of Cr.P.C. It is suffice to observe that in whatever the provisions this order is covered, it was the binding duty of the police to comply the order of the Magistrate and to submit the report. Non-compliance of the same is a punishable offence under Indian Penal Code as well as under the Police Act and Regulations. It is not required for this court to observe at this stage as to what, if any, the offence was committed. It is left to the magistrate to decide. I cannot resist to observe that despite non-compliance of the order of the Magistrate by the police, the learned Magistrate did not take any legal action against the erring police officers. By issuance of show cause notice to the erring police officers including Superintendent Of Police, in case, the order was served on him, explanation was to be obtained and in case no explanation was received or found not satisfactory, it was required for the learned Magistrate to order for lodging of a criminal prosecution against the erring officers in accordance with law as per the procedure laid down in Cr.P.C. As the case will remain pending before the learned Magistrate for trial, it is for the learned Magistrate to decide as to whether any action requires now or not.

13. The petition is also for quashing the criminal proceedings based on complaint as a whole. In this regard, Shri. Rathore, learned counsel for the petitioner has argued that the complaint has been filed after a period of one month, hence, the truthfulnessof the allegations is doubtful. It is true that with regard to the incident happened on 17.08.95, this complaint has been filed on 21.09.95, but as observed hereinabove the respondent had immediately taken steps and reported the matter to the higher authorities by way of complaint in the shape of an application duly supported by an affidavit. As such, at this stage, this delay neither can be considered as fatal for the prosecution nor on this count, the complaint is required to be quashed.

14. In view of the above discussion, the petition is allowed so far as the offence punishable under Section 500 of IPC is concerned and criminal case No.188/04 is quashed with regard to this offence. For the rest, the petition is disposed of with the aforementioned observation.

Petition allowed.

I.L.R. [2007] M. P., 1731

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice B. M. Gupta

25 July, 2007

O.P.GUPTA .... Applicant*

vs.

STATE OF M.P. .... Non-applicant

Prevention of Corruption Act, (XLIV of 1988) - Section 2(i)(c) - Public Servant - Accused working as Executive Engineer, M.P. Vidyut Mandal - Accused facing trial for offences under Section 7, 13(1)(d) & 13(2) of Prevention of Corruption Act - Officers of State Electricity Board are required to carry out public functions - They are public authorities - Officers of Electricity Board are Public Servant and can be prosecuted for such offences - Petition dismissed. (No Para)

Cases Referred :

Naresh Kumar Madan Vs. State of Maharashtra; Cr.A. No. 519/07 (SC), *Bimal Kumar Gupta Vs. Special Police Establishment Lokayukt;* 2001(1) MPHT 330, *State of Maharashtra VS. Laljit Rajshi Shah and others;* AIR 2000 SC 937.

N.P. Dwivedi and *S.K. Tiwari,* for the Applicant

V.S. Chaturvedi, P.P. for the State

ORDER

B. M. Gupta, J. :–Undisputed facts of the case are that the petitioner is facing trial for the offences punishable under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1998 (hereinafter referred as the "Act") in Special Case No.1/99 pending in the Court of Special Judge (Prevention of Corruption Act), Morena.

2. The allegation against the petitioner is that on 23rd February 1998 he was posted as Executive Engineer M.P. Vidyut Mandal at Sheopurkalan. He inspected oil mill of complainant Babulal and threatened him to initiate a recovery proceeding for Rs.10,000/-against him. In this matter the petitioner received Rs.1,000/-as illegal gratification from the complainant on the ground that he will favour the petitioner in the case. After framing of the charge on 10th January 2000, petitioner moved an application before the Learned Judge praying therein to discharge him as he is not a Public Servant under the provisions of the Act, hence, he cannot be prosecuted for the aforementioned offences. His application being rejected vide order dated 18th June 2004, this petition has been preferred by him.

3. The only question for consideration is as to whether the petitioner is a Public Servant under the Act and he can be prosecuted for the aforementioned offences ?

4. In a recent pronouncement in the case of *Naresh Kumar Madan vs. State of Maharashtra* judgment dated 10th April 2007 passed in Criminal Appeal No.519/07,

*M.Cr.C. No. 3368/04 (ग्वा)

the Apex Court has observed that the officers of the Electricity Board are Public Servant and can be prosecuted for such offences. The relevant extracts of the judgment are as under:-

"Appellant is a Civil Engineer. He is employed in the Madhya Pradesh Electricity Board.....

He allegedly took illegal gratification from the complainant for the purpose of grant of an electrical connection.....

A charge-sheet was filed against him under Section 7 read with Section 13(1)(d)/13(2) of the Prevention of Corruption Act, 1988 (for short 'the 1988 Act'). An application was filed by him contending that he being not a public servant, his prosecution under the 1988 Act was not maintainable. The learned Trial Judge rejected the said contention. A Revision Application was filed by the appellant thereagainst before the High Court, which was dismissed by the learned Single Judge of the High Court by reason of the impugned judgment dated 02.08.2006.

Before the courts below as also before us, the contention of Appellant has been that 'public servant' having been defined in Section 81 of the 1948 Act, the same does not satisfy the requirements of the definition as contained in Section 21 of the Indian Penal Code. Strong reliance, in this behalf, has been placed on *Bimal Kumar Gupta v. Special Police Establishment Lokayukt* [2001 (1) MPHT 330 : (2001) 3 JLJ 2], wherein it has been held that employees of the Madhya Pradesh State Electricity Board are not public servants.

The officers of the State Electricity Board are required to carry out public functions. They are public authorities. Their action in one way or the other may entail civil or evil consequences to the consumers of electrical energy.....

We, therefore, fail to see any reason as to why the appellant would not answer the description of public servant within the provisions of the said Act.....

The Prevention of Corruption Act, 1947 was repealed and enacted in the year 1988. The definition of 'public servant', as contained in Section 2(c) thereof, is a broad based one. Reliance was placed by the learned Judge in the case of *State of Maharashtra v. Laljit Rajshi Shah and Others* [AIR 2000 SC 937]. Therein the court was dealing with a case of a member of a cooperative society. It was not dealing with the case of an employee of a statutory corporation. The said decision, therefore, has no application to the facts of the present case.

For the reasons aforementioned, we find no merits in this appeal, which is accordingly dismissed."

5. After considering the definition of Public Servant under Section 2 (i)(c) of the Act as well as the definition of Public Servant given in Section 21 of the Indian Penal Code and also the definition of Public Servant given in Section 81 of the Electricity (Supply) Act 1948, the Apex Court has observed as quoted hereinabove.

6. During the course of argument Shri Dwivedi on behalf of the petitioner has cited the judgment of *State of Maharashtra vs. Laljit Rajshi Shah and others* 2000 SCC (Cri.) 533 and the case of *Bimal Kumar Gupta vs. Special Police Establishment Lokayukt* 2001(1) MPHT 330 in favour of petitioner, but vide aforementioned judgment in *Naresh Kumar* (supra), the Apex Court has observed that the case of *Bimal Kumar Gupta* (supra) does not lay down the correct law. With regard to the earlier judgment of the Apex Court in the case of *Laljit Rajshi Shah* (supra), the Apex Court has observed that in that case court was dealing with a case of a Member of Cooperative Society. It was not dealing with the case of an employee of Statutory Corporation. The said decision, therefore, has no application to the facts of the present case.

7. In view of this the impugned order passed by the Learned Judge does not appear erroneous. There appears no abuse of the process of the court. Consequently, the petition is dismissed.

Petition dismissed.

I.L.R. [2007] M. P., 1732

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Rakesh Saksena

6 September, 2007

AARTI ARYA .... Applicant*

vs.

STATE OF M.P. .... Non-applicant

A. Penal Code, Indian (XLV of 1860) - Section 306 - Abatement to commit suicide - Applicant/wife belonging to Upper Caste married to Deceased belonging to Scheduled Caste Community - Marriage opposed by family members - Deceased working on the post of Civil Judge - Applicant was in Bhopal for taking coaching when deceased consumed some poisonous substance at Itarsi - Deceased was taken to hospital and applicant was informed - Deceased was treated at Itarsi and Bhopal but could not be saved - Mother of deceased stated that applicant used to quarrel with deceased on trivial matters - Father of deceased stated that deceased had informed him that he had consumed milk containing poison as he had some altercation with his wife - Sister of deceased stated that applicant did not behave with her parents respectfully - Applicant did not like deceased to go at parents house -

*M.Cr.C.No. 5778/2007(J)

Relations between applicant and deceased were not cordial - Held - Instigate denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite - Presence of mens rea is necessary concomitant of instigation - Nothing on record to show that applicant wanted or intended that her husband should commit suicide - She was married knowing full well that he belonged to Scheduled Caste - No offence under Section 306 of I.P.C. made out - Proceedings of criminal case quashed.

The word 'instigate' denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite. Presence of mens rea, therefore, is the necessary concomitant of instigation. It is common knowledge that words uttered in a quarrel in a spur of the moment cannot be taken to be uttered with mens rea. It is just a fit of anger and emotional distress, without intending any consequence.

On examining the allegations made against the petitioner in the evidence and material adduced by the prosecution with the charge sheet, it is apparent that there is absolutely nothing to indicate that petitioner in any manner wanted or intended that her husband (deceased) should commit suicide. She had married to Mukesh knowing full well that he belonged to scheduled caste of the community. They had lived happily for a long period. A child was also born out of wedlock. The petitioner is an educated lady and with a view to appear in the examination of civil judge she had temporarily left her husband's house for joining coaching at Bhopal. There does not appear anything to show that deceased did not like her to appear in such examination. Merely because the petitioner objected her husband to keep close association with her parents and other family members, it cannot be assumed that she wanted that he should commit suicide. Even if there had been frequent altercations and quarrels between them on that count, it cannot be held that she incited or instigated her husband to commit suicide.

(Paras 12 & 15)

B. Criminal Procedure Code, 1973 (II of 1974) - Section 482 - Scope - Power can be exercised where allegations made in F.I.R. or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence.

Scope of exercise of powers under Section 482 of the Code was also considered in the case of State of Haryana v. Bhajanlal-1992 Supp. (1) SCC 355, wherein in para 102 it was held that those powers can be exercised where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. Similarly, the powers can be exercised in a case where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. (Para 14)

Cases Referred :

Sanju @ Sanjay Singh Sengar Vs. State of Madhya Pradesh; AIR 2002 SC 1998, *R.P. Kapoor Vs. State of Punjab;* AIR 1960 SC 866, *State of Haryana Vs. Bhajanlal;* 1992 Supp (1) SCC 355.

Satish Sharma, with *Shri Abhay Pandey,* for the Applicant.
Pramod Choubey, G. A. for the State.

ORDER

RAKESH SAKSENA, J. :–Applicant has filed this petition under Section 482 of the Code of Criminal Procedure for quashing proceedings arising out of Crime No. 206/07 of Police Itarsi, now pending before the Judicial Magistrate First Class, Itarsi, as Criminal Case No. 496/06, for the offence under Section 306 of IPC.

2. The facts as alleged by the prosecution are that petitioner who belonged to an upper caste family (Dubey) married to Mukesh Arya (deceased) who belonged to scheduled caste community in the year 2003. Their marriage was opposed by their family members. Deceased was working on the post of Civil Judge. At the relevant time, he was posted as Civil Judge at Itarsi. Petitioner's in-laws did not approve the marriage. A child was born out of the wedlock in the year 2004. Petitioner was well educated and wanted to appear in the examination for the post of Civil Judge to be held in the year 2007. For the purpose of taking coaching, she was temporarily residing at Bhopal with her parents. On 15.3.2007, in the night, Mukesh Arya (deceased) consumed some poisonous substance. He was taken to hospital at Itarsi, where he was treated by Dr. Sunil Mantri and Dr. Tikariya, but they suggested that he should be taken to Bhopal, then Mr. Dinkar and other fellow judges took Mukesh Arya to Bhopal and got him admitted in Ayushman Hospital. In the same night, petitioner was informed about the serious condition of her husband. Despite all efforts and the treatment, on 18.3.2007, Mukesh Arya expired. Dr. Pramod Shrivastava of Ayushman Hospital sent report to Police Habibganj, Bhopal. On such report, a murg was registered. During murg enquiry, the statements of Kailashibai, mother, Laxmi Narayan, father of the deceased and other witnesses were recorded. On enquiry, it was found that petitioner used to harass the deceased and subjected him to mental cruelty, as she belonged to higher caste and she did not like association of deceased with his parents and relatives. Thus, she abetted deceased to commit suicide. Therefore, a case under Section 306 of IPC was registered against her on 13.4.2007.

3. After investigation, charge sheet was filed before the Court of Magistate.

4. Learned senior counsel Shri Satish Sharma for the petitioner submits that on the basis of evidence and material produced by the prosecution on record, prima-facie no ingredients constituting offence under Section 306 IPC are made out. He submits that in the allegations made by witnesses against the petitioner, no element of provocation, incitement, instigation, inducement or compulsion is found, which could have led the

deceased to commit suicide. Merely trivial domestic skirmishes cannot be said to amount the abetment. Since the basic elements of the offence under Section 107 IPC, which are necessary for constituting offence under Section 306 are absent, no criminal prosecution can be launched against the petitioner.

5. Shri Pramod Choubey, learned Government Advocate, on the other hand, submits that at the present stage the evidence and material adduced by the prosecution cannot be critically and analytically scrutinized so as to find whether the evidence on record is sufficient for conviction of the petitioner. The evidence of witnesses recorded by police during investigation clearly discloses that petitioner had abetted the deceased to commit suicide.

6. On perusal of the written report submitted by Smt. Kailashi Arya, mother of deceased, and her statement recorded under Section 161 of Cr.P.C. it is seen that petitioner used to insult Mukesh Arya by talking in objectionable and insulting manner. Mukesh Arya was very much frustrated by marrying petitioner. While he was in the hospital, he told her that he was fed up with Aarti and there was no aim left for his life, therefore, he was going. For death of her son, petitioner was responsible. Petitioner used to quarrel on trivial matters with her son. If Mukesh talked to them, petitioner objected to it saying that they were not of the same standard. They did not even know the etiquettes of decent living. On such talks, frequent altercations took place between them. When she enquired from the petitioner about the cause for Mukesh's taking poison, she told her that there had been some altercation between them at about 10.00 O'clock in the night. When the petitioner was at hospital, she instructed to a peon to remove the glass from which the Mukesh Arya consumed the milk. Kailashibai, in her statement disclosed that from some time petitioner was living with her parents at Bhopal in MACT quarters, her son was living alone at Itarsi. In the night of 16.3.2007 petitioner had informed them on telephone that the condition of Mukesh was serious and he was brought in Ayushman Hospital, Bhopal. She had asked them to reach at hospital. At hospital, Aarti had asked them to not to say anything to anybody, as several people including videographers were there. According to this witness, at the time of cremation of the dead body, petitioner and her family members did not come to their house. Only petitioner had come for a few minutes at the cremation ground.

7. Laxmi Narayan, father of deceased stated that on 16.3.2007 when he was at his home, at about 1.00 O'clock, he received telephonic call from Aarti that condition of Mukesh was serious and she asked him to reach Ayushman Hospital. When he reached at the hospital, Mukesh was not talking. After about two hours he could speak. He told him that he had drunk milk containing poison because there had been some altercation between him and his wife on telephone. He had consumed poison due to tension.

8. Smt. Vinita Sunehre, sister of deceased stated that petitioner did not behave with her parents respectfully. She did not like Mukesh to go at parents house. She even

used abusive words for Mukesh. The relations between Mukesh and petitioner were not cordial. They frequently used to quarrel. When she asked the petitioner, she told her that such quarrels were frequent, but she did not know as to why Mukesh took such a serious step. She insulted her too.

9. Witness P.N. Dinkar, who is also a member of Judicial Service, stated that at about 10.40 p.m. Mukesh informed him on telephone that he was not feeling well and he wanted to be taken to hospital. He went to the house of Mukesh and took him to hospital. Dr. Sunil Mantri, Dr. Tikariya and Dr. Dayal treated him, but suggested that he should be taken to any hospital at Bhopal. When he reached hospital at Bhopal, petitioner, her brother and father were present there.

10. Witness Ram Narayan, who happened to be a peon in the Court of Judicial Magistrate, Itarsi, stated that the petitioner was residing at Bhopal since last one month, he, therefore, was cooking food for deceased. On 15.3.2007, deceased and another Judge Mr. Dinkar had gone to Hoshangabad. He had cooked the food for deceased and kept inside the house as one key of the house was with him. When he came at the house on 16.3.2007, the house was sealed. He came to know that Shri Arya was admitted in the hospital at Bhopal.

11. The question before this Court is as to whether on the basis of above evidence an offence of abetment to commit suicide is made out against the petitioner. "Abetment" is essential ingredient for making out the offence under Section 306 of IPC. Section 107 of IPC defines 'abetment' . Section 107 reads as under:

> **"107. Abetment of a thing.**-A person abets the doing of a thing, who-
>
> **First**-Instigates any person to do that thing; or
>
> **Secondly.**-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> **Thirdly.**-Intentionally aids, by any act or illegal omission, the doing of that thing."

12. In case of *Sanju @ Sanjay Singh Sengar v. State of Madhya Pradesh*-AIR 2002 SC 1998 The Apex Court considered several decisions and held that the charge for an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased, particularly when ingredients of abetment are not attracted on the statements of deceased or witnesses. The Apex Court considered as under:-

> "9. In *Swamy Prahaladdas v. State of M.P. & Anr.*, 1995 Supp. (3) SCC 438, the appellant was charged for an offence under Section 306 I.P.C. on the ground that the appellant during the quarrel is said to

have remarked the deceased 'to go and die'. This Court was of the view that mere words uttered by the accused to the deceased 'to go and die' were not even prima facie enough to instigate the deceased to commit suicide.

10. In *Mahendra Singh v. State of M.P.* 1995 Supp. (3) SCC 731, the appellant was charged for an offence under Section 306, I.P.C. basically based upon the dying declaration of the deceased, which reads as under:

"My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of those reasons and being harassed I want to die by burning."

11. This Court, considering the definition of 'abetment' under Section 107, I.P.C., found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased. This Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.

12. In *Ramesh Kumar v. State of Chhattisgarh* (2001) 9 SCC 618, this Court while considering the charge framed and the conviction for an offence under Section 306, I.P.C. on the basis of dying declaration recorded by an Executive Magistrate, in which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go and that thereafter she had poured kerosene on herself and had set fire. Acquitting the accused this Court said:

"A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged and such petulance discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide to commit suicide, The conscience of the court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty."

It was ultimately found that even if accused did tell the deceased 'to go and die', that itself did not constitute the ingredient of 'instigation'. The word 'instigate' denotes

incitement or urging to do some drastic or unadvisable action or to stimulate or incite. Presence of mens rea, therefore, is the necessary concomitant of instigation. It is common knowledge that words uttered in a quarrel in a spur of the moment cannot be taken to be uttered with mens rea. It is just a fit of anger and emotional distress, without intending any consequence.

13. In the present case, it has been stated by Kailashibai and also by Ram Narayan that petitioner was residing at Bhopal since about a month, whereas deceased was living at Itarsi. At the time of incident also deceased was not with the petitioner. Even if some hot altercation or quarrel took place between them on telephone, in the absence of any material to indicate the nature of conversation, it cannot be held that the petitioner incited or instigated the deceased to commit suicide.

14. In case of *R.P. Kapoor v. State of Punjab*-AIR 1960 SC 866, the Supreme Court summarized some categories of cases in which the criminal proceedings can be quashed:

> "(1) Where it manifestly appears that there is a legal bar against institution or continuance e.g. Want of sanction;
>
> (2) Where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;
>
> (3) Where the allegations constitute an offence, but there is no legal evidence adduced or evidence adduced clearly or manifestly fails to prove charge. It has however been emphasized that while exercising jurisdiction under Section 482 of the Code High Court would not ordinarily embark upon an enquiry whether evidence in question is reliable or not or whether at a reasonable appreciation of its accusation would not be sustained. That is the function of the trial Court. Judicial process should not be an instrument of oppression or needless harassment.

Scope of exercise of powers under Section 482 of the Code was also considered in the case of *State of Haryana v. Bhajanlal*-1992 Supp. (1) SCC 355, wherein in para 102 it was held that those powers can be exercised where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. Similarly, the powers can be exercised in a case where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

15. On examining the allegations made against the petitioner in the evidence and material adduced by the prosecution with the charge sheet, it is apparent that there is

absolutely nothing to indicate that petitioner in any manner wanted or intended that her husband (deceased) should commit suicide. She had married to Mukesh knowing full well that he belonged to scheduled caste of the community. They had lived happily for a long period. A child was also born out of wedlock. The petitioner is an educated lady and with a view to appear in the examination of civil judge she had temporarily left her husband's house for joining coaching at Bhopal. There does not appear anything to show that deceased did not like her to appear in such examination. Merely because the petitioner objected her husband to keep close association with her parents and other family members, it cannot be assumed that she wanted that he should commit suicide. Even if there had been frequent altercations and quarrels between them on that count, it cannot be held that she incited or instigated her husband to commit suicide.

16. Accepting the allegations made against the petitioner by the prosecution as it is, they do not constitute the offence of abetment by her to commit suicide. In this view of the matter, this Court is of the view that there is absolutely no material on record, sufficient for continuing the criminal prosecution against the petitioner. The factual position clearly shows that the criminal proceeding pending against the petitioner is nothing but a sheer abuse of process of law, which should be quashed by exercising powers under Section 482 of Cr.P.C..

17. Accordingly, this petition is allowed. The proceeding of Criminal Case No. 496/06 for the offence under Section 306 of IPC, pending in the Court of Judicial Magistrate First Class, Itarsi, against the petitioner, is quashed.

Petition allowed.

I.L.R. [2007] M. P., 1741

SUPREME COURT OF INDIA

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

3 October, 2007

MOTI LAL & anr. ...Appellants*

vs.

STATE OF M.P. ...Respondent

Penal Code, Indian (XLV of 1860)–Section 302–Murder–Intention–Dispute arose between parties on throwing mud by son of appellant No. 1–On complaint by deceased Munnilal appellants told him that their children would act in that fashion only–Munnilal assaulted by means of axe–Baldeo reached on spot when he too was assaulted–Munnibai was set on fire–Munnilal and Baldeo died on spot whereas Munnibai succumbed to injuries later on–Trial Court imposed death sentence–High Court convicted appellants holding that free fight between parties had taken place and acquitted other accused persons for offence under Section 302–Held–No case made out that injuries were inflicted by appellants in their self-defence–Manner in which offences have been committed was gruesome–Not only Munnilal was killed but whosoever came to save was not spared–Not a case where appellants can be absolved of charges of murder–Appeal dismissed.

It is therefore, difficult to accept the contention of learned counsel for the appellant that they are not guilty of commission of the said offence. The question as to whether they had any intention to kill or not must not engage our serious attention as in this case existence of any common intention has been ruled out. The High Court proceeded to record its reasons only on the basis of individual acts of the appellants. No case has been made out that the injuries were inflicted by the appellants in their self-defence. In absence of any such case having been made out, injuries suffered by some of them pales into its significance. Three persons lost their lives. The manner in which the offences have been committed was gruesome. They not only killed Baldev and Munnilal but also dragged Munnibai to her house, poured kerosene and set her on fire. Whosoever had come to save was not spared. Narbadiya Bai and Amritlal had also been assaulted. Even the children were not spared. (Para 20)

JUDGMENT

The Judgment of the Court was delivered by S.B. SINHA, J. :–Appellants–Motilal and Santosh Kumar are before us aggrieved by and dissatisfied with the judgment of conviction and sentence passed by a Division Bench of the Madhya Pradesh High Court dated 13.5.2004.

2. The parties were neighbours. Their houses were divided only by a wall. They

*Criminal Appeal No. 1268/2006

bore animosity with each other. The sequence of events started with defaecation by a child-Nitin in the house of Motilal.

3. On 4.7.1999 at about 9.30 a.m. when Nitin son of deceased Munnilal was playing near a tap situated close to his house, Pushpendra son of Motilal put some mud on his clothes. Nitin went to his house and informed his father Munnilal. Munnilal came to the house of Motilal and complained in regard to the conduct of Pushpendra. Motilal, Santosh and Hariram allegedly told him that their children would act in that fashion only. Narbadiya Bai-P.W.-3 reached the spot and told them that they always picked up quarrels. Appellants herein allegedly started inflicting axe blows on Munnilal-since deceased. Narbadiya Bai tried to save him, but allegedly one Jamuna Bai inflicted a blow on her by means of an iron pipe. Appellants Kalli Bai and Guddi Bai also hurled stick blows on Narbadiya Bai. Meanwhile Baldev said to have reached at that point of time. Appellants inflicted axe blows on Baldev and Hariram gave a blow of Baka on Baldev. Appellants Kali and Guddi Bai are said to have given stick blows on Baldev. Appellant-Lachhu snatched the axe from Santosh Kumar and dealt a blow on the head of deceased Munnilal.

4. Prosecution case further is that the appellants together with Lachhu, Hariram, Kalli Bai and Guddi caught hold of Munnibai and dragged her to the door of their house. Whereas Motilal brought a can of kerosene and sprinkled kerosene on Munnibai, Santosh put her on fire. When Amritlal, husband of Munnilal tried to save her, Santosh dealt an axe blow on him which Amritlal took on his hand. Amritlal, thereafter, ran away from the place of incident and informed the police. Munnibai in the meantime rushed towards a nearby well and jumped there into. Sita-daughter of Amritlal reached the place of occurrence. She was pushed into a drain by Santosh. Similar treatments were meted out to Devshree and other children.

5. First information report was lodged at about 11 a.m. on the same day. All the accused persons were arrested at the spot. In fact, the arrival of police saved further deterioration of the situation.

6. Munnilal and Baldev died on the spot. Munnibai was rescued from the well. Her dying declaration was recorded. She succumbed to her injuries later on.

7. Charges under Section 302/149 I.P.C., Section 307 and Section 148 were framed against the accused including the appellants here in and others being Jamuna Bai, Guddi Bai, Lachhu, Bariram and Kalli Bai.

8. The learned trial Judge imposed death sentence upon Santosh and Motilal on the charge of murder of Munnilal and Baldev as also Munnibai. They were also sentenced under Section 307 of the I.P.C. for attempt to murder Narbadiya Bai and Amritlal. Other accused were also charged and convicted under Section 324 I.P.C. for causing hurt to the children.

9. The High Court, however, by reason of the impugned judgment opined that a free fight between the parties had taken place. It proceeded to examine the case on the basis of the actual role played by each of the accused. Upon analysing the evidence, it was opined that only appellants aer guilty of commission of offences mentioned hereinbefore. Apart from convicting Jamuna Bai for attempt to murder Narbadiya Bai and Hariram were convicted for causing hurt to Devshree under Section 324 I.P.C. other accused were acquitted.

10. As indicated hereinbefore, whereas the judgment of conviction under Section 302 IPC and Section 302/149 was confirmed against Santosh Kumar and Motilal but their sentence was reduced from that of death to rigorous imprisonment for life. Santosh Kumar was also convicted for commission of an offence punishable under Section 307 I.P.C. for attempt to commit murder of Amritlal and sentenced to undergo rigorous imprisonment for seven years.

11. Learned counsel appearing on behalf of the appellants would submit that keeping in view the fact that there had been a free fight, the appellants could not be said to have any intention to kill the aforementioned persons. Learned counsel in this behalf drew our attention to the testimony of Dr. D.K. Jain-D.W.2 as also Dr. Vijay Parmar-D.W.1, who had proved the injuries suffered by the accused persons.

12. A feeble attempt was also made by the learned counsel to content that as the prosecution have not explained the injuries on the part of the accused persons, the entire prosecution case must fail.

13. Learned counsel appearing on behalf of the State, on the other hand, submitted that the sequence of events as noticed by the learned Sessions Judge itself as also by the High Court clearly establish the cruel manner in which an attempt has been made not only to kill three persons but to attempt to murder two others and cause injuries to the children.

14. Learned counsel would submit that the High Court had committed a serious error in acquitting the other accused persons of the serious charges made against them. It was submitted that had the police not intervened, the number of deceased might have increased. It was pointed out that Munnibai was not only dragged by the accused to their own house, a can of kerosene was brought from inside the house and sprinkled on her body and fire was lit. She only out of desperation jumped into the well and could be rescued only after the police arrived.

15. Prosecution in support of its case, examined a large number of witnesses. Amongst them, Narbadiya Bai (P.W.-3) was widow of deceased Baldev, mother of deceased Munnilal and mother-in-law of deceased Munnibai, gave her version in regard to the incident in question. She fully supported the prosecution case. She gave details as to how Baldev and Munnilal were done to death and Munnibai was set on fire. She also establishd that when Amritlal tried to save Munnibai was hit by an axe blow by

Santosh. When Sita and Devshree reached there, Santosh pushed Sita into a drain. Devshree also received the same treatment from him. According to her, Hari Ram also dealt a blow of Baka on the thigh of Devshree.

16. Amritlal is another prosecution witness. He was offering his prayers in his house at about 10.30 a.m. on the relevant day. When he heard some cries, he came out and saw the occurrence. Sarita (P.W.-8) was also an eye witness.

17. The High Court, however, despite such evidences, proceeded on the basis that injuries on the persons of the accused had not been explained. As Narmadiya Bai did not name Jamuna Bai, Guddi Bai and Hari Ram as assaulting anybody, they were given the benefit of doubt.

18. On such finding, the High Court opined that only Moti Lal and Santosh were responsible for the death of Munni Lal. Similarly, as regards the death of Baldev, Santosh and Moti Lal were found to be guilty.

19. In regard to setting Munnibai on fire, again the High Court proceeded on the basis that Santosh had dragged Munnibai and Moti Lal poured kerosene on her. Participation of other accused in his said act was not accepted. The High Court was of the opinion that the prosecution could not establish individual act of any other appellant, so far as the attempt to commit murder of Narbadiya is concerned. However, in regard to Amritlal, Santosh was found responsible for attempt to commit his murder.

20. It is therefore, difficult to accept the contention of learned counsel for the appellant that they are not guilty of commission of the said offence. The question as to whether they had any intention to kill or not must not engage our serious attention as in this case existence of any common intention has been ruled out. The High Court proceeded to record its reasons only on the basis of individual acts of the appellants. No case has been made out that the injuries were inflicted by the appellants in their self-defence. In absence of any such case having been made out, injuries suffered by some of them pales into its significance. Three persons lost their lives. The manner in which the offences have been committed was gruesome. They not only killed Baldev and Munnilal but also dragged Munnibai to her house, poured kerosene and set her on fire. Whosoever had come to save was not spared. Narbadiya Bai and Amritlal had also been assaulted. Even the children were not spared.

21. In this view of the matter, we are of the opinion that it is not a case where the appellants can be absolved of the charges of murder of Munnilal, Baldev and Munnibai.

22. The appeal is dismissed. However, having regard to the fact that the State has not preferred any appeal against the judgment of acquittal passed by the High Court against the said accused persons, it is not possible for us to hold that it was not a case of free fight or the other accused also had any hand therein.

Appeal dismissed.

I.L.R. [2007] M. P., 1745

WRIT APPEAL

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

31 October, 2007

KAMLESH GOUR ...Appellant*

Vs.

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

Prisoners Act (III of 1900)–Prison Rules, M. P., 1968 are replaced by M.P. Prisoner's Leave Rules, 1989–After the Rules 1989 have come into force, the releasing authority will have to be guided by Rule 4 of the Rules 1989, while considering grant of leave under sub-section (1) of Section 31-A of the Prisoners Act, 1900 as amended by the Prisoners (M.P. Amendment) Act, 1985.

It will be clear from Clause (c)of Rule 4 quoted above that the prisoners shall be granted leave under sub-section (1) of Section 31-A of the Act if the releasing authority is satisfied that leave may be granted without detriment to the public interest. In other words, whether the releasing authority is of the opinion that leave if granted to the prisoners would be detrimental to the public interest, he may reject the application for leave. In the present two cases, on a reading of the orders passed by the releasing authority rejecting the applications of the appellants for parole, we find that the releasing authority has taken a view that if the appellants are released, the peace in the village/ community to which they belong will be in danger. The rejection of the applications for paroles of the appellants in the two cases by the releasing authority therefore is in accord with the provisions of sub-section (1) of Section 31-A read with 4 of the Rules, 1989.

In the Full Bench judgment in *Ganga Charan v. State of M.P. and others* (supra) cited by Mr. Bhargava, reliance has been placed on the MadhyaPradesh Prisons Rules, 1968 .and in particular Rule 358 thereof which requires consideration of full information regarding the character of the crime committed by the prisoner, his conduct in prison and the probability of his reverting after release to criminal habits or instigating others to commit crime. Rule 358 of the Madhya Pradesh Prison Rules, 1968 have been replaced in so far as leave to prisoners are concerned by the Rules, 1989. After the Rules 1989 have come into force, the releasing authority will have to be guided by Rule 4 of the Rules, 1989 while considering grant of leave under sub-section (1) of Section 31-A of the Prisoners Act, 1900 as amended by the Prisoners (Madhya Pradesh Amendment) Act, 1985. (Paras 7 & 8)

Cases Referred :

Ganga Charan Vs. State of M.P., 1994 JLJ 795, *Jeewan Singh Verma Vs. State of M.P. & anr.;* 2002 (1) MPLJ 347

D.D. Bhargava, for the petitioner

Rahul Jain, Dy. G.A., for the respondents

* W.A. 1428/07.

JUDGMENT

The Judgment of the Court was delivered by **A.K. PATNAIK. C. J.** :–The two appeals have been filed under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Peeth Ko Appeal) Adhiniyam, 2005 against the orders passed by the learned Single Judge in W.P. No. 18247/2006 and W.P. No.7392/2007 on 27.8.2007.

2. The appellant in W.A. No. 1428/2007 was convicted under Section 302/149 IPC and sentenced to RI for life in Sessions Trial No.203 by the Additional Sessions Judge, Sehore on 1.1.2005. After completion of 2 years and two months and 20 days of imprisonment, the appellant filed an application for parole but the Collector, Sehore by order dated 21.8.2006 rejected the application. Aggrieved, the appellant filed W.P. No. 18247/2006 against the order of rejection of his application for parole, but by the impugned order dated 27.8.2007 the learned Single Judge has dismissed the writ petition after holding that the reasons assigned in the impugned order rejecting the application for parole were good reasons.

3. The appellant in W.A. No. 1429/2007 was convicted under Section 302 of the IPC and sentenced to life imprisonment by the Additional Sessions Judge, Shahdol on 13.3.1999. After completing more than two years of imprisonment, the appellant filed an application for parole but the application was rejected by order dated 16.11.2006. The appellant filed W.P. No.7392 of 2007 but by the impugned order dated 27.8.2007, the learned Single Judge dismissed the writ petition after holding that there is no illegality found in the order rejecting the application for parole."

4. Mr. D.D. Bhargava, learned counsel for the appellants submitted that in a Full Bench judgment of this Court in *Ganga Charan vs. State of M.P. and others,* 1994 JLJ 795 it has been held that full information regarding the character of the crime committed by the applicant, his conduct in prison and the probability of his reverting after release to criminal habits or instigating others to commit crime is required to be considered under Rule 358 of the Madhya Pradesh Prisons Rules, 1968, but in this case the orders of rejection would show that these factors have not been considered by the authority while rejecting the application for parole. He also cited the decision of a learned Single Judge of this Court in *Jeewan Singh Verma vs. Slate of M.P. and another,* 2002(1) MPLJ 347 and submitted that the conduct of the applicant in the prison has to be considered while considering the application for parole. Mr. Bhargava argued that since the conduct of the appellants in prison has not been considered by the authorities, the orders of rejection passed in both these cases are bad in law.

5. The Prisoners Act, 1900 as amended by The Prisons (Madhya Pradesh Amendment) Act, 1985, has made provisions in Part Vl-A on leave and emergency leave to prisoners. In Part Vl-A, Section 31-A provides for grant of leave to prisoners

and Section 31-B provides for power to grant leave to prisoners on the ground of emergency. Since the appellant in this case has not applied for parole on any ground of emergency, Section 31-B is not relevant case and instead Section 31-A is relevant for deciding this case. Sub-section (1) of Section 31-A is quoted hereinbelow:

> 31-A. **Grant of leave to Prisoners** -(1) Subject to the provisions to this part and to such conditions as may be prescribed, the State Government or any authority to which the State Government may delegate its powers in this behalf may grant have to any prisoner who has been sentenced to a term of imprisonment of not less than three years for a period not exceeding twenty-one days in a year, excluding the time required for journeys to the first place of his visit immediate after departure from the prison and from the place of last visit to the person back.

6. A reading of sub-section (1) of Section 31-A of the Prisoners Act, 1900 as amended by The Prisoners (Madhya Pradesh Amendment) Act, 1985 quoted above would show that leave can be granted to prisoners under the said provision subject to the provisions of Part Vl-A as well as such conditions as may be prescribed. Section 31-E is titled "power to make rules" and sub-section (1) of Section 31-E provides that the State Government may make rules for carrying out the purposes of Part Vl-A and sub-section (2) of Section 31-E states that in particular and without prejudice to the generality of the power under sub-section (1), such rules may provide for all or any of the matters mentioned therein. Under Clause (b) of sub-section (2) of Section 31-E, the State Government may make rules providing the conditions for grant of leave under sub-section (1) of Section 31-A. In exercise of such power under Section 31-E, the State Government has made the Madhya Pradesh Prisoner's Leave Rules,1989 (for short the **'Rules, 1989'**). Rule 4 of the Rules, 1989 reads as follows:

> **4. Condititons of Leave.-** The prisoners shall be granted leave under sub-section (1) of Section 31-A of the Act on the following conditions, namely :-
>
> (a) He fulfills the conditions laid down in section 31-A of the Act;
>
> (b) He has not committed any offences in jail between the date of application for leave and receipt of the order of such leave;
>
> (c) The releasing authority must be satisfied that the leave may be granted without detriment to the public interest;
>
> (d) He gives in writing to the releasing authority the place or places which he intends to visit during the period of his leave and undertake not to visit any other place during such period -without obtaining prior permission of the releasing authority in that behalf and

(e) He should furnish security to the satisfaction of the releasing authyorty if such security is demanded by the releasing authority.

7. It will be clear from Clause (c)of Rule 4 quoted above that the prisoners shall be granted leave under sub-section (1) of Section 31-A of the Act if the releasing authority is satisfied that leave may be granted without detriment to the public interest. In other words, where the releasing authority is of the opinion that leave if granted to the prisoners would be detrimental to the public interest, he may reject the application for leave. In the present two cases, on a reading of the orders passed by the releasing authority rejecting the applications of the appellants for parole, we find that the releasing authority has taken a view that if the appellants are released, the peace in the village/community to which they belong will be in danger. The rejection of the applications for paroles of the appellants in the two cases by the releasing authority therefore is in accord with the provisions of sub-section (1) of Section 31-A read with 4 of the Rules, 1989.

8. In the Full Bench judgment in *Ganga Charan v. State of M.P. and others* (supra) cited by Mr. Bhargava, reliance has been placed on the MadhyaPradesh Prisons Rules, 1968 .and in particular Rule 358 thereof which requires consideration of full information regarding the character of the crime committed by the prisoner, his conduct in prison and the probability of his reverting after release to criminal habits or instigating others to commit crime. Rules 358 of the Madhya Pradesh Prison Rules, 1968 have been replaced in so far as leave to prisoners are concerned by the Rules, 1989. After the Rules 1989 have come into force, the releasing authority will have to be guided by Rule 4 of the Rules, 1989 while considering grant of leave under sub-section (1) of Section 31-A of the Prisoners Act, 1900 as amended by the Prisoners (Madhya Pradesh Amendment) Act, 1985.

9. The judgment of the learned Single Judge in *Jeewan Singh Verma vs. State of M.P. and another* (supra) cited by Mr. Bhargava, the learned Single Judge has found that the convict in that case was the only son of his mother who was ill and therefore held that refusal to grant parole on a specious plea that he will get himself involved in similar crime, without indicating any kind of antecedent or any other essential facts and accordingly directed the authorities to extend the privilege of temporary release/ parole as per law to the son of the petitioner in that case. This was thus a case of a release of parole on the ground of illness of the mother of the prisoner. No such case has been made out by the appellant for release on parole in the present two cases.

We therefore do not find any merit in the two appeals and we dismiss the same.

Appeal dismissed.

I.L.R. [2007] M. P., 1749

WRIT PETITION

Before Mr. Justice R.K. Gupta

17 October, 2007

ARVIND KUMAR CHATURVEDI ...Petitioner*

vs.

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

Constitution of India–Article 16–Transfer–Recommendation of MLA of different constituency–Effect–Petitioner transferred to Bhopal from Chhatarpur at his own request on 10.7.06–Petitioner was transferred to Chhatarpur and respondent no. 3 from Kannod to Bhopal by order dated 23.12.2006–Transfer order of Petitioner and respondent no. 3 set aside by High Court with liberty to pass fresh order if circumstances so warrant–Petitioner again transferred from Bhopal to Kannod and Respondent no. 3 transferred from Kannod to Bhopal–Held–Record produced by respondents show that local MLA of District Morena had recommended transfer of respondent no. 3 to Bhopal–Respondent no. 3 had remained at Bhopal from the year 2002 till 10.7.06–It is clear that petitioner has been transferred in order to accommodate respondent no. 3 at any cost–Recommendation has not been made by MLA of either Bhopal or Kannod but by MLA of Morena–Transfer has been effected only because of recommendation of MLA of Morena as such transfer is arbitrary–Transfer order of Petitioner and that of respondent no. 3 quashed–Petition allowed.

But in the present case the MLA who has written the letter to the Energy Minister concerned for transfer of the petitioner to create a vacancy for respondent no. 3 does not belong to Kannod or to Bhopal. He is a MLA of Morena where the petitioner nor the respondent no. 3 was posted. Under the circumstances, the judgment passed by the Apex Court wherein it is held that transfers can also be effected on the basis of the complaint or the representation which is submitted to the authority concerned by the local M.L.A. cannot be said to be a *malafide* or arbitrary but in the facts and circumstances of the present case, the M.L.A. who has recommended for transfer of the petitioner does not belongs to the locality where the petitioner or the respondent no. 3 is posted. Apparently, respondent no. 3 has succeeded to inlfuence the local M.L.A. for transfer of the petitioner so that he could be accommodated. The contents of the letter which is filed on record itself indicates the aforesaid aspect. On the basis of the same, I am inclined to hold that the transfer of the petitioner was at the instance of the M.L.A. who does not belong to the locality where these persons were posted. The transfer has been effected only for the reason that the respondent no. 3 has the political milage and connections, therefore, the M.L.A. has attempted for the petitioner's transfer. The only intention behind such attempt is to accommodate responent no. 3 in place of

W.P. 9331/2007 (J)

the petitioner at Bhopal and the transfer as such under the circumstances is arbitrary as it has no nexus with the administrative exigency. Nothing has been shown by the respondent State Govt. in their return or from the document that the administrative exigency demanded for the petitioner's transfer. (Para 9)

Case Referred :

Mohd. Masood Ahmad v. State of U.P. and others, C.A.No. 4360/07 decided on 18.9.07 (SC)

Ashok Sinha, for the Petitioner
Shailesh Mishra, G.A.for the Respondent No. 1 and 2
Naman Nagrath, for the Respondent No. 3

Cur.adv.vult.

ORDER

R.K. Gupta, J. :-

They are heard.

The present petition is filed by the petitioner challenging the order of his transfer datd 9.7.07 which is Annexure P/1 to the petition. The petitioner also challenges another order dated 9.7.07 which is Annexure P/2 which relates to Respondent No. 3. The effect of these two orders are that petitioner has been transferred to the place where the respondent no. 3 was posted and the respondent no. 3 has been directed for his transfer to the place where the petitioner is posted.

2. The petitioner by an order dated 10.07.06 (Annexure P/3) was transferred on his own request from Chhattarpur to Bhopal. So far as Respondent No. 3 is concerned, Respondent No.3 remains at Bhopal for a period from 2002 till 10.07.06. Respondent No.3 by an order dated 10.07.06 was transferred from Bhopal to Kannod. So far as petitioner is concerned, the petitioner by an order dated 23.12.07 (Annexure P/5) was transferred from Bhopal to Chhattarpur and by an order Annexure P/6 dated 23.12.06 respondent no. 3 was transferred from Kannod to Bhopal. Since the petitioner was tranferred from Chhattarpur to Bhopal on his own request on the ground that the children were receiving education at Bhopal and it was a request transfer and within a period of six months the petitioner by an order datd 23.12.06 (Annexure P/5) was transferred from Bhopal to Chhatarpur, therefore, the petitioner was compelled to file a petition before this Court which was registered as W.P. No. 19160/06(s). The said writ petition was finally disposed of by this Court by an order dated 4.1.07, copy of the same is Annexure P/7 to the petition.

3. As it is evident from the order, this court quashed the order of transfer whereby the petitioner was transferred from Bhopal to Chhattarpur and thereafter the State was also given a liberty to pass an order of transfer, if circumstances so warrant. Thus, the order dated 23.12.06 (Annexure P/5) which was Annexure P/1 in the earlier petition was quashed. After quashing the order petitioner continue to remain at Bhopal.

Thus, the total tenure of the petitioner at Bhopal had been only from 17.10.06 till 09.07.07 when the petitioner was transferred from Bhopal to Kannod by passing a fresh order. Thus the tenure of the petitioner at Bhopal had been only nine months. So far as Respondent No. 3 is concerned, he had been at Bhopal for a period from 2002 till 10.07.06 and by an order dated 10.07.06, Respondent No. 3 was transferred from Bhopal to Kannod.

4. This Court in the present petition stayed the operation of the order of transfer dated 09.07.07 by passing an order dated 01.08.2007, with the result, the petitioner continued to work at Bhopal. The petitioner has challenged this order of transfer on the ground that the order of transfer of the petitioner has been effected at the instance of M.L.A. who has written letter for transfer of the petitioner to the Energy Minister. It is also contended that Respondent No. 3 has political milage and it has been utilized by him to accommodate himself at the place where the petitioner is posted. As a consequence of the same petitioner has been transferred within a short period of nine months though the petitioner was transferred from Chhatarpur to Bhopal on his own request. It is also contended that there are no administrative exigency to transfer the petitioner, the only administrative exigency to transfer the petitioner is to accommodate the Respondent no. 3 at Bhopal.

5. Respondent No. 1 and 2 have filed the return and in the return the allegations have been denied and it has been contended that there is no *malafide* in transferring the petitioner. This is also denied that transfer is an exigency of service and an employee cannot be transferred. Respondents have stated that request of the Respondent no. 3 for his transfer from Kannod to Bhopal has been considered and the respondent no. 3 has been transferred from Kannod to Bhopal. It is also contended by them that since this Court had earlier set aside the order of transfer of the petitioner but a liberty was given to the respondents to pass a fresh order of transfer.

6. An application was moved by the petitioner to summon the record which was I.A. No. 7797/07. Counsel for State Govt. on 19.9.07 informed this Court that relevant record has been received and accordingly the case was directed to be fixed for final disposal at motion hearing. The following record has been produced by the State Govt. and on perusal of the record it is found that a letter of local MLA from District Morena Shri Bansilal Jatav. This letter has been addressed to the Energy Minister concerned to transfer the petitioner. This letter also gives reference to accommodate respondant no. 3 at Bhopal. Further in this letter, reference is also given to earlier judgment passed by this Court and the said MLA attempted for transfer of the petitioner from Bhopal by passing a fresh order and also to accommodate respondent no. 3 at Bhopal. In this reference it would be necessary to mention here that neither the petitioner nor the respondent no. 3 were posted at District Morena. The record further shows that on this basis a proposal was prepared with regard to transfer of various incumbents which is clear from the proposal of transfer signed by S.S. Mulzalde, Chief Engineer, Electrical

Safety and Chief Electrical Inspector, M.P. In the said proposal, the petitioner was proposed to transferred at Kannod from Bhopal on administrative ground and so far as respondent no. 3 is concerned, he was proposed to transferred from Kannod to Bhopal on his own request. Against both the names i.e. petitioner and respondent no. 3 it is mentioned that transfer is effected on the basis of the directions of the Energy Minister. On this basis, the proposal was sent to the Secretary, Energy Department, Bhopal. On this basis, the petitioner's transfer has been effected by the impugned order (Annexure P/1) from Bhopal to Kannod and by another order (Annexure P/2), the respondent no. 3 was transferred from Kannod to Bhopal. The respondents have also submitted a record with reference to the complaint against the petitioner dated 15.3.07 which is written by Shri Meharban Singh Patel. On this, Under Secretary of Energy Department by a letter dated 19.6.07 directed to conduct an enquiry against the petitioner. Along with the record, nothing has been filed by the State Govt. to show as to what was the result of the enquiry, whether the allegations made against the petitioner were found correct or the allegations made in the said report were false.

7. On the basis of the record which has been supplied it is now clear that the petitioner though has worked at Bhopal only for a period from 17.10.06 till 09.07.07, thus within a period of nine months, the petitioner's transfer has been effecetd. During this period, by an order dated 23.12.06 (Annexure P/5) the petitioner was transferred from Bhopal to Chhattarpur and Respondent no. 3 was accommodated in place of the petitioner by bringing him from Kannod to Bhopal. This order was set aside by this Court though liberty was given by this Court to pass a fresh order, **if circumstances so warranted.** On the basis of the same, the question now is what was the circumstances which warrants the petitioner's within a period of nine months from Bhopal to Kannod. As it has already seen that during this period on 23.12.06, the petitioner was transferred from Bhopal to chhattarpur and after the transfer of the petitioner, the respondent no. 3 was brought in place of the petitioner at Bhopal from Kannod. After this order was set aside on 04.01.07, after 4.1.07 nothing is shown on record with regard to the circumstances which warranted transfer of the petitioner. On the basis of the record submitted by the respondent State Govt., only circumstance which warranted transfer of the petitioner is that to accommodate respondent no. 3 only and not the administrative exigency. Resonent No. 3 had already been there at Bhopal for a period from the year 2002 till 10.7.06 when the petitioner was transferred from Chattarpur to Bhopal. He joined there just for a short period and he had been transferred from Bhopal to Kannod and again within a period of three months, the respondent no. 3 is brought to Bhopal by transferring him to Kannod and to accommodate respondent no. 3, a vacancy was created by transferring the petitioner from Bhopal to Kannod. This order has been set aside by this Court by order dated 04.01.07 with a liberty to the respondent State Govt. to pass a fresh order. After 04.01.07 no material has been filed as to what was the administrative exigency which warranted the petitioner's transfer. The fact has to be seen that after transferring the petitioner from Bhopal to Chhattarpur by

passing an order Annexure P/1, again a vacancy was created to accommodate respondent no. 3 and the respondent no. 3 by an order dated Annexure P/2 was accommodated by way of his transfer to Bhopal. Thus, the only administrative exigency in the facts and circumstances of the case and also keeping in view the material supplied by the State Govt. at the time of arguments seems to accommodate at any cost the Respondent No.3. There is no administrative exigency warranting the petitioner's transfer. On the basis of the same, it is clear that respondent no. 3 has the political milage. This also proves on the basis of the letter written to the Minister concerned by the MLA Shri Bansilal Jatav of District Morena. The said MLA does not belong to Bhopal or Kannod. On the basis of the letter written by Shri Bansilal Jatav, M.L.A., the Energy Minister has directed for the transfer of the petitioner from Bhopal to Kannod and to accommodate respondent no. 3 at Bhopal by transferring him from Kannod, a proposal has also been moved on the basis of the directions issued by the Energy Minister and on the basis of the letter of the MLA, Shri Bansilal Jatav, the Energy Minister has directed for the transfer of the petitioner to accommodate respondent no. 3.

8. Apart from the aforesaid, the Apex Court in Civil Appeal No. 4360/07 *Mohd. Masood Ahmad v. State of U.P. and others* decided on 18.09.2007 has held that a transfer can be recommeneded by the local MLA and the Member of the Parliament as they are the representatives of the area and being responsible to the Area, therefore, they have power to recommend for transfer. The relevant para is as under :

> "8. Learned counsel for the appellant submitted that the impugned transfer order of the appellant from Muzaffarnagar to Mawana, District Meerut was made at the instance of an MLA. On the other hand, it has been stated in the counter affidavit filed on behalf of respondent Nos. 1 & 2 that the appellant has been transferred due to complaints against him. In our opinion, even if the allegation of the appellant is correct that he was transferred on the recommendation of an MLA, that by itself would not vitiate the transfer order. After all, it is the duty of the representatives of the people in the legislature to express the grievances of the people and if there is any complaint against an official the State Government is certainly within its jurisdiction to transfer such an employee".

9. But in the present case the MLA who has written the letter to the Energy Minister concerned for transfer of the petitioner to create a vacancy for respondent no. 3 does not belong to Kannod or to Bhopal. He is a MLA of Morena where the petitioner nor the respondent no. 3 was posted. Under the circumstances, the judgment passed by the Apex Court wherein it is held that transfers can also be effected on the basis of the complaint or the representation which is submitted to the authority concerned by the local M.L.A. cannot be said to be a *malafide* or arbitrary but in the facts and circumstances of the present case, the M.L.A. who has recommended for transfer of the petitioner does not belongs to the locality where the petitioner or the respondent no.

3 is posted. Apparently, respondent no. 3 has succeeded to inlfuence the local M.L.A. for transfer of the petitioner so that he could be accommodated. The contents of the letter which is filed on record itself indicates the aforesaid aspect. On the basis of the same, I am inclined to hold that the transfer of the petitioner was at the instance of the M.L.A. who does not belong to the locality where these persons were posted. The transfer has been effected only for the reason that the respondent no. 3 has the political milage and connections, therefore, the M.L.A. has attempted for the petitioner's transfer. The only intention behind such attempt is to accommodate responent no. 3 in place of the petitioner at Bhopal and the transfer as such under the circumstances is arbitrary as it has no nexus with the administrative exigency. Nothing has been shown by the respondent State Govt. in their return or from the document that the administrative exigency demanded for the petitioner's transfer.

10. In this reference it will also be proper to refer the document dated 16.9.07. The Under Secretary by this letter directed the Chief Engineer Electrical Safety and Chief Electrical Inspector to make enquiry about the complaint which was made against the petitioner on 15.3.07 by one Shri Meharban Singh though it was directed to conduct and enquiry about the truth-ness of the said complaint but no record has been produced to the Court as to about the enquiry whether the complaint was found to be true or incorrect. Another complaint was also made against the petitioner on 15.5.07. On this complaint also, the Under Secretary by a letter dated 6.1.07 directed to conduct an enquiry but no record is shown to the Court as to whether the allegations made in the complaint were found to be correct or false. It is contended that when the Under Secretary directed to conduct an enquiry with regard to truth-ness of the said compliant then the transferring authority should have waited for the result of the complaint and if the charges levelled in the complaint are found to be correct then the petitoner ought to have been transferred.

11. The political milage of the respondent no. 3 is also clear from another aspect that the enquiry before the High Power Committee is already against respondent no. 3 to cancel the status certificate of respondent no. 3. In the said proceedings it is to be decided that whether the status certificate granted to the respondent no. 3 is correct and the respondent no. 3 whether belongs to reserved community. A petition was filed before the Indore Bench of this Court which was registered as W.P.S. No. 2611/04. The said petition was allowed by an order dated 27.4.05 which is Annexure P/10. In the said case respondent no. 3 was also a respondent as respondent no. 5 and this court disposed of the petition with a direction to the High Power Committee to decide the controversy with regard to the caste of the respondent no. 5 (respondent no. 3 in the present case) of Scheduled Tribe as per letter dated 18.2.85 sent by the Under Secretary to the Principal Secretary. The present respondent no. 3 (respondent no. 5) was also given a liberty to submit a representation. The said High Power Committee was directed to take a decision in the aforesaid matter within a period of three months.

The judgment has been passed by this Court on 27th April, 2007 and the State Govt. in the return have avoided to give any definite reply to the afoersaid aspect. The petitioner has made a grievance that because of the political milage of the respondent no. 3, no action has yet been taken by the High Power Committee and the accommodation under the circumstances of the respondent no. 3 by giving him posting at Bhopal is only to help him to influence the Department for not taking any action against him. All these allegations have been made in para 5.7 of the petition.

12. The respondent no. 3 has only stated that he has no control over the enquiry and have further stated that the reference to the enquiry by the petitioner as directed by Indore Bench of this Court was unnecessary and the reference has been made unnecessarily. Thus, there is nothing on record that this Court had given three months time to complete the enquiry and no enquiry against the respondent no. 3 was completed within the stipulated period of three months and thus to accommodate respondent no. 3 at a place where the enquiry is pending and thereafter itself is indicative of the fact that respondent no. 3 has the political milage and connection. It is also clear that respondent no. 3 had been posted at Bhopal for a period of nearly about four months for a period of 2002 to 2006. So far as petitioner is concerned, petitioner was transferred within three months from Bhopal to Chhattarpur where from he was transferred to Bhopal. The said order of transfer was quashed by this Court though liberty was given to pass a fresh order, **if circumstances so warranted.** Without there being any circusmtances warranted to transfer the respondent no. 3, again the petitioner is transferred from Bhopal to Kannod and against respondent no. 3 is brought at Bhopal. Thus, the only reason for transfer in the light of the discussion made above is that transfer is arbitrary and has been effected without there being any administrative exigency. The reason for transfer is only to accommodate respondent no. 3 so that he can continue at Bhopal and may also by utilizing his political milage may get rid over the enquiry which is pending against him with regard to the status certificate. There is nothing on record that petitioner's request has been accepted as his wife is posted at Bhopal. The petitioner was posted at Bhopal on his own request as the petitioner's children were carrying out their studies at Bhopal. That was the purpose to transfer the petitioner from Chhattarpur to Bhopal which was accepted and within four months the petitioner is transferred to Kannod. There is nothing on record that during this period of four months, the education of the petitioner's children is over. Again this Court on 4.1.07 has set aside the order of transfer then again within six months, the petitioner is transferred and every time by transferring the petitioner respondent no. 3 has been accommodated.

13. It is also not a case of the State Govt. in the return that there had been complaints against the performance of the petitioner at Bhopal and for this reason the petitioner has been transferred. Thus, there had nothing in the return of the State Govt. to show that there had been any complaint against the petitioner and on the basis of the said complaint, the transfer of the petitioner was necessitated in public interest.

14. Counsel for the respondent no. 3 submitted that wife of the petitioner is a Tehsildar and she is posted at Bhopal, therefore, the petitioner applied for his transfer in terms to the policy issued by the State Govt. regulating the transfer wherein there is a policy that both husband and wife shold be posted at one place together. In this reference it is also to be seen that the record which has been filed by the State Govt., there is no reference to the acceptance or refusal submitted by the respondent no. 3. The proposal was prepared only on the basis of the letter of local M.L.A. of District Morena and the same was submitted to the Energy Minister.

15. On the basis of the same, the submission so made by learned counsel for Respondent no. 3 that because wife of the petitioner was also posted at Bhopal does not seems to be a correct submission on the basis of the record submitted by the petitioner.

16. The respondent being State has to look after the welfare of its subjects. It is not that in a welfare State its activities should be tilted towards one side. In the present case, on the basis of overall assessment, it is apparent that the interest of the respondent-State has tilted towards respondent No. 3. The State somehow or the other was interested to bring him at Bhopal only, therefore, within a period of nine months two attempts were made by transferring the petitioner from Bhopal and bring the respondent No. 3 at Bhopal even though the earlier order of transfer was quashed. Petitioner sought his transfer from Chhatarpur to Bhopal on his own request on the ground that his children are prosecuting their studies at Bhopal. On the basis of the letter of M.L.A., the M.L.A. demanded transfer of the respondent No. 3 on the ground that the children of the respondent No. 3 are studying at Bhopal. Thus, the children of both; the petitioner and the respondent No. 3 were receiving education at Bhopal. On this basis it is clear that when the petitioner was transferred from Chhatarpur to Bhopal on his own request then within a short span of six months he was tarnsferred from Bhopal to Chhatarpur to accommodate the respondent No. 3 and when this Court set aside the order of transfer with a liberty to transfer the petitioner, in case, circumstance arises, then apparently there was no other circumstance than to accommodate the respondent No. 3. Such an attitude cannot be treated to be an attitude of a welfare State.

17. For the reasons stated hereinabove, I set aside the order of transfer of the petitioner Annexure P/1 dated 09.07.07 so also the transfer of responent no. 3 by an order Annexuer P/2 daetd 09.07.07.and allowed the petition with a cost of Rs. 5000/- to be borne by the respondents proportionately.

18. During the course of hearing one Shri Jitendra Kumar Sharma, Asst. Grade III was present in the court and has submitted that relevant record has been handed over to him by the Secretariat in sealed cover envelope. Office is directed to keep the record submitted by the respondents in sealed cover envelope along with the file.

Order accordingly.

I.L.R. [2007] M. P., 1757

WRIT PETITION

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

25 October, 2007

VEDICA COLLEGE OF EDUCATION, BHOPAL ... Petitioner*

Vs.

BARKATULLAH UNIVERSITY ...Respondent

A. **National Council for Teacher Education Act (LXXIII of 1993) - Section 14–Recognition of Institutions–NCTE communicated to Principal informing him that college is recognized for 2006-2007–100 seats were allotted to college for admission–Examination forms were submitted and University permitted students to appear–Results were not declared by University on the ground that Institution was not granted unconditional recognition-Held–Nothing in Section 14 that Regional Committee shall issue first provisional order and thereafter a formal order of recognition–Every order granting recognition is to be communicated in writing to institution, examining body, local authority or State Govt. or Central Govt. and is also required to be published in official Gazette–Order of recognition which is communicated is same which is published in Official Gazette–If the order of recognition is communicated but the same is not published in official Gazette it cannot be said that there is no formal order of recognition.**

There is therefore no difference between the order of recognition which is communicated and the order of recognition that is published in the official gazette.

(Para 7)

B. **Words and Phrases - Estoppel - University accepted examination forms of students - No condition was stipulated that results will not be declared until a formal order of recognition is published in official gazette - University is estopped from taking a stand at later stage that it will not declare results of students unless and until formal order of recognition is published in official gazette - University directed to declare results.**

Moreover, in the facts of the present case we find that the University has accepted the examination forms and has permitted the students who were admitted to the college during the academic year 2006-2007 to take the B.Ed examination and no condition was stipulated by the University at the time of acceptance of the forms for examination that the results will not be declared until a formal order of recognition is published in the official gazette. The University, therefore, is estopped from taking a stand at a later stage that it will not declare the results of the students who have taken the examination unless and until a formal order of recognition of the college is published in the official gazette. (Para 9)

*W. P. No. 12012/07. (J)

Vedica College of Education, Bhopal vs. Barkatullah University, 2007

Ajay Mishra, with Ms. *D.K. Bohrey,* for the petitioners.

P. K. Kaurav, for the respondent.

Rahul Jain, Dy. G.A. for the State in W.P. No. 13252/07.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :– In these two writ petitions, the petitioners have prayed for a writ/direction to the Barkatullah University to declare the results of the students admitted to the B.Ed. course during the academic year 2006-07 in the Vedica College of Education, Bhopal.

2. The facts briefly are that the Vedica College of Education, Bhopal, (for short 'the College, was established by the Vedic Shiksha Samiti, Bhopal, which is a Society registered under the M.P. Societies Registrikaran Adhiniyam 1973, to impart education in teaching. The Vedic Shiksha Samiti applied for grant of recognition to the National Council for Teachers Education (for short 'the NCTE") for the academic year 2005-2006 and by a letter dated 9.8.2005, the NCTE communicated the recognition granted to the College by the Western Regional Committee of NCTE for B.Ed course for the academic year 2005-2006, subject to the condition that the college will submit the list of staff/faculty duly approved by the Registrar of the affiliating University/ competent authority before commencement of the academic session. In the letter, it was stated that the formal order of recognition will be issued only after the receipt of the list of staff/faculty in the Western Regional Committee, NCTE, Bhopal. After getting such recognition of NCTE, the college obtained affiliation from the Barkatullah University, Bhopal, and admitted students allocated to the college by the Board of Secondary Education during the academic year 2005-2006. Thereafter, the NCTE communicated an order dated 23.5.2007 to the Principal of the college informing him that the college is recognised for the year 2006-2007. The Board of Secondary Education as the Nodal Agency authorised to hold centralized counselling for admission to B.Ed course in the State of Madhya Pradesh allotted 100 students for admission to the college during the academic year 2006-2007. On the basis of such allotment, students were admitted to the B.Ed course of the college for the academic year 2006-2007. The college then submitted examination forms of the students admitted for the academic year 2006-2007 to the Barkatullah University and the Barkatullah University permitted these students to appear in the examination as regular students, but the results of the B.Ed examination of the students for the academic year 2006-2007 of the college were not published.

3. The college has filed Writ Petition No. 12012/2007 and five students of the college who were admitted to the college for the academic year 2006-2007 and who have taken the B.Ed examination, have filed Writ Petition No. 13252/2007 praying for a direction to the Barkatullah University to publish the results of the B.Ed examination.

We have heard Mr. Ajay Mishra learned Senior counsel appearing for the petitioner(s) and Mr. P.K. Kaurav. learned counsel appearing for the respondent/university.

4. We find that the only contention raised by the Barkatullah University in their returns filed in the two writ petitions, is that the college has not been granted unconditional recognition as required under Section 14 of the National Council for Teacher Education Act, 1993 (for short 'the Act) by any formal order of recognition and in absence of such formal order of recognition, the Barkatullah University is not in a position to declare the results of the students admitted to the college for the academic year 2006-2007.

5. Section 14 of the Act on which reliance is placed by Mr. Kaurav, is quoted herein-below :

> **"S. 14. Recognition of Institutions offering course for Training in Teacher Education–**
>
> (1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:
>
> Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.
>
> (2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.
>
> (3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall -
>
> (a) If it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution subject to such conditions as may be determined by regulations; or

(b) If it is of the opinion that such institution does not fulfill the requirements laid down in sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing:

Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institution for making a written representation.

(4) Every order granting or refusing recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the concerned examining body, the local authority or the State Government and the Central Government.

(5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under clause (b) of sub-section (3).

(6) Every examining body shall, on receipt of the order under sub-section (4), -

(a) grant affiliation to the institution, where recognition has been granted, or

(b) cancel the affiliation of the institution, where recognition has been refused."

6. Sub-section (3) of Section 14 of the Act quoted above would show that on receipt of an application by the Regional Committee from any institution and after obtaining from the institution concerned such other particulars as it may consider necessary, the Regional Committee shall grant recognition to the institution, if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations. Sub-section (4) of Section 14 of the Act provides that every order granting recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the concerned examining body, the local authority or the State Government and the Central Government. There is nothing in Section 14 of the Act to indicate that the Regional Committee shall issue first a provisional order and thereafter a formal order of recognition.

7. Mr. Kaurav learned counsel appearing for the respondent/University,

submitted that sub-section (4) of Section 14 of the Act provides for publication of order of recognition in the official gazette and therefore the order, which is published in the official gazette, would be a formal order. We are unable to accept this contention of Mr. Kaurav. Sub-section (4) of Section 14 of the Act provides that every order granting recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the official gazette and communicated in writing for appropriate action to the institution and to the concerned examining body, the local authority or the State Government and the Central Government. We have seen that under sub-section (3) of Section 14, there can be only one order of recognition and it is this order of recognition under sub-section (3) of Section 14 of the Act which is published in the official gazette as well as communicated to the institution and to the concerned examining body, the local authority or the State Government and the Central Government. There is therefore no difference between the order of recognition which is communicated and the order of recognition that is published in the official gazette. Hence, if an order of recognition has been issued by the Regional Committee under sub-section (3) of Section 14 of the Act and has been communicated in writing to the institution and to the concerned examining body, the local authority or the State Government and the Central Government, it cannot be said that there is no formal order of recognition merely because the same has not been published in the official gazette.

8. Apart from the language of sub-sections (3) and (4) of Section 14 of the Act, the consequences of the plea raised by the Barkatullah University that without a formal order of recognition, the University cannot declare the results of the students who have taken the B.Ed examination conducted by the University would be very grave for the students. Once an order of recognition is issued by the Regional Committee in favour of an institution and the institution is affiliated with the examination body, the institution which has been granted recognition, can admit the students to the course or training for which the recognition has been granted as provided in the regulations made under the Act. On completion of B.Ed course, such students obviously will have to take examination and if the examining body with which the institution is affiliated, turns round and says that unless a formal order of recognition is published in the official gazette, they will not publish the results of the students admitted to the college on the basis of the recognition by the Regional Committee of the NCTE and affiliation by the examining body, the students will have wasted the whole of their academic year for no fault on their part.

9. Moreover, in the facts of the present case we find that the University has accepted the examination forms and has permitted the students who were admitted to the college during the academic year 2006-2007 to take the B.Ed examination and no condition was stipulated by the University at the time of acceptance of the forms for examination that the results will not be declared until a formal order of recognition is published in the official gazette. The University, therefore, is estopped from taking a

stand at a later stage that it will not declare the results of the students who have taken the examination unless and until a formal order of recognition of the college is published in the official gazette.

10. For the aforesaid reasons, we allow these two writ petitions and direct the Barkatullah University to publish the results of the students of the college who were admitted during the academic year 2006-2007 to B.Ed course and who have taken the B.Ed examination conducted by the Barkatullah University within a period of seven days from the date of receipt of certified copy of this order.

Petition allowed.

I.L.R. [2007] M. P., 1762
WRIT PETITION
Before Mr. Justice Abhay M. Naik
29 October, 2007

SANTOSH KUMAR SINGH ... Petitioner*
Vs.
STATE OF M.P. & ors. ...Respondents

A. Panchayat Raj Avam Gram Swaraj Adhiniyam, M. P. 1993 (I of 1994) - Section 21-No Confidence motion- Motion of no confidence challenged on the ground that Naib Tahsildar who was appointed as Presiding Officer was on bad terms with Petitioner - Held - Resolution is passed on the basis of votes cast by Panchas - Voting rights of Panchas are not vitiated by mere appointment of particular person - Presiding officer has no role under law to influence voters -Principles of Natural Justice cannot be said to be violated.

As regards appointment of Presiding Officer for meeting of Gram Panchayat for consideration of no confidence motion, it may be seen that the resolution is passed on the basis of votes cast by the Panchas. Merely by appointment of a particular person as a Presiding Officer, the voting exercised by Panchas is not vitiated. Panchas are required to cast their votes at their free will and the Presiding Officer has no role under law to influence the voters. In such a situation merely on appointment of a particular person as Presiding Officer in the meeting of no confidence, the principles of natural justice cannot be said to be violated unless the aggrieved party establishes that prejudice was caused to him due to such appointment. In the present case, the petitioner has not specifically averred in the writ petition that what prejudice was caused to him on account of appointment of the said Presiding Officer. Thus, in the absence of causing of prejudice due to the appointment of a particular Presiding Officer, challenge to the no confidence resolution on this ground is not acceptable. (Para7)

*W.P. No. 7246/2007.

B. Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P.1993 (I of 1994)- Section 21(2) - Right to Speak - Shall have a right to speak at, or otherwise to take part in - No Confidence Motion challenged on the ground that the Petitioner was not given opportunity to speak - Held - Word 'or ' is disjunctive or alternative conjunction which expresses choice between two alternatives - 'Comma' merely provides an emphasis and does not take away regular meaning of conjunctive word 'or'- Petitioner had participated in proceeding and was not prevented from exercising his right to speak - Petitioner having failed in exercising his right to speak cannot be permitted to impugn the proceedings on the ground of alleged violation of Sub-Section 2 - Petition dismissed.

The word "or" is a conjunction. Conjunctions are divided into two classes : Co-ordinating and Subordinating. The word "or" is one of the chief Co-ordinating Conjunction. A Co-ordinating Conjunction is defined as one which joins together clauses of equal rank. Co-ordinating Conjunctions are further divided in four kinds : (1) Cumulative or Copulative (2) Adversative (3) Disjunctive or Alternative (4) Illative. According to the well known Grammarians P.C. Wren and H. Martin "or" is a disjunctive or alternative conjunction which expresses a choice between two alternatives. In 120th Edition of Wren and Martin's High School English Grammar and Composition the word "or" expresses a choice between two alternatives.

> Thus. the punctuation of 'comma' merely provides an emphasis and does not take away the regular meaning of the conjunctive word "or"

Accordingly, I hold that the petitioner who participated in the proceedings of no confidence and was not prevented from exercising his right to speak in such meeting cannot assail the proceeding of no confidence for violation of the provision contained in Sub-section (2). He has admittedly participated in the proceedings of no confidence and no prejudice is established to have been caused to him. He had the full opportunity of exercising his right to speak in such a meeting and he having failed to exercise such opportunity, cannot be permitted to impugn the proceedings on the ground of alleged violation of Sub-section (2). (Paras 10 & 12)

Cases Referred :

M.K. Salpekar vs. Sunil Kumar Shamsunder Chaudhari; AIR 1988 SC 1841, *Sama Alana Abdulla Vs. State of Gujarat;* AIR 1996 SC 569, *Nagsai Vs. State* of *Madhya Pradesh and others;* AIR 1998 MP 81.

Ms. Smita Verma, for the petitioner
Vinod Mehta, Govt. Adv. for the State
U.K. Sharma, with *Pramod Tiwari,* for the intervener.

Cur.adv.vult.

ORDER

ABHAY M. NAIK, J. :–Petitioner was elected as Sarpanch of Gram Panchayat, Jamua No. 1 on 23.1.2005. S.D.O. and Prescribed Authority, Vikas Khand, Majhauli, District Sidhi vide Annexure/P-3 dated 29.5.2007 convened a meeting on 12.6.2007 on a motion of no confidence against the petitioner. Shri Santosh Niraj,Naib Tahsildar was appointed as a Presiding Officer. A resolution of no confidence was ultimately passed on 12.6.2007 against the petitioner on the basis of 15 votes cast in favour of no confidence as against 3 votes cast against it.

2. It has been stated in the petition that the said Presiding Officer was not keeping good terms with the petitioner and complaints were already made against him as revealed in Annexure/P-4 dated 15.4.2007, Annexure/P-5 dated 7.6.2007 and Annexure/P-6 dated 8.6.2007. Further complaints as revealed in Annexure/P-7 to P-10 were also made to the effect that the Panchas were under pressure and the no confidence motion was being passed without their free will. Accordingly, it is stated that the no confidence resolution passed against the petitioner is arbitrary and *malafide* and violative of principles of natural justice and the same is liable to be quashed.

3. Intervener raised a preliminary objection that the no confidence resolution is challengeable under Sub-section 4 of Section 21 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 and the petition is therefore liable to be dismissed on account of availability of alternative efficacious remedy. On merits it is contended that the resolution was validly passed and the petitioner having participated in no confidence proceedings has not been prejudiced in any manner. Accordingly, the petition is liable to be dismissed.

4. Learned counsel for the parties including the learned senior counsel for intervener made their respective submissions which are being considered in the succeeding paragraphs.

5. Sub-section (4) of Section 21 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for brevity hereinafter referred to as 'Panchayat Act'.) contains a provision that if a Sarpanch desires to challenge the validity of the motion of no confidence under Sub-section (1) he shall within seven days refer the dispute to the Collector who shall decide it as far as possible within 30 days. Thus, obviously, there is an alternative efficacious remedy available to the petitioner against the impugned no confidence resolution contained in Annexure/P-1. Undisputedly, a writ petition against such a resolution may be directly entertained by this Court under Article 226 of the Constitution of India if the impugned action is without jurisdiction or in violation of principles of natural justice or challenge to *vires* is involved or fundamental right is infringed.

6. In the present case, the Gram Panchayat had a power to pass a resolution of no

confidence under Section 21 of the Panchayat Act. At this juncture, Ms. Smita Verma made the following three submissions to make out a case of violation of principles of natural justice :-

(i) Presiding Officer was keeping bad terms with the petitioner which was complained at various occasions as revealed in Annexure/P-4 to P-10. Such a Presiding Officer could not have been appointed in the matter of no confidence against the petitioner .

(ii) Votes in favour of no confidence motion were cast under three at undue pressure as revealed in Annexure/P-7 to P-10. Therefore, no confidence motion stood vitiated.

(iii) Petitioner was not given an opportunity to speak as required under Sub-section (2) of Section 21 of Panchayat Act. This has an effect of vitiation of the no confidence resolution.

7. As regards appointment of Presiding Officer for meeting of Gram Panchayat for consideration of no confidence motion, it may be seen that the resolution is passed on the basis of votes cast by the Panchas. Merely by appointment of a particular person as a Presiding Officer, the voting exercised by Panchas is not vitiated. Panchas are required to cast their votes at their free will and the Presiding Officer has no role under law to influence the voters. In such a situation merely on appointment of a particular person as Presiding Officer in the meeting of no confidence, the principles of natural justice cannot be said to be violated unless the aggrieved party establishes that prejudice was caused to him due to such appointment. In the present case, the petitioner has not specifically averred in the writ petition that what prejudice was caused to him on account of appointment of the said Presiding Officer. Thus, in the absence of causing of prejudice due to the appointment of a particular Presiding Officer, challenge to the no confidence resolution on this ground is not acceptable.

8. As regards the alleged threat or undue pressure on the Panchas, it is observed that the petitioner has failed even to place on record before this Court affidavits of Panchas who may be said to have cast votes under undue pressure or threat. This apart, it requires an oral evidence to establish that any kind of threat was extended to a particular Pancha. Such fact could have been proved only in a dispute referable under Sub-section (4) of Section 21 of Panchayat Act. In the absence of affidavits of the concerned Panchas it cannot be treated as established that the votes were not cast by Panchas at their free will.

9. As regards the third submission Ms. Smita Verma, learned counsel contended that under Sub-section (2) of Section 21 a Sarpanch has a right to speak in the meeting of no confidence. This opportunity having not been given to him, the no confidence resolution is liable to be quashed.

Interpreting the provision, it has been contended that the petitioner had a right to speak in the meeting of no confidence and had a right to take part in the proceedings of the meeting. Admittedly, the petitioner has. taken part and has participated in the proceedings of no confidence motion. It is not the case of the petitioner that he was prevented from speaking in the proceedings of no confidence meeting or was denied his right to speak in such meeting. It has been contended that the Sarpanch had a simultaneous right of speaking as well as taking part in the proceedings of meeting because a coma is inserted before a conjunctive word "or". According to Ms. Verma, learned counsel the word "or" preceded by coma is to be construed as "and". Thus, in the absence of opportunity of availing right to speak, the no confidence motion is stated to have been vitiated. The exact relevant sentence of Sub-section (2) of Section 21 is as follows :-

> "The Sarpanch or Up-sarpanch, as the. case may be, shall have a right to speak at, or otherwise to take part in, the proceeding of the meeting." (underlined by me).

In order to construe the provision it is necessary to examine that what is the requirement according to this provision. Does it require that the Sarpanch ought to have been given a right to speak simultaneously with a right to take part in the proceedings or it is sufficient that he is given an opportunity to take part and has not been prevented from exercising his right to speak. Ms. Smita Verma, learned counsel did not substantiate her aforesaid contention either by English Grammar or by judgemade law.

10. The word "or" is a conjunction. Conjunctions are divided into two classes : Co-ordinating and Subordinating. The word "or" is one of the chief Co-ordinating Conjunction. A Co-ordinating Conjunction is defined as one which joins together clauses of equal rank. Co-ordinating Conjunctions are further divided in four kinds : (1) Cumulative or Copulative (2) Adversative (3) Disjunctive or Alternative (4) Illative. According to the well known Grammarians P.C. Wren and H. Martin "or" is a disjunctive or alternative conjunction which expresses a choice between two alternatives. In 120th Edition of Wren and Martin's High School English Grammar and Composition the word "or" expresses a choice between two alternatives. In this book the following illustrations have been given :–

(i) She must weep, or she will die.

(ii) Either he is mad, or he feigns madness.

Thus. the punctuation of 'comma' merely provides an emphasis and does not take away the regular meaning of the conjunctive word "or"

11. There was an occasion before the Hon'ble Supreme Court of India to consider the effect of comma before the conjunction "or" in the case of *M. K. Salpekar vs,*

Sunil Kumar Shamsunder Chaudhari; (AIR 1988 SC 1841). It was observed in paragraph 7 :-

> "The punctuation 'comma' in the sub-clause after "alternative accommodation" and before the rest of the sentence indicates that the last part of the sub-clause namely "and does not reasonably need the house" governs only the second part of the sub-clause."

There was again a similar occasion before the Apex Court in the case of *Sama Alana Abdulla Vs. State of Gujarat* (AIR 1996 SC 569). I may profitably quote paragraph-7 and 8 as follows from the said decision :-

> "7. It was next contended that the High Court has misinterpreted Section 3(1) (c) and erroneously held that the sketch, plain, model, article or note or other document or information need not be secret for establishing an offence under that section. In order to appreciate this contention, it is necessary to refer Section 3 which reads as follows :-
>
> 3. Penalties for spying-(l) If any person for any purpose prejudicial to the safety or interests of the State-
>
> (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or
>
> (b) makes any sketch, plan model or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or
>
> (c) obtains, collects records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States."
>
> The High Court held that the word 'secret' in Clause (c) qualifies only the words "official code or pass word" and not "any sketch, plan, model, article or note or other document or information". The reason given by the High Court is that after the phrase "any secret official code or pass word", there is a comma and what follows is thus not intended to be qualified by the word 'secret'. The Calcutta High Court in *Sunil Ranjan Das v. The State,* (1973) 77 Cal WN 1061 has also taken the same view. It has held that the word 'secret' in the said section qualifies officials code or password and not any sketch, plan, model. article or note or other document or information. This is

clear from the comma and the word 'or' which comes after the word 'password;.

8. In our opinion, the view taken by the Gujarat High Court in this case and by the Calcutta High Court in the case of *Sunil Ranjan Das* is correct. We find hat the said interpretation also receives support from sub-section (2) of Section 3. While providing for a presumption to be raised in prosecution for the offence punishable under that section the phraseology used by the legislature is "if any sketch, plan, model, article, note, document or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or password is made, obtained, collected, recorded, published or communicated." From the way the said-section is worded it becomes apparent that the qualifying word 'secret' has been used only with respect to or in relation to official code or password and the legislature did not intend that the sketch, plan, model, article, note, document or information should also be secret. As we do not find any substance in the second contention raised on behalf of the appellant it is also rejected. In the result, the appeal fails and is dismissed."

12. Accordingly, I hold that the petitioner who participated in the proceedings of no confidence and was not prevented from exercising his right to speak in such meeting cannot assail the proceeding of no confidence for violation of the provision contained in Sub-section (2). He has admittedly participated in the proceedings of no confidence and no prejudice is established to have been caused lo him. He had the full opportunity of exercising his right to speak in such a meeting and he having failed to exercise such opportunity, cannot be permitted to impugn the proceedings on the ground of alleged violation of Sub-section (2).

13. Ms. Smita Verma, learned counsel placed reliance on the decision of this Court in the case of *Nagsai Vs. State of Madhya Pradesh and others* (AIR 1998 M.P. 81). Facts of the case of *Nagsai* (supra) are quite distinguishable in as much as it was found in that case that the petitioner was not allowed to speak and cast his vote in the meeting of no confidence motion. In the present case there is neither such allegation nor any material on record to establish that the petitioner was not allowed to speak in the meeting. On the contrary. petitioner did participate and had a full opportunity to speak against the no confidence motion. This having been not availed, reliance on *Nagsai's decision* (supra) is out of place.

14. In the result, the petition has no force, firstly, on account of availability of alternative efficacious remedy and secondly, also for want of substance on merits. Accordingly, the writ petition is dismissed, however, without order as to costs.

Petition dismissed.

I.L.R. [2007] M. P., 1769

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

30 November, 2007

Dr. KAILASH TYAGI and another ...Petitioners*

Vs.

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

A. **Public Services (Promotion) Rules, M. P. 2002 - Rules 7(8) and (9) - Lowering the standard of evaluation - Benchmark Very Good is requirement for promotion from Class I to higher pay scale of Class I post - Petitioner No. I promoted from the post of Assistant Professor to the post of Professor in the year 2006 - State Govt. by order dated 24-5-07 reduced the standard of benchmark from very good to good retrospectively w.e.f. 1-1-2004 for promotion from the post of Asstt. Professor to the post of Professor as one time measure - Held - As per Rule 7(9) of Rules, 2002, Lowering the Standard of evaluation is permissible only for public servants of S.C. or S.T. categories and none else - No whisper either in impugned decision or return that decision to relax criteria from *Very Good to Good* for promotion to the post of Professor has been taken in favour of public servants of S.C. or S.T. categories - Decision of State Govt. to relax and reduce benchmark from *Very Good to Good* not justified being contrary to Rules, 2002 - Promotion made during pendency of petition giving benefit of relaxation stand cancelled - Petition allowed.**

Except the aforesaid Rule 8, empowering the Government for lowering the standard of evaluation there is no other provision for relaxation. On a plain reading of Rule 8, it is clear that the Government may by order make provisions in favour of public servants of the Scheduled Castes and Scheduled Tribes for lowering the standard of evaluation in the matter of promotion to any class or classes of services or posts in connection with the affairs of the State. Thus it is clear that the lowering standard of evaluation is permissible only for the public servants of the Scheduled Castes and Scheduled Tribes categories and none else. In the impugned decision there is absolutely no whisper that the decision to relax the criteria from "very good" to "good" for the promotion from the post of Assistant Professors to the post of Professor has been taken in favour of the public servants of the Scheduled Castes and Scheduled Tribes. Moreover there is no mention in the communication Annexure P/1 and also in the return of the State Govt. as to under which rule the power of relaxation has been exercised.

It is not disputed by the respondents and the interveners that after coming into force of Rules of 2002 the promotions of the Assistant Professors to the post of

*W.P. No. 7509/07 (s). (J)

Professors are being done by applying Rules of 2002 and the bench mark of very good was being consistently followed by the State Govt.. On a conjoint reading of Rule 2(F) which defines Establishment, Rule 3 which deals with the Scope and Application and Rule 14 which deals with Repeal and Saving and on a close scrutiny of Rules of 2002 it is clear that for the promotions in question the Rules of 2002 alone would be attracted and not the Rules of 1990. Admittedly for the promotion to the post of Professors the feeder cadre is Assistant Professor. (Paras 12,13)

B. Constitution of India - Article 226 - *Locus Standi*–Petitioner No. 1 stood promoted in the year 2006 - Impugned decision to lower the standard of evaluation made retrospective w.e.f. 1-1-2004 - Candidates who had secured *good* and were senior to Petitioner as Asstt. Professor would again become senior to Petitioner No. 1- Petitioner No. 1 has *locus standi* to challenge impugned decision of State Govt. 1770

So far as the question of *locus-standi* of the petitioner no. 1 to challenge the impugned decision, I am of the view that the petitioner no.1 though has already been promoted, still as is clear from the decision of relaxation, the same is made applicable with retrospective effect from 1.1.2004. In the circumstances those candidates who had secured 'good' and were senior to the petitioner as Assistant Professor would become again senior to the petitioner if the impugned decision is implemented. In the circumstances, the petitioner no. 1 has got sufficient *locus-standi* to challenge the impugned decision of the State Govt. (Para 10)

Smt. Shobha Menon, with *Ms. Manjit Chuckal,* for the Petitioner no. 1

Atulanand Awasthy, for the Petitioner no. 2

Harish Agnihotri, for the Respondents nos. 1,3,4 & 5

K. S. Wadhwa and Ms. Vandana Shrivastava, for the Respondents No. 2.

S.C.Sharma, with *Harshit Patel, R.B.Dubey & Sandeep Singh,* for the Interveners,

ORDER

SHANTANU KEMKAR, J. :–Feeling aggrieved by the decision of the State Government communicated to the M.P. Public Service Commission (second respondent) vide letter dated 24.5.2007 (Annexure P/1) whereby it had decided as one time measure to reduce the bench mark for promotion from the post of Assistant Professor to the post of Professor on the position as existed on 1.1.2004 from 'very good' (minimum 13 marks) to 'good' (minimum 10 marks), the petitioners have filed this petition.

2. As per the petitioners, the petitioner no. 1 is working on the post of Professor in Higher Education Department of the State of M.P.. He is the State Secretary of petitioner no.2 M.P. Gazetted Officers Association (for short 'Association') and has been

authorized by the President of the Association vide letter dated 15.6.2007 (Annexure P/2) to file the present petition. In the meeting of the Departmental Promotion Committee (for short 'DPC) held on 5.12.2005 and 15.12.2005, the petitioner no.1 along with several other Assistant Professors was promoted to the post of Professor vide order dated 23.5.2006 (Annexure P/3). Thereafter, in meeting of the DPC held on 18.5.2006, 27.5.2006 and 4.10.2006 other incumbents were also promoted from the post of Assistant Professors to the post of Professors vide order dated 8.12.2006 (Annexure P/4):-

3. The case of the petitioners is that the service conditions of the petitioner and similarly placed candidates are governed by Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1990 ('Rules of 1990' for short). The promotion from the post of Assistant Professor to the post of Professor is governed by M.P. Public Services (Promotion) Rules, 2002 ('Rules of 2002' for short). According to the petitioners, the impugned decision of the State Govt. of lowering the standard of bench mark from 'very good' (13 marks) to 'good' (10 marks) as communicated vide Annexure P/1 is wholly illegal, arbitrary and without jurisdiction. There is no power to relax the bench mark of very good to good under the Rules of 2002. The relaxation of bench mark from very good to good for consideration of the cases of promotion from the post of Assistant Professor to the post of Professor would render the rule requiring bench mark of very good for the said promotion redundant. It is stated that decision to relax the bench mark retrospectively with effect from 1.1.2004 would have prejudicial effect upon the petitioner no. 1 inasmuch as the yard sticks and parameters to which the petitioner no. 1 was required to face, would be different from the candidates whose cases would be considered in view of the impugned decision of relaxation of bench mark of very good to good. It is further averred that the decision of relaxation of the bench mark has been taken to favour few candidates and the said decision is violative of Articles 14 & 16 of the Constitution of India.

4. The State Govt. filed return and has denied the averments made by the petitioners. According to the respondents, the petitioner no.1 having been already promoted from the post Assistant Professor to the post of Professor is not entitled to raise any objection against the decision of relaxation of the bench mark for the promotion from the posts of Assistant Professor to the posts of Professors. It is stated that the Rule 7 (8) of Rules of 2002 is applicable only in the cases where the promotion of Class-I Officer is made in the higher pay scale of Class-I post and in that case only the bench mark of very good is required. In the present case the promotion is from Class-I post of Assistant Professor to the Class-I post of Professor of same pay scale, therefore, the bench mark of very good is not the requirement of the Rules of 2002.

5. The interveners in their reply have stated that for the promotion to the post of Professor from the post of Assistant Professor the requirement is not very good but is of 'consistently good performance appraisal reports', therefore, the decision of

relaxation of bench mark from very good to good is justified. According to the interveners from Class-I post of Assistant Professor selection grade promotion to the post of Professor a post of Class-I being in the same pay scale, Rules of 1990 would be attracted and not the Rules of 2002.

6. I.A-No. 7281/2007 and I.A.No. 8750/2007 have been filed on behalf of the petitioner no.2 seeking deletion of its name from array of the cause title. Along with I.A.No. 8750/2007 a letter of the President of the petitioner no.2 Association has been filed seeking withdrawal of the petition. Having regard to this controversy this Court on 4.10.2007 issued following direction to the petitioners:-

> " Counsel for the petitioner has raised an objection. It is contended by her that the Secretary of the Association i.e. petitioner no,2 has preferred the petition. Counsel appearing on behalf of the petitioner no.2 Shri Atul Anand Awasthy submitted that the application has been moved to delete the name of the petitioner no.2. Now there seems to be a dispute between the officer bearers of the petitioner no.2. Under the circumstances the counsel for the petitioner Smt. Shobha Menon, Sr. Advocate who was appearing earlier for the petitioners is directed to file a resolution authorizing Dr. Kailash Tyagi to file a petition on behalf of the Association. She is also directed to file bye-laws of the Association, wherein the Secretary without there being any resolution is permitted to file a case. She is also directed to file a fresh resolution whereby it is decided to continue the case for the petitioner no.2. The necessary documents may be filed within a period of two months."

7. However, the resolutions as directed by this Court have not been filed, on the other hand it was declared on behalf of the petitioners that the petitioners do not want to file any further documents except submission made in 1. A.No. 9003/2007. Thus the resolution authorizing the petitioner no.1 to file the petition on behalf of the Association has not been filed, the bye-laws of the Association have also not been filed, neither a fresh resolution whereby it is decided to continue the case for petitioner no.2 has been filed. On the other hand a letter as aforesaid of the President of the Association has been filed by Shri Atulanand Awasthy, who appeared for the petitioner no.2 Association, seeking withdrawal of the petition.

8. Heard learned counsel for the parties and perused the record. Before dealing with the merits of the petition, I propose to consider and decide the aforesaid applications filed on behalf of petitioner no.2. Through these applications the President of the petitioner no.2 Association is seeking deletion of the name of the petitioner no.2 from the petition and for withdrawal of the petition on its behalf.

9. Admittedly the petitioner no.2 is a recognized M.P. Gazetted Officers Association. No resolution of the Association authorizing Dr. Kailash Tyagi to file the

petition and to continue with it in the light of the specific objection taken by the interveners and through I.A.No. 7281/2007 submitted on behalf of the President of the petitioner no.2 Association has been filed. Inspite of the specific direction of this Court the petitioners have not filed such resolution passed by the Association authorizing Dr. Kailash Tyagi to file the present petition on behalf of the association. Pursuant to the application I.A. 8750/2007 filed by the President of the Association by its newly appointed counsel seeking withdrawal of the petition, the petitioners were directed to file a fresh resolution of the Association resolving to continue the case for the petitioner no.2 Association but the petitioners failed to file such resolution. Thus, in the absence of resolution authorizing Dr. Kailash Tyagi to file and continue with the petition on behalf of the petitioner no.2 Association, in my considered view the petition filed by Dr. Kailash Tyagi on behalf of the Association petitioner no.2 is not maintainable. Hence I.A.7281/2007 and I.A.8750/2007 stands allowed.

10. So far as the question of *locus-standi* of the petitioner no.1 to challenge the impugned decision, I am of the view that the petitioner no.1 though has already been promoted, still as is clear from the decision of relaxation, the same is made applicable with retrospective effect from 1.1.2004. In the circumstances those candidates who had secured 'good' and were senior to the petitioner as Assistant Professor would become again senior to the petitioner if the impugned decision is implemented. In the circumstances, the petitioner no.1 has got sufficient *locus-standi* to challenge the impugned decision of the State Govt.

11. Coming to the merits of the case, the Rules of 2002 have been framed for determination of the basis for promotion on the public services and posts and relating to reservation in favour of Scheduled Castes and Scheduled Tribes. It applies to establishment as defined in the said rules and provides for determination of basis for promotion. It further provides that promotion from Class-I to higher pay scale of Class-I posts shall be made on the basis of merit-cum-seniority. Rule 7(8) of Rules of 2002 deals with eligibility for promotion from Class-I to higher pay scale of Class-I posts and for it benchmark requirement is 'very good'. Rule 7(9) requires preparation of the select list from the feeder cadre who are graded very good. Rule 8 of Rules of 2002 provides for power to the Government for lowering the standard of evaluation. Rule 8 reads thus:

> "8. Lowering the standards of evaluation- The Government, may by order, make provisions in favour of the public servants of the Scheduled Castes and the Scheduled Tribes for lowering the standards of evaluation in the matter of promotion to any class or classes of services or posts in connection with the affairs of the State.
>
> (emphasis supplied).

12. Except the aforesaid Rule 8, empowering the Government for lowering the

standard of evaluation there is no other provision for relaxation. On a plain reading of Rule 8, it is clear that the Government may by order make provisions in favour of public servants of the Scheduled Castes and Scheduled Tribes for lowering the standard of evaluation in the matter of promotion to any class or classes of services or posts in connection with the affairs of the State. Thus it is clear that the lowering standard of evaluation is permissible only for the public servants of the Scheduled Castes and Scheduled Tribes categories and none else. In the impugned decision there is absolutely no whisper that the decision to relax the criteria from "very good" to "good" for the promotion from the post of Assistant Professors to the post of Professor has been taken in favour of the public servants of the Scheduled Castes and Scheduled Tribes. Moreover there is no mention in the communication Annexure P/1 and also in the return of the State Govt. as to under which rule the power of relaxation has been exercised.

13. It is not disputed by the respondents and the interveners that after coming into force of Rules of 2002 the promotions of the Assistant Professors to the post of Professors are being done by applying Rules of 2002 and the bench mark of very good was being consistently followed by the State Govt.. On a conjoint reading of Rule 2(F) which defines Establishment, Rule 3 which deals with the Scope and Application and Rule 14 which deals with Repeal and Saving and on a close scrutiny of Rules of 2002 it is clear that for the promotions in question the Rules of 2002 alone would be attracted and not the Rules of 1990. Admittedly for the promotion to the post of Professors the feeder cadre is Assistant Professor.

14. Having regard to the aforesaid, in the absence of any power of relaxation provided under Rules of 2002 except in the cases of Scheduled Caste and Scheduled Tribe categories the State Govt. was not justified in taking decision to relax and reduce the benchmark from very good to good for promotions from the post of Assistant Professor to the post of Professor. The impugned decision (Annexure P/1) being clearly contrary to the statutory rule position and being impermissible under Rules of 2002 deserves to be and is hereby quashed.

15. The promotions which have been made during the pendency of this petition giving benefit of relaxation (Annexure P/1) shall stand cancelled as by way of interim order dated 27.6.2007 passed in Writ Appeal No. 1067/2007 the State Govt. was directed to make it clear in the promotion orders as may be issued that the same shall be subject to final order passed in this Writ Petition No. 7509/2007(s).

16. Accordingly, the petition on behalf of petitioner no. 1 succeeds. No orders as to costs.

Petition succeeds.

I.L.R. [2007] M. P., 1775

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

17 October, 2007

NARAYAN SINGH and another ...Appellants*

Vs.

SURAT SINGH and another ...Respondents

Cooperative Societies Act, M. P., 1960 (XVII of 1961)–Sections 41-A(5), 64, 82, M. P. Cooperative Societies Rules, Rule 66(2)(h), M.P. Land Revenue Code, 1961, Section 165 - Bar of jurisdiction of Court - Auction of land by Bank for recovery of loan amount challenged being void under Rule 66 (2)(h) of Rules - Land could not have been auctioned as plaintiff is member of aboriginal tribe - Application under Order VII Rule 11 C.P.C. for dismissal of suit as barred filed by applicant - Suit dismissed by Trial Court as not maintainable, however, it was remanded back by Appellate Court holding that it involves disputed question of facts - Held - Facts averred in plaint were disputed - If plaint averments are accepted as true, suit could not have been dismissed on preliminary ground - As preliminary issue requires evidence to be recorded it cannot be said that suit was not maintainable - Appeal Dismissed.

Considering the questions raised in the instant case, it cannot be said that the suit was not maintainable before the Civil Court as the aforesaid question of preliminary issue requires evidence to be recorded. Thus, no case for interference in the appeal is made out. It is made clear that the discussion has been made by this Court with a view to advert the submissions. This Court has not decided the question of maintainability of suit as that has to be done by Trial Court after recording the evidence on merits of the case along with other issues. Any observation made in the order will not come in the way of the trial Court to decide the suit. (Para 12)

Cases Referred :

M/s Ramdayal Umraomal vs. M/s Pannalal Jagannathiji; AIR 1979 M.P. 153=AIR 1978 M.P. 16, *Baldeo Kumar Agrawal vs. Managing Director;* AIR 1997 M.P. 147, *Deputy Registrar Co-Op. Societies vs. Narayan Prasad Mishra and another;* 1972 MPLJ 997, *Bata Shoe Co. Ltd. vs. Jabalpur Corporation;* AIR 1977 SC 955.

Ashish Shroti, for the appellants

N.K. Patel, with *S.B. Patel,* for the Plaintiff

S. Verma, GA, for the respondents.

Cur.adv.vult.

*M.A. No. 1280/1998.

ORDER

ARUN MISHRA, J. :–The appeal has been preferred by the defendants aggrieved by order dated 16.7.1998, passed by First Additional District Judge, Damoh, in Regular Civil Appeal No. 9-A/98.

2. The facts, in short, are that the plaintiff/respondent instituted a suit for declaration of title and injunction with respect to disputed land comprised in survey no. 91/1 area 6.32 acres, survey no. 92 area 15.02 acres, survey no. 93 area 15.68 and survey no. 94 area 8.62 acres, totalling 46.64 acres, situated at Mouja village Imaliya, Tahsil Jabera, district Damoh.

3. Plaintiff submitted that he had obtained a loan from Land Development Bank, Damoh, by mortgaging the land. Loan of Rs. 4700/- was obtained twenty years ago. Only a sum of Rs. 2404.60 was outstanding. The Bank without intimating the him, in collusion with defendants, auctioned the land on 15.6.1981 for a sum of Rs. 65000/- and sale letter was issued on 5.9.1981 in favour of defendants 1 and 2. However, possession was not handed over to the defendants. It remained with the plaintiff. The plaintiff came to know about the auction in 1985, then he raised objections. Before that he was in continuous possession of the said land. Plaintiff approached the Collector. Correction of the revenue record was ordered in favour of the plaintiff by the Collector and it was held that the auction proceeding was illegal and void. The plaintiff approached the Additional Registrar, Cooperative Societies, by way of filing the revision. Revision was allowed. Revision was preferred against the order passed by the Additional Registrar before the Board of Revenue. The order passed by the Additional Registrar was set aside by the Board of Revenue. It was submitted by the plaintiff that plaintiff being a member of aboriginal tribe was entitled for protection under Section 165 of M.P. Land Revenue Code (hereinafter referred to as 'the Code') and Section 41-A (5) of M.P. Cooperative Societies Act, as the land of the aboriginal tribe could not have been auctioned. Thus, auction was illegal and void. Permission of the Collector was also not obtained before the land was auctioned and sale certificate was issued. Apart from that, auction amount and stamp amount was also not deposited within the prescribed period. As such, the auction was illegal and void under Rule 66 (2)(h) of the M.P. Cooperative Societies Rules. The value of the land was more than Rs. 1,50,000/-. The land was sold only for a sum of Rs. 65,000/-, whereas outstanding amount was only 2404.60. Thus, the suit land comprising of 45 acres could not have been sold for recovery of outstanding amount. For this reason also, the sale is illegal and void. Family of the plaintiff would starve in case the order passed by the Board of Revenue was allowed to stand. Consequently, the suit was filed.

4. Joint written statement filed by the defendants 1 and 2. It was contended that plaintiff had failed to carry out the obligation of repayment of loan obtained from the Land Development Bank. Plaintiff was duly informed of the auction proceedings.

Plaintiff had filed an application for auction of the land. Plaintiff has obtained the balance amount from the Bank after the auction was made. Land has been made cultivable by them after huge expenditure. They were in possession of the land. The order passed by the Board of Revenue was proper. Value of the land was not 1,50,000/-. Civil Suit was not maintainable in view of Section 82 of the M.P. Cooperative Societies Act. Plaintiff was not entitled to take the ground of aboriginal tribe, as he had earlier claimed that he belonged to scheduled tribe. Thus, the suit be dismissed.

5. The trial Court dismissed the Civil Suit No. 11-A/94 filed by the plaintiff on 13.3.1995 on the ground that there was no prayer made to declare the auction as *null* and *void*. In view of Section 64 of the M.P. Cooperative Societies Act, the Civil Court was not having jurisdiction. In case the land auctioned was more, than was necessary for satisfying the amount of loan, the remedy was to approach the High Court by way of filing writ petition. The trial Court further held that the irregularities pointed out could not assume the shape of nullity of the auction proceedings. There was no lack of jurisdiction on the part of the Cooperative Society carrying out the auction. Thus, the civil court was not having requisite jurisdiction to entertain the suit.

6. Aggrieved by the dismissal of the suit, the plaintiff preferred an appeal before the First Additional District Judge, Damoh. Civil Appeal No. 9-A/98 it has been allowed as per order dated 16.7.1998. The case has been remanded back to the trial Court. The Appellate Court has held that issue No. 8 was mixed question of law and fact and could not have been decided without recording the evidence of the parties. Thus, the order passed by the trial Court dismissing the suit on preliminary issues has been set aside. Aggrieved by the order dated 16.7.1998 remanding the case to the trial Court, the instant appeal has been preferred by the defendant.

7. Shri Ashish Shroti, learned counsel appearing on behalf of appellants, has submitted that in view of Section 64 of M.P. Cooperative Societies Act, the civil suit was not maintainable as against the proceedings, which were within the purview of Cooperative Societies Act. Order of Board of Revenue was not amenable to challenge before the civil court. Section 82 bars jurisdiction of civil court, as the dispute was required to be referred to the Registrar, Cooperative Societies. He relied on certain decisions to be referred later.

8. Shri N.K. Patel, learned senior counsel appearing on behalf of respondent No.1 with Shri S.B. Patel, Adv., submitted that the question could not have been decided without recording the evidence. Whether notice of auction was given or not was a disputed question of fact. The averments of collusion was also disputed. Land of aboriginal tribe could not have been sold, as provided under Section 165 of the Code and Section 41-A (5) of the M.P. Cooperative Societies Act. Consequently, the auction proceeding was void. In the plaint, on the basis of proceeding being void, declaration of title was sought, as the possession was not taken over from the plaintiff.

It was not necessary to seek the declaration, once the proceeding was assailed as void, that relief was implicit in the declaration of title itself.

9. In the instant case, the facts as averred in the plaint were disputed. None of the facts were admitted. In case the facts mentioned in the plaint are accepted as correct, suit could not have been dismissed on the preliminary issue. As facts were disputed, the court below was right in setting aside the decision rendered by the trial Court. Trial Court without recording evidence came to the conclusion that the transaction was not a nullity. Material aspect is that whether plaintiff belongs to aboriginal tribe. Trial Court did not consider the fact that whether plaintiff belongs to aboriginal tribe or not, as provided in Section 165 (6) of the Code. The same is quoted below :

> [(6) Notwithstanding anything contained in sub-section (1) the right of Bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe by the State Government by a notification in that behalf, for the whole or part of the area to which this code applies shall-
>
> (i) in such areas as are predominately inhabited by aboriginal tribes and from such date as the State Government may, by notification, specify, not be transferred nor it shall be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe in the area specified in the notification;
>
> (ii) In areas other than those specified in the notification under clause (i), not to be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe without the permission of a Revenue Officer not below the ran of Collector, given for reasons to be recorded in writing."

Provisions of Section 41-A(5) of the M.P. Cooperative Societies Ac also provides certain protection to the aboriginal tribes. Sub-section (5) of Section 41-A of the Act is quoted below:-

> "41-A(5) Nothing in this section shall be construed to empower the society to sell any land or interest therein of a person belonging to an aboriginal tribe which has been declared to be an aboriginal tribe by the State Government by notification under sub-section (6) of section 165 of the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959) to a person not belonging to such tribe."

It is also clear that 'Gond' has been declared to be aboriginal tribe in the notification, issued by the State of M.P. under the provisions of Section 165 (6) of the Code. All these questions were necessary to be resorted to before rendering any decision in the case. Full Bench of this Court in *My Ramdayal Umraomal v. M/s Pannalal Jagannathji*-AIR 197 Madhya Pradesh 153 has laid down that issue relating to

jurisdiction can be tried as preliminary issue only if it can be disposed of without recording any evidence. Where issue of jurisdiction is a mixed question of law and fact requiring recording of evidence, same cannot be tried as a preliminary issue. Earlier decision of this Court reported in AIR 1978 Madh Pra 16 was reversed.

10. In the instant case, in order to satisfy whether the provisions of the Act and the Rules before auction were complied or not, it was necessary to record the evidence. It was also necessary to go into the question of valuation of the property, it was also necessary to consider the question that how much land of the plaintiff could have been sold. These question require evidence to be adduced. Thus, the decision rendered by the appellate Court is found to be correct.

11. Shri Ashish Shroti, learned counsel appearing on behalf of appellant/ defendants, has relied upon the decision of this Court reported in *Baldeo Kumar Agrawal v. Managing Director*-AIR 1997 Madhya Pradesh 147, in which the Court has laid down that if the dispute touching the business of Society, dispute based on a contract entered into by the Society with contractor in the course of its essential business of dealing in forest produce, is a 'dispute' which clearly 'touches' the business of the society, referable to Registrar only and the civil suit was barred. The facts of the instant case are different and the decision is required to be rendered by the trial Court after recording the evidence. He has also relied upon decision of this Court, in *Deputy Registrar Co-op. Societies v. Narayan Prasad Mishra and another*-1972 MPLJ 997 it has been held that Section 64 of the Cooperative Societies Act bars raising of dispute in Civil Court. The facts of the case are not similar to the instant case. He has also relied upon the decision of the Apex Court in *Bata Shoe Co. Ltd. v. Jabalpur Corporation*-AIR1977 SC 955 in which the Apex Court has laid down that filing of civil suit was barred by virtue of provisions of the Municipalities Act.

12. Considering the questions raised in the instant case, it cannot be said that the suit was not maintainable before the Civil Court as the aforesaid question of preliminary issue requires evidence to be recorded. Thus, no case for interference in the appeal is made out. It is made clear that the discussion has been made by this Court with a view to advert the submissions. This Court has not decided the question of maintainability of suit as that has to be done by Trial Court after recording the evidence on merits of the case along with other issues. Any observation made in the order will not come in the way of the trial Court to decide the suit.

13. There is no merit in the appeal. Resultantly, the same is hereby dismissed. Trial Court shall proceed further as early as possible and decide the suit, preferably within one year, as the civil suit was filed in the year 1991. By now 17 years have passed.

Appeal dismissed.

I.L.R. [2007] M. P., 1780

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

24 October, 2007

RAM CHANDRA DIXIT and another ...Appellants*

Vs.

ARVIND KUMAR JAIN ...Respondent

Accommodation Control Act, M. P. (XLI of 1961)-Section 12(l)(f) - *Bonafide*, Requirement for non residential purposes - Reasonably suitable accommodation - Respondent/Landlord filed suit for eviction on the ground that he requires suit premises for starting business of manufacturing and sale of ready-made garments - Suitability of suit premises challenged by tenant on the ground that suit premises is situated in Transport Nagar - Held - Requirement of reasonably suitable accommodation has been engrafted if alternative accommodation is available - Plaintiff not having any alternative accommodation - He cannot be non suited on the ground that accommodation in question is not reasonably suitable for his proposed business - Appeal dismissed.

It is apparent from aforesaid provision that plaintiff should not have reasonably suitable alternative accommodation of his own for the proposed business for which suit has been filed, even if the accommodation owned by the plaintiff from which ejectment of tenant is sought, the plaintiff is not required to prove that suit accommodation is suitable for him, the plaintiff cannot be non-suited on the ground that accommodation in question was not reasonably suitable for his proposed business though he has no other accommodation of his own to do the business, it is with respect to alternative accommodation if it is available, the requirement of reasonably suitable accommodation has been engrafted under Section 12(l)(f) of the Act so as to provide protection to a tenant from unjust pretexts. On facts, the accommodation in question is quite spacious in which business of manufacture of ready-made garments could conveniently be started by the plaintiff. Merely by the fact that area in question is used as Transport Nagar, there was no legal bar for the plaintiff to start the business of manufacture of ready-made garments, no such provision creating bar has been pointed out. (Para 9)

Cases Referred :

Karnidan Sarda and another vs. Sailaja Kanta Mitra and another; AIR 1940 Patna 683, *A.E.G. Carapiet vs. A.Y. Derderian;* AIR 1961 Calcutta 359, *M/s Chuni Lal Dwarka Nath vs. Hartford Fire Insurance Co. Ltd. and another;* AIR 1958 Punjab 440, *Bhoju Mandal and others vs. Debnath Bhagat and others;* AIR 1963 SC 1906.

R. P. Agarwal, with *Praveen Dave,* for the appellants.

*S.A. No. 132/2007.

Smt. Shobha Menon, with *A. S. Handa,* for the respondent.

Cur. adv. vult.

JUDGMENT

ARUN MISHRA, J. :–The appeal has been preferred by defendants/tenants aggrieved by the judgement and decree dated 19.12.2006 passed by 1st Additional District Judge in Civil Appeal No. 31-A/2005 thereby affirming the judgement and decree dated 5.2.05 passed by Vth Civil Judge, Class-II, Bhopal in Civil Suit No. 27-A/2001.

2. Plaintiff/respondent filed the instant suit for eviction of defendants/tenants on the ground contemplated under Sections 12(l)(a), 12(l)(b), 12(l)(c) and 12(l)(f) of M.P. Accommodation Control Act (hereinafter referred to as "the Act"). Plaintiff wanted to start the business of manufacture cum sale of ready-made garments , he was not having suitable alternative accommodation for that purpose, notice dated 10.7.2000 was served terminating the tenancy.demanding the vacant possession, however the suit accommodation was not vacated hence suit was preferred.

3. Defendants contended that Ramchandra Dixit had obtained the accommodation in the name and style of Universal Motor Transport Corporation from the father of plaintiff, accommodation was not sub-let to anyone else, plaintiff was not the exclusive owner nor the accommodation had fallen to his share in the partition, rent was not accepted by the plaintiff inspite of the fact that it was tendered, plaintiff did not require the suit accommodation *bona fide,* he was having other alternative accommodation to carry on the business, if he so desired, area in question is used for the purpose of transport business, no obstruction was caused to the plaintiff hence suit be dismissed.

4. The trial Court initially decreed the suit on the ground under Section 12(l)(f) of the Act. Civil Appeal No. 22-A/04 was preferred, it was partly allowed on 30.11.04, case was remanded to the trial Court to decide the issue of ownership on the basis of evidence, thereafter fresh evidence was adduced by the parties. As against the decision of appellate Court dated 30.11.04, a writ petition no.490/05 was preferred which was decided by this Court on 2.2.05, the defendants were given liberty to raise the questions in appeal to be filed as against the final decision to be rendered by the trial Court. Remand order dated 30.11.04 was not interfered with. Thereafter trial Court has as per judgement and decree dated 5.2.05 decreed the suit on the ground under Section 12(l)(f) of the Act. Dissatisfied with the same, 1st appeal was preferred, that has been dismissed by the impugned judgement and decree dated 19.12.2006. Consequently, the successive appeal has been preferred by the unsuccessful defendants/tenants.

5. Shri R.P.Agarwal, learned Sr. Counsel appearing with Shri Praveen Dave on behalf of defendants/appellants has submitted that plaintiff has failed to cross examine the defendant Omprakash Dixit on crucial statement made by him in para 8 of his deposition that there were other vacant suitable alternative accommodation situated in the back side of the house, thus, plaintiff was having reasonably suitable alternative

accommodation to start the business, thus, decree could not have been passed on the ground under Section 12(l)(f) of the Act. He has also submitted that accommodation in question could not be said to be a reasonably suitable accommodation for the purpose of business proposed by the plaintiff as locality is used for transport nagar, with the permission of local administration, thus, it could not be said that plaintiff would be able to conveniently carry on the business of manufacture of ready made garments in the suit premises. Consequently, the decree passed under Section 12(l)(f) of the Act be set aside. Alternatively he has submitted that in case of dismissal of appeal, defendants/ tenants be given reasonable time to vacate the accommodation.

6. Ms.Shobha Menon, learned Sr. Counsel appearing with Shri A.S.Handa for plaintiff/landlord has submitted that plaintiff has categorically stated in his deposition that he was not having any other suitable alternative accommodation of his own for the purpose of business, no cross-examination was made by defendant as to availability of any other shop in the back side of the house. She has also taken this Court to the partition decree passed, the plaint of Civil Suit No. 82-A/1976 and the map Ex.P/11. She has submitted that area marked with red colour was given on the ground floor to plaintiff Arvind Kumar Jain and that entire area is in occupation of the defendants as tenants. No other portion in the house was allotted in partition to plaintiff Arvind Kumar Jain, thus, it is apparent from plaint (P/10) and map (P/11) along with judgement and decree P/1 and P/2 of the partition case that there was no other alternative accommodation of his own available to plaintiff to carry on the business of manufacture of ready-made garments. The suit premises could very well be used conveniently by the plaintiff for the purpose of manufacture of ready-made garments.

7. I have heard the learned counsel for parties at length and gone through the oral as well as documentary evidence on record with the help of learned senior counsel appearing for parties.

8. Coming to the first submission raised by Shri R.P.Agarwal, learned Sr.Counsel that suitable alternative accommodation was available in the back portion of the house as stated by Omprakash Dixit in para 8 of his deposition. The submission cannot be accepted for several reasons firstly this suggestion was not given to the plaintiff in his cross-examination that he was having alternative accommodation and there was a shop vacant in the same house behind the disputed portion,if it was the case of defendants, it ought to have been pleaded in the written statement that the said accommodation was vacant and available to the plaintiff, further more it was necessary to put the said case of defendants in the cross-examination of the plaintiff and his witnesses, but admittedly that has not been done. It is conceded that no such suggestion was made to the plaintiff or his witness examined in support of the case, thus, the bald statement made by defendant Omprakash Dixit in para 8 of his deposition carries his case nowhere as rule of cross-examination is that parties must put their case and obtain explanation, cross examination is not a mere form of procedure but is

a matter of substance as held in *Karnidan Sarda and another vs. Sailaja Kanta Mitra and another* AIR 1940 Patna 683, *A.E.G. Carapiet vs. A.Y.Derderian* AIR 1961 Calcutta 359, *M/s Chuni Lal Dwarka Nath vs. Hartford Fire Insurance Co.Ltd. and another* AIR 1958 Punjab 440 and in *Bhoju Mandal and others vs. Debnath Bhagat and others* AIR 1963 SC 1906 . It appears that in para 18 of his deposition he was subjected to cross-examination by the plaintiff whether he was aware which portion, in the suit house , belonged to the plaintiff, he was not able to say with assertion which portion had fallen in the share of plaintiff on the ground floor ,in the absence of making an assertion by the plaintiff that portion where he had suggested that alternative accommodation was vacant and available had fallen to the share of plaintiff, the statement of defendant could not have been relied upon, particularly when there was failure to put the case in cross-examination of plaintiff. Apart from that when we consider the judgement and decree P/1,P/2, plaint (P/10) and map (P/11) of the partition suit, it is clear that only the portion shown with the red colour on the ground floor had fallen to the share of plaintiff and that entire portion is undisputedly is in occupation of defendants as tenants. Thus, on merit also the statement made by defendant in para 8 that there was alternative accommodation available to the plaintiff could not have been accepted . In view of the partition decree and the map on record, the portion that has been suggested as alternative accommodation could not be said to be owned by the plaintiff, even if any accommodation was vacant in the said portion on the back of the house, though it has not been established by defendant that any such accommodation was vacant in back portion of the house. In the circumstances Courts below have rightly held that there was no alternative accommodation of his own available to the plaintiff for doing the business of manufacture of ready-made garments.

9. Coming to the submission raised by Shri R.P.Agarwal, learned Sr. Counsel that shop in question could not be said to be reasonably suitable for doing the business by the plaintiff. I find the submission to be legally unacceptable as well as untenable on facts. Section 12(l)(f) of the Act reads thus :-

> "12. Restriction on eviction of tenants-(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely :
>
> (f) that the accommodation let for non-residential purposes is required *bonafide* by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned."

It is apparent from aforesaid provision that plaintiff should not have reasonably suitable alternative accommodation of his own for the proposed business for which suit has been filed, even if the accommodation owned by the plaintiff from which ejectment of tenant is sought, the plaintiff is not required to prove that suit accommodation is suitable for him, the plaintiff cannot be non-suited on the ground that accommodation in question was not reasonably suitable for his proposed business though he has no other accommodation of his own to do the business, it is with respect to alternative accommodation if it is available, the requirement of reasonably suitable accommodation has been engrafted under Section 12(1)(f) of the Act so as to provide protection to a tenant from unjust pretexts. On facts, the accommodation in question is quite spacious in which business of manufacture of ready-made garments could conveniently be started by the plaintiff. Merely by the fact that area in question is used as Transport Nagar, there was no legal bar for the plaintiff to start the business of manufacture of ready-made garments, no such provision creating bar has been pointed out.

10. Coming to the submission of grant of time in order to vacate the premises as accommodation is used for the purpose of business, it is considered appropriate to give time to appellants/defendants till 31st of March, 2008, however, the same shall be subject to following riders :-

> "(i) The defendants/appellants to furnish undertaking within a period of fifteen days from today before the Executing Court to hand over peaceful vacant possession on or before 31st March,2008.
>
> (ii) Defendants shall deposit the arrears of rent, if any, within a period of fifteen days from today and shall continue to deposit the rent on or before 15th day of every month. In case any of the aforesaid condition is violated, it would be open to the plaintiff/decree holder to execute the decree forthwith."

11. No other point was raised.

12. Resultantly, the appeal being devoid of merit is dismissed. However, parties are left to bear their own costs as incurred of the appeal. C.c.as per rules.

Appeal dismissed.

I.L.R. [2007] M. P., 1785

APPELLATE CIVIL

Before Mr. Justice U. C. Maheshwari

30 October, 2007

M.P. STATE CIVIL SUPPLIES CORPORATION LTD. ...Appellant*

Vs.

MARAIN AGARWAL ...Respondent

Arbitration and Conciliation Act (XXVI of 1996)–Sections 34,37, Civil Procedure Code, 1908, Section 11 Explanation (iv) - Constructive *Res Judicata*- Agreement took place between parties on 21-11-98 - Respondent was to procure Soyabean for appellant - Some dispute arose during the subsistence of contract and same was referred to Sole Arbitrator-Dispute was resolved by award dated 25-10-99- Another dispute was submitted by respondent before Sole Arbitrator on 24-6-2002 contending that during subsistence of same contract he had purchased gunny bags worth Rs. 2,75,000/- for packing of Soyabean- Appellant raised objection of constructive *Res Judicata* - Held - Gunny bags were purchased by respondent for appellant on 20-11-1998 -Earlier Reference was made to Sole Arbitrator in month of March 1999 - Dispute referred by successive application to arbitrator was in existence, but same was not referred to arbitrator -Procedure provided under Civil Procedure Code is applicable - Successive Claim was not entertainable as same was hit by provision of constructive *Res Judicata*–Appeal Allowed.

As per the provision of explanation IV of the CPC, in the absence of any specific provision under the Act, the procedure provided under the Civil Procedure Code is applicable and in view of the facts of the present case as mentioned above, the aforesaid Section 11 with its explanation is applicable to the present case and it is undisputed fact that inspite having the cause of action for reference, the present dispute on the date of filing the former dispute the same was not referred to arbitrator by the respondent, therefore, by virtue of the aforesaid provision and it's explanation IV, the successive claim could not be entertained either by the arbitrator or the court.

In view of the above mentioned facts, it is apparent that inspite having the cause of action, the present dispute was not referred for arbitration while submitting the earlier dispute, thereby the respondent himself did not included his own claim and intentionally omitted and relinquished the same and, therefore, he did not have any right to file the separate reference by showing different cause of action arising out of the same contract. (Paras 11 & 13)

Cases Referred :

K.V. George vs. Secretary to Govt., Water and Power Deptt., Trivandrum; AIR 1990 SC 53, *Kewal Singh vs. Lajwanti;* AIR 1980 SC 161.

*M.A. No. 2790/2004. (J)

M.P. State Civil Supplies Corporation Ltd. vs. Marain Agarwal, 2007

K.S.Wadhwa, for the Appellant
A.K.Mishra, Assisted by *Ankit Saxena,* for the Respondent.

Cur. adv. vult.

ORDER

U.C. MAHESHWARI, J. :–On behalf of the appellant, this appeal is preferred under Section 37 of the Arbitration And Conciliation Act, 1996 (for short the Act) being aggrieved by the judgment dated 6.5.2004 passed by Vth Addl.District Judge, Bhopal in Arbitration Case No.25/2003 dismissing the appellant's application filed under Section 34 read with Section 16 of the Act for setting aside the arbitral award dated 1.4.03 passed by the sole arbitrator.

2. The factual matrix of the case in short are that an agreement took place between the parties on dated 21.11.98. According to it, the respondent had lo procure 1000/- metric tone of Soyabean for the appellant from Ujjain district in the Kharif year 1998-99. During subsistence of such contract, on arising some dispute, the same was referred to the sole Arbitrator in the month of March, 1999 by the appellant. The same was resolved by the award dated 25.10.99 by the Arbitrator. Such arbitral award is not under dispute in the present litigation. Subsequent to the aforesaid award, the respondent submitted his other dispute on dated 24.6.2002 before the aforesaid sole arbitrator, the Commissioner-cum-Director Food , Civil Supplies and Consumer Products, Madhya Pradesh, Bhopal contending that as per the terms of the contract, during subsisting the same, he purchased 11025 number of gunny bags of worth Rs.2.75.000/- for packing of the aforesaid Soyabean. Its payment was to be made by the appellant. The same was not made, on which the respondent gave a notice in this regard to the appellant vide dated 19.11.01 but the same was not complied with. With these averments, the aforesaid dispute was referred to the arbitrator.

3. Reply of the aforesaid claim was filed on behalf of the appellant in which *inter alia* the claim of the respondent was denied. Besides the above, the objection regarding constructive *resjudicata* along with the objection that the subsequent claim is not maintainable after disposal of the first claim especially when the cause of action regarding the referred dispute was arisen before date of filing the first dispute which was filed in the month of March, 1999 in which the alleged dispute was not referred. Considering the case of the parties, the arbitrator passed the award in favour of the respondent and against the appellant. Being dissatisfied, the present appellant preferred an application for setting aside such arbitral award dated 1.4.03 by mentioning various grounds including the ground of constructive *resjudicata* and the tenability of the subsequent dispute in view of the facts mentioned above while mentioning the case of the appellant.

4. All the grounds and objections taken by the appellant are denied by the respondent by filing its reply dated 4.9.2003.

5. On consideration by affirming the arbitral award of the arbitrator, the appellant's application has been dismissed by the trial court vide impugned judgment, hence the appellant has come to this court for setting aside the impugned order as well as the aforesaid arbitral award.

6. Shri K.S.Wadhwa, learned appearing counsel for the appellant assailed the impugned order and award on the ground that such subsequent reference of the dispute by the respondent was not entertainable on the principle of *resjudicata* and also in view of the earlier arbitral award dated 25.10.99. The cause of action regarding the dispute referred subsequently on dated 24.6.02 was available to the respondent on the date of filing the first reference to adjudicate the dispute in the month of March 1999. If the same was not referred on earlier occasion then after adjudication of the earlier dispute vide dated 25.10.99, the respondent precluded to refer any dispute relating to the contract of the parties. The same could not be entertained by virtue of provision of Order 2 rule 2 of the CPC. Besides this, on merits he said that the respondent has failed to prove that the alleged gunny bags were purchased by him for the appellant and the same were used and supplied to any office of the appellant, hence the findings of the trial court that the same were purchased for the appellant and supplied to it are not sustainable. In this premises, by placing reliance on a decision of the Apex Court in the matter of *K. V. George vs. Secretary to Govt., Water and Power Dept., Trivandrum* -AIR 1990 SC 53, prayed for setting aside the impugned order and the arbitral award by allowing this appeal.

7. On the other hand Shri A.K.Mishra, learned Senior Advocate assisted by Shri Ankit Saxena, learned appearing counsel for the respondent while opposing the aforesaid arguments said that the impugned dispute was not referred to the arbitrator while filing the earlier dispute as the cause of action for the same was not available on such occasion. The same was made available to the respondent when the price of such gunny bags were not paid after giving the notice dated 19.11.01. Accordingly, the cause of action for the earlier referred dispute and the present dispute were altogether different and in view of such different cause of action, it was neither necessary nor it could be included in the said reference. In such premises the analogy of constructive *resjudicata* or the provision of Order 2 rule 2 of the CPC are not applicable to the present case. In view of different cause of actions, the same respondent had a right to file the successive reference and the same was rightly filed. In such premises, the arbitrator did not commit any fault or misconduct in passing the arbitral award. On merits, he said that in view of the terms of the contract, the appellant was duty bound to pay the cost of the gunny bags purchased by the appellant vide Bill No.137 dated 20.11.98. He also referred the photocopy of such Bill and the averments of Clause 12 of the agreement in this regard. By elaborating his arguments, he further said that by-allowing his appeal, the appellant cannot be permitted to withhold the cost of the gunny bags. The appellant, being State functionary, is duty bound to pay the requisite sum to

the citizen like the appellant. He also said that the natural justice demands that the State should not be permitted to withheld such sum with it. With these submissions, by placing his reliance on a decision of the Apex Court in the matter of *Kewal Singh Vs. Lajwanti*- AIR 1980 SC 161, he said that the impugned order does not requires any interference at this stage and prayed for dismissal of the appeal.

8. Having heard the learned counsel, I have carefully gone through the record of the arbitrator, the trial court and also perused the impugned award. It is undisputed fact on record that the agreement dated 21.11.98 took place between the parties to procure the Soyabean to the tune of 1000 metric tonne by the respondent for the appellant from district Ujjain for the Kharif year 1998-99. During subsisting such contract, on arising dispute, the same was referred by the respondent to the aforesaid sole arbitrator and the same was resolved by the arbitral award dated 25.10.99. It is apparent that the dispute regarding price of the gunny bags or its interest was neither claimed nor mentioned in such reference. The same was submitted before the arbitrator on dated 24.6.2002. There is no dispute between the parties regarding the earlier award as appeared from the record.

9. As per the case of the respondent, the aforesaid gunny bags 11025 in number having worth of Rs.2,75,000/-, were purchased by the respondent for the appellant on dated 20.11.1998 as mentioned in the Bill of Hitesh Trading Company from where, as alleged, the same were purchased by the respondent. Undisputedly, the earlier reference was made to the arbitrator in the month of March, 1999, therefore, it could be said that the dispute referred by the successive application to the arbitrator was in existence on such day because such payment was not made to the respondent by the appellant. Accordingly, the cause of action of such reference was available to the respondent on referring the earlier dispute. Inspite it, the same was neither mentioned nor referred to the arbitrator.

10. In the above mentioned circumstances, the court has to consider whether the subsequent reference application of the respondent is hit by the principle of constructive *resjudicata* enumerated under Section 11 of the CPC and the provision of Order 2 rule 2 of the CPC. Before giving any finding on this question, I would like to reproduce the concerned abstract of Section 11 of the CPC which is as under :-

> "11. *Resjudicata.*
>
> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section; the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.-.....

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
Explanation V.....
Explanation VI.....
Explanation VII....."

11. As per the provision of explanation IV of the CPC, in the absence of any specific provision under the Act, the procedure provided under the Civil Procedure Code is applicable and in view of the facts of the present case as mentioned above, the aforesaid Section 11 with its explanation is applicable to the present case and it is undisputed fact that inspite having the cause of action for reference, the present dispute on the date of filing the former dispute the same was not referred to arbitrator by the respondent, therefore, by virtue of the aforesaid provision and it's explanation IV, the successive claim could not be entertained either by the arbitrator or the court. This aspect was considered and answered by the Apex Court in the matter of *K. V. George* (supra) in which it was held as under :-

> 17. With regard to the submission as to the applicability of the principles of *res judicata* as provided in Section 11 of the Code of Civil Procedure to arbitration case, it is to be noted that Section 41 of the Arbitration case provides that the provisions of the Code of Civil Procedure will apply to the Arbitration proceedings. The provisions of *res judicata* are based on the principles that there shall be no multiplicity of proceedings and there shall be finality of proceedings. This is applicable to the arbitration proceedings as well. It is convenient to refer to the decision in *Daryao v. State of U.P.*, (1962) 1SCR 574 at pp. 582. 83=(AIR 1961 SC 1457 at p. 1462) wherein it has been held that the principles of *res judicata* will apply even to proceedings under Articles 32 and 226 of the Constitution of India. It has been observed that:-
>
> "Now, the rule of *res judicata* as indicated in S. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive *res judicata* may be said to be technical; but the

basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *resjudicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32."

18. In *Satish Kumar v. Surinder Kumar*; AIR 1970 SC 833, it has been observed that (at p. 838) :-

"The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference .....This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed."

19. Considering the above observations of this Court in the aforesaid cases we hold that the principle of *res judicata* or for that matter the principles of constructive *res judicata* apply to arbitration proceedings and as such the award made in the second arbitration proceeding being Arbitration Case No. 276 of 1980 cannot be sustained and is therefore, set aside. The High Court has rightly allowed the F.M.A. No. 304 of 1982 holding that the appellant-contractor was precluded from seeking the second reference. No other points have been raised before us by the appellant.

Therefore, it is held that the successive reference of the respondent was not entertainable as the same was hit by the aforesaid provision.

12. Apart the above, in view of the provision of order 2 rule 2 of the CPC the

respondent was precluded to file the successive reference for the dispute for which the cause of action arose during subsisting and performing the contract and before filing the earlier reference and the same was not raised in the former reference. The concerning provision of Order 2 rule 2 of the CPC reads as under :-

> **2. "Suit to include the whole claim.**
>
> (2) Relinquishment of part of claim–Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished."

13. In view of the above mentioned facts, it is apparent that inspite having the cause of action, the present dispute was not referred for arbitration while submitting the earlier dispute, thereby the respondent himself did not included his own claim and intentionally omitted and relinquished the same and, therefore, he did not have any right to file the separate reference by showing different cause of action arising out of the same contract. Such question was also considered by the Apex court in the matter of *K. V. George* (supra) in which it was held as under :-

> "14. With regard to the submission that the issues that have been raised in the second claim petition before the Arbitrator are barred under the provisions of Order 2. Rule 2 of the Code of Civil Procedure, it is convenient to refer to a passage in Mulla's Code of Civil Procedure (Volume II, Fourteenth Edition) at page 894:-
>
> "..... This rule does not require that when several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. What the rule lays down is that where there is one entire cause of action, the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect of those parts."
>
> 15. It is pertinent to refer in this connection to the decision in *Muhammad Hafiz v. Mirza Muhammad Zakariya,* AIR 1922 PC 23, wherein a mortgage deed provided that if the interest was not paid for six months the creditor should be competent to realise either the unpaid amount of the interest due to him or the amount of principal and interest, by bringing a suit in court without waiting for the expiration of the time fixed, and the plaintiff, more than 3 years after (i.e. time fixed), brought a suit for interest alone and got a decree. It was held that the second suit for principal and arrears of interest was not maintainable as under Order 2, Rule 2, C. P. C. he must be deemed to have relinquished his claim for further relief, he having exercised the option of suing for interest alone. It was further held

that the cause of action referred to in the rule is the cause of action which gives occasion to, and forms the foundation of, the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim; he cannot afterwards seek to recover the balance by independent proceedings.

16. In the instant case, the contract was terminated by the respondents on April 26, 1980 and as such all the issues arose out of the termination of the contract and they could have been raised in the first claim petition filed before the Arbitrator by the appellant. This having not been done the second claim petition before the Arbitrator raising the remaining disputes is clearly barred."

In view of the aforesaid provision and dictum of the Apex Court, on examining the present case, the same is applicable here and in such premises , the successive reference filed on dated 24.6.2002 after disposing of the first reference by award dated 25.10.99, was neither maintainable nor entertainable. In pursuance of it the impugned arbitral award and the order of the trial court are not sustainable. Hence, the same are hereby set aside.

14. In view of the aforesaid findings, the other issues raised by the parties did not require any consideration on merits. So far the case cited by the respondent's counsel in the matter of *Kewal Singh vs. Lajwanti* (supra) is concerned, the same is based on different facts and circumstances relating to the question regarding hostile discrimination and about the reasonable classification under the provision of Article 14 of the Constitution of India. The same is not helping to the respondent in any manner especially in view of the above mentioned dictum of the Apex Court. Therefore, by allowing this appeal, the impugned judgment/order is hereby set aside and in pursuance of it, the arbitral award dated 1.4.03 passed by the sole arbitrator is also set aside. In the facts and circumstances of the case, there shall be no order as to the costs.

15. The appeal is allowed as indicated above.

Appeal allowed.

I.L.R. [2007] M. P., 1793

APPELLATE CIVIL

Before Mr. Justice Dipak Misra and Mr. Justice S.A. Naqvi

30 October, 2007

SMT. MANJU and anr. ...Appellants*

Vs.

GHANSHYAM and others ...Respondents

A. Commissioner of Oath Rules, 1976, Rule 2(b), High Court Rules and Orders, Rule 1 of Chapter III, Oaths Act, 1969, Section 3, Civil Procedure Code, 1908, Section 139, Criminal Procedure Code, 1974, Section 297- Oath Commissioner - Whether Oath Commissioner entitled to administer oath and solemn affirmation for the purpose of proceeding in High Court–Oath Commissioner is created under Oath Act - They can administer oath for filing in judicial proceedings only if they are empowered in this behalf by High Court - High Court has not empowered any person to administer oath for filing affidavits for proceeding before High Court–Rule 2(b) of Rules, 1976 defines Court as only Civil Court under superintendence of High Court - Oath Commissioner not entitled to administer oath and receive solemn affirmation under Rules, 1976 for the purpose of proceeding in High Court.

An Oath Commissioner is created under the Oaths Act. As per Section 3(1) (a) of the said Act they can administer oath for filing in the judicial proceeding only if they are empowered in this behalf by the High Court. The High Court has not empowered any person to administer oath for filing affidavits for proceeding before the High Court. Hence, cannot usher their authority and administer oath for filing affidavits before High Court. That apart, as has been discussed hereinabove when no one has been appointed, provisions of Section 3(1) (a) has to be given due prominence and its statutory requirement cannot be annihilated or made nugatory. Hence, there has to be an appointment.

High Court of M.P. has framed Commissioner of Oaths Rules, 1976. The dictionary clause that has been envisaged in Rule 2(a) defines 'appointing authority' means the High Court. Clause (b) of rule 2 reads as under:-

> "2 Definitions
>
> (b) 'Court' means only civil court under superintendence of the High Court." (Emphasis supplied)

It is contended that the term 'courts' has been used in Rule 5 and hence, it would include all courts including the High Court. The dictionary clause defines that

*M.A. No. 4239/07. (J)

the 'court' would mean only civil court under the superintendence of the High Court. As far as the term means is concerned it has definiteness and nothing can be ordinarily added to it.

In view of the aforesaid we are of the considered opinion that Oath Commissioner is not entitled under the law to administer the oath and receive solemn affirmation under the Commissioner of Oaths Rules, 1976 for the purpose of a proceeding in the High Court. Thus, view taken in *Smt. Manju Singh Parmar* (supra) lays down the correct law. Consequently, the order passed in *Maharishi Mahesh Yogi Shiksha Prasaar Samiti* (supra) stands overruled. (Paras 20,22 & 28)

B. Words and Phrases - Precedent - Judgment is a precedent for what it decides.

It is well settled in law that a judgment is a precedent for what it decides. In this context we may profitably refer to the decision rendered in the case of *Ambica Quarry Works etc Vs. State of Gujarat and others* and *Ambalal Manibhai Patel and others Vs. State of Gujarat and others,* AIR 1987 SC 1073. (Para 9)

Cases Referred :

Bhagwati Prasad Singhal vs. State of Madhya Pradesh and another, M. P. No. 4033/93 decided on 9-5-05, *Kamal Narain Sarma vs. Dwarka Prasad Mishra and others;* AIR 1966 SC 436, *Sajjain Kumar Vs. C.L. Verma and another;* AIR 2006, *Allahabad 36, Smt. Manju Singh Parmar and others Vs. Brij Kishore Palod and another;* M.C.C. No. 1962/2007 decided on 3-9-07, *Jabalpur Bus Operators Association & others Vs. State of M.P. and another;* 2003 (1) MPJR 158, *Shashi Bhushan Bajpai Vs. Madhavrao Scindia;* AIR 1998 MP 31, *Ambica Quarry Works etc. Vs. State of Gujarat and others* and *Ambalal Manibhai Patel and others Vs. State of Gujarat;* AIR 1987 SC 1073, *Haryana Financial Corporation and another Vs. Jagdamba Oil Mills and another;* (2002) 3 SCC 496, *State of Haryana and others Vs. AGM Management Service Ltd.;* (2006) 5 SCC 520, *Rambhuwan Prasad Upadhyaya and another Vs. State of M.P. and others;* W.P. No. 1945/1998.

Case overruled :

Maharishi Mahesh Yogi Shiksha Prasar Samiti Vs. State of M.P. and another W.P. No. 14211/07 decided on 26-10-07.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J:–This batch of appeals were listed for rectification of default, the same being, the affidavit that has been filed in support of the application for condonation of dealy preferred under Section 5 of the Limitation Act, 1963 in each case has been sworn to by the Oath Commissioner instead of Notary under the Notaries Act, 1952. Though the aforesaid matters were listed for rectification of the aforesaid singular default which has been pointed out by the Registry, Mr. A.M. Trivedi, learned senior

counsel, Mr.P.C. Paliwal, Mr.Imtiyaz Hussain, Mr. Ashok Lalwani, Mr. Greeshm Jain, Mr.K.N. Fakaruddin, Mr. Ashish Shroti, Mr. Ashish Trivedi, Mr. N.S. Parmar, Mr. D. K. Sharma and Mr. Vipin Sharma, Advocates' addressed this Court that the default pointed out by the Registry is absolutely erroneous as such a default does not emerge if the provisions engrafted in various enactments and rules framed by the High Court of Madhya Pradesh from time to time are scrutinized in proper perspective and further in view of the decisions in the field governing the said facet.

2. At the very outset it is seemly to state that there is no dispute that the affidavits in these appeals have been sworn to by the Oath Commissioner. Mr. A.M. Trivedi, learned senior counsel leading the argument has commended us to the rule 1 of Chapter 3 of M.P. High Court Rules and Orders.

3. On the bedrock of the aforesaid Rule it is urged that the persons who have the authority under Section 297 of the Code of Criminal Procedure and Section 139 of the Code of Civil Procedure are the persons empowered to administer oath or receive solemn affirmation for the affidavits used in the proceeding before the High Court. Learned senior counsel has commended us to the Division Bench decision rendered in the case of *Bhagwati Prasad Singhal Vs. State of Madhya Pradesh and Another* (MP No.4033/1993 decided on 9.5.2005). Quite apart from the above learned counsel have invited our attention to the decision rendered by Constitution Bench of the Apex Court in *Kamal Narain Sarma Vs. Dwarka Prasad Mishra and Others,* AIR 1966 SC 436, and a decision rendered by the Division Bench of Allahabad High Court in *Sajjain Kumar Vs. C.L.Verma and Another,* AIR 2006 Allahabad 36. It is canvassed by them that the view expressed by the Division Bench of this Court in *Smt. Manju Singh Parmar and Others Vs. Brij Kishore Palod and Another* (MCC No. 1962/ 2007 decided on 3.9:2007) runs counter to the decision rendered in *Bhagwati Prasad Singhal* (supra) and, therefore, it does not have the precedential value if the fundamental concept of precedent is taken into consideration and law laid down by the Full Bench in *Jabalpur Bus Operators Association & ors. Vs. State of M.P. and another,* 2003 (1) MPJR 158. Learned counsel for the parties have further propounded that Section 139 of the CPC and Section 297 of the CrPC in unequivocal and categorical terms authorise the Oath Commissioner to administer the oath or receive solemn affirmation in the case of affidavit for any purpose, for the simon pure reason the said provisions by the express and unambiguous language used therein so postulate. A decision rendered in *Shashi Bhushan Bajpai Vs. Madhavrao Scindia,* AIR 1998 MP 31 has also been pressed into service to pyramid the stand that an affidavit sworn to by the Oath Commissioner for the purpose of proceeding before the High Court cannot be treated to be illegal, unjust and unacceptable. The learned counsel have further, to bolster their stand and reinforce the stance, placed reliance on the decision rendered in the case of *Maharishi Mahesh Yogi Shiksha Prasaar Samiti Vs. State of MP and Others* (Writ Petition No.14211/2007) decided on 26.10.2007.

4. The learned counsel for the appellants have further canvassed that the Rule 1 of Chapter III of the High Court Rules and Orders has to govern the field and the Commissioner of Oath Rules, 1976 (for short 'the 1976 Rules') cannot override the same and a harmonious construction has to be placed so that they can coexist in congruity and homogeneity so that the Oath Commissioner can be regarded as entitled to administer the oath and get affidavits sworn for the purpose of filing before the High Court. It is their further submission that the procedural law is handmaid of justice and it cannot be conferred the status of mistress to rule.

5. To appreciate the submissions raised at the Bar it is necessary, nay, imperative to refer to Rule 1 of Chapter III of the High Court Rules and Orders. The said Rule reads as under:

> "1. The Additional Registrar or Deputy Registrar, a notary public appointed under the Notaries Act, 1952, and other persons mentioned in Section 539 of the Code of Criminal Procedure and Section 139 of the Code of Civil Procedure are persons empowered to administer the oath or receive the solemn affirmation in the case of affidavits to be used in this Court and the Supreme Court.
>
> [Note: Section 539 of the Code of Criminal Procedure Code 1898 referred in the said rule corresponds to Section 297 of the Criminal Procedure]"

6. The said Rule was referred to in *Bhagwati Prasad Singhal* (supra). The Division Bench in paragraphs 2.4 has expressed the opinion as under:

> "It is clear from the above provisions that they relate to and provide for only administration of oath or affirmation in respect of affidavits to be used in proceedings before the Courts covered by the Civil Procedure Code or Criminal Procedure Code, as also the High Court and the Supreme Court. They do not enable or empower any one, in particular Judges or Judicial Magistrate to administer oath or affirmation in respect of affidavits which are not intended to be used in proceedings before Courts."

7. Submission of Mr.Trivedi, Mr. Ashok Lalwani, Mr. Paliwal and Mr.Greeshm Jain and other counsel appearing for the parties is that the said Rule is the fundamental and principal genus and any person empowered in Section 297 of the Code of Criminal Procedure and Section 139 of the Code of Civil Procedure can administer the oath or receive the solemn affirmation an affidavit for a judicial proceeding in any court. To bolster the aforesaid stance they, with immense vehemence, have drawn our attention to the conclusions summed up in *Bhagwati Prasad Singhal* (supra) in paragraph 7. Learned counsel for the parties have drawn inspiration from sub-paragraph (a)

of paragraph 7. However, for the sake of completeness we intend to reproduce the paragraph in entirety:

> "7. We may resultantly summarize the position as follows:
>
> (a) A Judge or Magistrate or an Oath Commissioner may administer oath or affirmation in respect of any affidavit to be used in any judicial proceedings, that is, any proceeding before any court to which C.P.C.Or Cr.P.C. is made applicable or any proceeding before any Tribunal which is empowered to receive evidence on oath.
>
> (b) A Notary Public may administer oath or affirmation in regard to all affidavits, that is not only to the affidavits in respect of which oath or affirmation can be administered by a Judge, Magistrate or Oath Commissioner, but also affidavits which are to be used for purposes other than Court/Judicial proceedings.
>
> (c) An Executive Magistrate can administer oath or affirmation in respect of affidavits to be used in any criminal proceedings or any proceedings before the High Court.
>
> (d) In regard to any affidavit which is to be used for purposes other than judicial/court proceedings, oath or affirmation can be administered by a Notary Public. It can also be administered by any person if empowered by the State Government under Section 3(2) of the Oaths Act, 1969. At present no person is empowered under Section 3(2) of the Oaths Act."

8. Emphasising on the language used in paragraph 7(a) Mr. Trivedi has submitted that the Division Bench has clearly laid down that the Oath Commissioner may administer the oath and receive solemn affirmation in the shape of affidavits to be used in any judicial proceeding, i.e., before any Court to which the Code of Civil Procedure and Code of Criminal Procedure are made applicable. Proponement of Mr. Trivedi is that when the Division Bench has used the word 'in any court' it would cover any court of law and indubitably would include the High Court.

9. To appreciate the aforesaid submission it is apt and apposite to get the projection of facts in the case of *Bhagwati Prasad Singhal* (supra). The cavil that emanated in the said case was whether a Judicial Magistrate can administer oath and affirmation in a proceeding which is not judicial in nature. The Court referred to Section 139 of the Code of Civil Procedure, Sections 2 and 297 of the Code of Criminal Procedure, M.P. High Court Rules and Orders, provisions of Section 8 of the Notaries Act 1952, Section 3 of the Oaths Act, 1969 and eventually summed up the conclusions as we have reproduced hereinabove. Thus, from the aforesaid adumbration of facts it is

clear as sunshine that the lis was quite different. The Division Bench was not addressing itself whether the Oath Commissioner can administer oath or receive solemn affirmation in the affidavits to be used for the purpose of proceedings before the High Court. It is well settled in law that a judgment is a precedent for what it decides. In this context we may profitably refer to the decision rendered in the case of *Ambica Quarry Works etc Vs. State of Gujarat and Others and Ambalal Manibhai Patel and Others Vs. State of Gujarat and Others,* AIR 1987 SC 1073 wherein it has been held as under:

> "The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

10. In *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another,* (2002) 3 SCC 496 it has been held as under:

> "19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In *London Graying Dock Co. Ltd. v. Horton* (737 at P. 761), Lord Mac Dermot observed: (All ER p.14C-D)
>
> "The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.
>
> "20. In *Home Office v. Dorset Yacht Co.* Lord Reid said (at All ER p.297 g-h) "Lord Atkin's speech..... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances". Megarry, J. in (1971) I WLR 1062 observed: "One must not, of course, construe even a reserved judgment of even Russell. L.J. as if it were an Act of Parliament." And, in *Herrington v. British Railways*

Board Lord Morris said: (All ERp.761c) "There is always peril in treating the words of a speech or judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

22. The following words of Lord Denning in the matter of applying precedents have become *locus classicus:*

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

* * * * * * * * *

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to Justice clear of obstructions which could impede it."

11. Similar view has been iterated in *State of Haryana and Others Vs. AGM Management Service Ltd.*, (2006) 5 SCC 520.

12. In view of the aforesaid enunciation of law we are disposed to think that the term "any court" used in the summation in paragraph 7(a) has to be restricted to mean the court to which CPC and CrPC is made applicable regard being had to the context in which the decision was rendered. Quite apart from the above it is also evident that the Division Bench speaking through the learned Chief Justice (as his Lordship then was) did not lay down the law regarding the exact conceptuality that flows from language employed in the Code of Civil Procedure and Code of Criminal Procedure. Thus, the conclusion, irrefragably, has to be studied in the backdrop of the Code of Civil Procedure and Code of Criminal Procedure. Ergo, we proceed.

13. In this context we may profitably refer to the decision rendered in *Rambhuwan Prasad Upadhyaya and another vs. State of M.P. and others.* (Writ Petition No.1945/1998). In the said case the Division Bench of this Court in paragraphs 10 and 11 has expressed the opinion as under:-

"10. Thus, the rule contained in Section 139 of the CPC are the rules which do not apply to the proceeding under Article 226 of the Constitution. Apart from this, these rules which are known as "Commissioner of Oath Rules, 1976" framed under Section 139 of the CPC define the Court to mean only civil Court under superintendence of the High Court. These rules define the "Commissioner of Oaths" to mean the person other than Civil Courts or Magistrates authorised u/s 139 (a) CPC or u/s 297 Cr.P.C. Or any other Court generally or specially empowered u/s 139(c) of the CPC to administer oath to the deponent. The "Appointing Authority" is defined to mean the High Court and the jurisdiction of the Oath Commissioner is given in Rule 5 which says that the Commissioner of Oaths shall have power to verify affidavits to be used in Courts by administering oaths and affirmations. The term of Oath Commissioner is provided in Rule 7 which is for a period not exceeding three years and his certificate may thereafter be renewed every three years by the District Judge with prior approval of appointing authority on payment of prescribed fee. It means that a person can remain oath commissioner in perpetuity provided a renewal application is made by him to the District Judge within 90 days before the expiry of the term under the existing certificate and the District Judge has been authorised to condone the delay up to 30 days and such an application is to be accompanied by a copy of treasury challan evidencing the deposit of free prescribed for the certificate of oath commissioner. The fees for renewal of the certificate of Oath Commissioner is Rs.300/- per year. This practice of appointment of Oath Commissioner in the District Court is unhealthy and leads to discrimination and the needy and deserving person is thrown out from the arena and a monopoly is created in favour of the few persons who are attached to or are favourite of the District Judge, and the criteria of the appointment has been completely sacrifised. These rules, in the opinion of the Court, require a thorough review so to satisfy the need of the needy advocates and also require precautions regarding abuse of the authority and elimination of corruption and in respect whereof Allahabad High Court Rules can be taken aid of. A situation may come that a particular oath commissioner adopting corrupt practice collect huge amount whereas the other, who do not indulge in corrupt practice may not earn any thing. In this connection, Rule 6 Chapter IV of the Allahabad High Court Rules, 1952 have provided that the fees paid shall be distributed among Oath Commissioners in such manner as the Chief Justice may from time to time direct. Under this rule, the Chief Justice of Allahabad High Court has introduced a coupon system.

These items need to be considered by the Rules Making Committee.

11. The rules framed under Section 297 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr.P.C.) are extracted below:-

"2. Appointment of Commissioner of Oaths by the High Court.-

The Commissioner of Oaths appointed from time to time by the High Court under Section 122, read with Section 139 of the Code of Civil Procedure, 1908 (Act 5 of the 1908) shall also be deemed to be appointed as the Commissioner of Oaths under Clause (b) of Sub-section (1) of Section 297 of the Code of Criminal Proceedure, 1973.

3. Appointment of Commissioner of Oaths by the Court of Sessions.- (1) When there is appointed a Commissioner of Oaths for any area by the High Court under rule 2, of the Court of Session shall not appoint any Commissioner of Oaths for that area.

(2) When there is no Commissioner of Oaths appointed by the High Court as above for any particular area and the Sessions judge is of opinion that there is need of a Commissioner of Oaths being appointed for that area, the Sessions Judge shall intimated such need to the District Judge concerned who shall deal with the matter as the Commissioner of Oaths Rules, 1976."

These rules are known as "Commissioner of Oath (Criminal) Rules, 1995" and have adopted the rules by saying that the Commissioner of Oaths apointed from time to time by the High Court under Section 122 read with Section 139 of the CPC shall also be deemed to be appointed as the Commissioner of Oaths under Clause (b) of sub-section (1) of Section 297 of the Cr. P. C."

14. In paragraph 13 it has been held as under :

"The Rules known as Commissioner of Oath's Rule 1976" do not apply to any proceedings in the High Court."

15. It is worthnoting that in the said case a report was called from the Additional Registrar (J) who submitted the report on 2.2.99. After perusing the report the Bench expressed that no person has been appointed or empowered under the Oaths Act, 1969 as Oath Commissioner.

16. Presently to the provisions. Section 139 of the CPC deals with the oath on affidavit by whom to be administered. The said provision reads as under:

"**S. 139. Oath on affidavit by whom to be administerd.**- In the case of any affidavit under this Code-

(a) any Court or Magistrate, or (aa) any notary appointed under the Notaries Act, 1952 (53 of 1952);

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf, may administer the oath to the deponent."

(underlining is ours)

17. Section 297 of the CrPC reads as under:

"**S. 297. Authorities before whom affidavits may be sworn.-** (1) Affidavits to be used before any Court under this Code may be sworn or affirmed before -

(a) any Judge or any judicial or Executive Magistrate, or

(b) any Commissioner of Oaths appointed by a High Court or Court of Session, or (c) any notary appointed under the Notaries Act, 1952 (53 of 1952).

(2) Affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief.

(3) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended."

(Emphasis supplied)

18. Mr. A.M. Trivedi, learned senior counsel and other counsel appearing for the parties have laid immense emphasis on clause (b) of the aforesaid provision. It is their submission that other persons would mean an Oath Commissioner as the words 'other persons' also find mention in Rule 1 of Chapter III of the MP High Court Rules and Orders. If both the provisions are read in proper perspective they would convey, if we are allowed to say so, a singular and solitary meaning that any officer or person whom the High Court may appoint in this behalf has the authority to give oath and receive affidavit on solemn affirmation. This is the language used in the Code of Civil Procedure. As far as the Code of Criminal Procedure is concerned, it postulates that any Commissioner of Oaths appointed by a High Court or Court of Session.

19. In this context it is obligatory on our part to refer to Section 3 of the Oaths Act which deals with the power to administer oath. The said provision reads as under:-

"S.3. Power to administer oaths.-(1) The following Courts and persons shall have power to administer, by themselves or, subject to the provisions of sub-section (2) of S.6, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law, namely:-

(a) all Courts and persons having by law or consent of parties authority to receive evidence;

(b) all commanding officer of any military, naval, or air force station or ship occupied by the Armed Forces of the Union, provided that the oath or affirmation is administered within the limits of the station.

(2) Without prejudice to the powers conferred by sub-section (1) or by or under any other law for the time being in force, any Court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf-

(a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or (b) by the State Government in respect of other affidavits."

(Emphasis supplied)

20. On a perusal of the said provision it is clear that an Oath Commissioner has to be authorised and empowered by the High Court for the purpose of affidavits for any judicial proceeding. Thus, if the language of Sections 139 of the Code of Civil Procedure, Section 297 of the Code of Criminal Procedure and language of Oaths Act are appropriately understood it would mean that an officer or other persons has to be conferred the authority by the High Court. Rule 1 of Chapter III of the MP High Court Rules and Orders stipulates the names of two categories of the officers,i.e. Additional Registrar or Deputy Registrar. The Rule also includes the Notary appointed under the Notaries Act, 1952. It also includes persons mentioned under Section 139 of the CPC and Section 297 of the CrPC. As far as officers are concerned there can not be any shadow of doubt that power has been conferred on them. As far as Notaries are concerned they should be appointed under the 1952 Act. The Notaries Act, 1952 defines Notary under Section 2(d). Section 2(e) defines word 'prescribed' meaning thereby prescribed by rules made under the said Act. Section 3 confers power on the Central Government as well as on State / Government to appoint Notaries. Section 8 deals with the functions of Notaries. Section 15 deals with the power to make rules. On a perusal of the anatomy of the said Act it is clear as day that there is no further provision by which a Notary is required to acquire powers. To clarify: a Notary once appointed, he is a Notary and would carry out the functions under the Act

that has been so held in *Bhagwati Prasad Singhal* (supra). In Rule 1 of Chapter III the term 'Notary' has been used. As far as Oath Commissioner is concerned there is no conferral of power but a referral of power which is ingrained under Section 139 of the Code of Civil Procedure and Section 297 of the Code of Criminal Procedure. Section 139 (b) postulates that any officer or other person whom a High Court may appoint in this behalf. Section 297 of the CrPC lays down that any Commissioner of Oaths appointed by a High Court or Court of Session. Thus, an Oath Commissioner, *ipso facto,* does not have the authority. He has to be appointed by the High Court for the said purpose as per the Code of Civil Procedure or by High Court or Court of Session as per the provisions of Code of Criminal Procedure. That is also the basic requirement under the Oaths Act. Section 3(a) of the said Act envisages to empower the persons. Thus, the matter can be looked into by another angle. An Oath Commissioner is created under the Oaths Act. As per Section 3(1) (a) of the said Act they can administer oath for filing in the judicial proceeding only if they are empowered in this behalf by the High Court. The High Court has not empowered any person to administer oath for filing affidavits for proceeding before the High Court. Hence, cannot usher their authority and administer oath for filing affidavits before High Court. That apart, as has been discussed hereinabove when no one has been appointed, provisions of Section 3(1) (a) has to be given due prominence and its statutory requirement cannot be annihilated or made nugatory. Hence, there has to be an appointment. It is submitted by the learned counsel for the parties that Oath Commissioners have been appointed by the High Court and hence, Rule 1 of Chapter III of the M.P. High Court Rules and Orders would come into full play. The aforesaid submission, on a first flush, seems quite attractive but the resplendence of the first flush does require close scrutiny for appreciation of its real bright contour. High Court of M.P. has framed Commissioner of Oaths Rules, 1976. The dictionary clause that has been envisaged in Rule 2(a) defines 'appointing authority' means the High Court. Clause (b) of rule 2 reads as under:-

> "2 Definitions (b) 'Court' means only civil court under superintendence of the High Court." (Emphasis supplied)

Clause (d) defines 'Commissioner of Oaths' and clause (e) defines 'District Judge'.

21. Emphasis is laid before us on Rule 5 which deals with the jurisdiction of Commissioner of Oaths. The said Rule reads as under:-

> **"5. Jurisdiction of Commissioner of Oaths.-** The Commissioner of Oaths shall have power to verify affidavits to be used in courts by administering oaths and affirmations."

22. It is contended that the term courts has been used in Rule 5 and hence, it would include all courts including the High Court. The dictionary clause defines that the

'court' would mean only civil court under the superintendence of the High Court. As far as the term means is concerned it has definiteness and nothing can be ordinarily added to it. The matter would have been different had there been inclusive definition or a different kind of definition. Mr. Trivedi has forcefully drawn our attention to the decision rendered in the case of *Sajjan Kumar* (supra). Learned counsel has placed reliance on paragraphs 3,4 and 7 of the same. On a perusal of paragraph 3 it is patent that under rule 1 of Chapter IV of the Allahabad High Court Rules there is provision for appointment of Oath Commissioner who is appointed by the Chief Justice of that High Court. The Division Bench dealt with the anatomy of the aforesaid rules and thereafter in paragraph 4 expressed the opinion that there is nothing to show that it was the sole provision and has been made in exclusions of or in derogation of other provisions of law governing the swearing of the affidavits. It was also held that not only the said but contrary to it, the proviso contained in Rule 4 of Chapter IV carves out exception to the general rules where the affidavits verified by the Oath Commissioner's of the other States. It was held that the said provisions show that it is not affidavit verified and sworn before the Oath Commissioner of High Court alone can be presented before High Court rather affidavit sworn before other persons authorised to verify affidavits and administer oath or affirmation also be presented before the High Court. In our considered opinion the Rules in Allahabad High Court are different and that is why the Division Bench had delivered the judgment in that context.

23. As far as *Kamal Narain Sarma* (supra) is concerned be it noted the said case arose from the State of Madhya Pradesh. In the said case the affidavit of the election petitioner was sworn by a clerk of Court in the District Court, Jabalpur. An objection was raised by the first respondent that the affidavit was not sworn before the proper authority as required under rule 94-A of the conduct of Election Rules, 1961 and the election tribunal accepted the objection and allowed the time to file proper affidavit. No action was taken against the said order. The tribunal framed two issues for determination. Issue No.20 dealt with the facet of affidavit. The tribunal rejected the said contention and expressed the opinion that as a fresh affidavit has already been filed the tribunal could proceed for trial. A writ petition was filed before the High Court and the Court quashed the two orders and the tribunal was directed to deal further with the petition. The High Court considered whether the provisions of Rule 94-A were mandatory or directory but did not address itself whether the first affidavit was proper or not. The Apex Court referred to Section 83 of the Representation of People Act, 1952 and thereafter referred to Rule 92 of the Conduct of Election Rules, 1961. Their Lordships eventually after referring to Section 139 of the Code of Civil Procedure and Section 539 of the Code of Criminal Procedure in paragraph 8 held as under:-

"8.The Clerk of Court was appointed a Commissioner of Oaths

under S. 139 (c) quoted above. It is contended that the powers of such a Commissioner were to administer oaths for purposes of affidavits under the Code of Civil Procedure and this meant XIX of the Code. It is pointed out that none of the conditions under which the affidavit is required under that Order applies here. It is argued that Commissioners appointed under one statute cannot swear affidavits prescribed under another statute and S. 539 of the Code of Criminal Procedure is also cited as an instance. This may be so. It may be that an affidavit sworn by a District Clerk of Court may not be good for the purposes of the Code of Criminal Procedure and *vice versa* but that is because the restriction is to be found in S. 139 of the one Code and S. 539 of the other. Rule 94-A makes no such condition and makes receivable an affidavit sworn before a Commissioner of Oaths without specifying of what kind. In this view of the matter the affidavit sworn before the District Clerk of Court, who undoubtedly is a Commissioner of Oaths, can only be excluded by taking an extreme and technical view which, in our opinion, is not justified."

24. We have bestowed our thoughtful and anxious consideration and carefully perused the aforesaid decision. In the aforesaid case their Lordships observed that the clerk of Court was appointed as Commissioner of Oaths under Section 139 and thereafter as has been stated above their Lordships referred to Rule 94-A expressed that the said Rule does not lays such condition and makes receivable an affidavit sworn before a Commissioner of Oaths without specifying of what kind and in that backdrop further expressed the opinion that the affidavit sworn before the District Clerk of Court who undoubtedly is a Commissioner of Oaths can only be excluded by taking an extreme and technical view. Mr. A.M. Trivedi submitted that exclusion of Oath Commissioner for the present purpose would tantamount to extreme technical view which the Constitution Bench has not appreciated.

25. The question that falls for consideration is whether there is any employed inclusion or whether in the Rule non-inclusion of the Oath Commissioner would be extremely technical in nature. As has been discussed earlier the High Court of M.P. has framed Commissioner of Oaths Rules, 1976. The High Court has already stipulated other persons mentioned in Section 139 of the CPC and Section 297 of the Cr.P.C. In *Kamal Narain Sarma* (supra) Rule 94-A was silent in this regard. Here the High Court has framed a set of Rules and referred to the provision and Acts conferring power on the High Court. In the said Rule there is the definition of 'court'. The term 'only' has been used. If Rules are read in entirety the indubitable and inescapable conclusion is that the Oath Commissioner can administer oath or receive solemn affirmation in respect of Civil Courts only.

26. Learned single Judge in *Maharishi Mahesh Yogi Shiksha Prasaar Samiti*

(supra) has referred to the decision rendered in MCC No.1962/2007, Rule 1 of Chapter III, Section 139 of the CPC and decision rendered in the case of *Bhagwati Prasad Singhal* (supra) and expressed the opinion in paragraphs 6 and 8 as under:-

> "6 Cumulative effect of rule 1 of Chapter III of High Court Rules read with Section 139 of Code of Civil Procedure and provisions of Commissioner of Oath Rules 1976 is that an affidavit attested by the Oath Commissioner would be valid in the proceedings before the High Court.
>
> xxx xxx xxx
>
> 8. It seems that the aforesaid position of law was not brough into the notice of the learned Division Bench which passed the order in MCC No. 1962/2007. However, in view of the Division Bench decision in the case of *Bhagwati Prasad Singhal* (supra) and further in view of rule 1 of the Chapter III of the High Court Rules and Orders read with Section 139 of CPC and Oath Commissioner Rules, there seems to be no default and accordingly, the default pointed out by the office is liable to be ignored. Office is not directed to ignore the default and proceed with the case in due manner."

27. In our considered opinion the learned single Judge has not correctly appreciated the ratio of the decision rendered in *Bhagwati Prasad Singhal* (supra) and has also not soundly placed interpretation on Section 139 of the CPC and provisions relating to Commissioner of Oaths Rules, 1976.

28. In view of the aforesaid we are of the considered opinion that Oath Commissioner is not entitled under the law to administer the Oath and receive solemn affirmation under the Commissioner of Oaths Rules, 1976 for the purpose of a proceeding in the High Court. Thus, view taken in *Smt. Manju Singh Parmar* (supra) lays down the correct law. Consequently, the order passed in *Maharishi Mahesh Yogi Shiksha Prasaar Samiti* (supra) stands overruled.

29. Learned counsel for the parties are directed to rectify the default within a period of four weeks hence.

Order accordingly.

APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

22 November, 2007

WAHID KHAN ...Appellant*

Vs.

STATE OF M. P. ...Respondent

A. **Arms Act, Indian (LIV of 1959) - Sections 22, 37 - Search and Seizure - Search for arms concealed in house of premises for any unlawful purpose would be illegal if Magistrate did not order it–Search to be carried out in accordance with corresponding provisions in Criminal Procedure Code–Act of raiding residences of appellant and other inmates without recording the reason to believe that arms and ammunitions were hidden therein was not justifiable.**

Section 22 of the Arms Act, 1961 provides for search and seizure of arms or ammunition, concealed in a house or premises for any unlawful purpose. Accordingly, search for arms would be illegal if a Magistrate did not order it. Further, by virtue of Section 37 of the Act, the search shall be carried out in accordance with the corresponding provisions of the Code. There is nothing on record to suggest that the mandatory provisions of the Code pertaining to recording of belief before raiding the houses were complied with. This Court is not oblivious of the principle that protection, under Section 99 of the IPC, to a public servant extends even for acts which will not be strictly justified by law (See : *Kanwar Singh vs. Delhi Admn.* AIR 1965 SC 871) yet, as indicated already, the act of raiding the residences of the appellant and other inmates of Mundipura, without recording the reason to believe that arms and ammunitions were hidden therein, was not justifiable. In other words, the search operation, being void, would not attract under Section 99 of the IPC. (Para 13)

B. **Penal Code, Indian (XLV of 1860) - Section 307 - Private Defence - Curfew was clamped in the wake of communal tension - Police Party on wireless message that situation is explosive reached near the house of appellant - Appellant struck on the chest of injured by gupti - Defence of appellant was that police party entered in the house misbehaved with ladies, belaboured him and caused damage to his households - Appellant also receiving lacerated wound on parietal region–Held - Non explanation of injuries sustained by appellant entitled him to take plea of private defence - Appellant had no intention to kill injured - Not possible to conclude that right of private defence was exceeded - Appellant was entitled to act in exercise of his right of private defence - Appellant acquitted - Appeal allowed.**

*Cr. A. No. 01/1997.

Right of private defence cannot be weighed in golden scales is an oft-quoted axiom. *(Amjad Khan vs. State of M.P.* AIR 1952 SC 165 referred to). Since the appellant had no intention to kil Bhagwan, his act amounted to an offence under Section 308 whereas the injuries sustained by him had made the police officials liable for the offence under Section 325 of the IPC. Thus, on facts also, it is not possible to conclude that the right of private defence had been exceeded.

In this view of the matter, the convicting the appellant for inflicting the injuries, found on the body of Bhagwan, is not sustainable in law as he was also entitled to act in exercise of right of private defence of body as well as that of property. (Paras 18,19)

C. Penal Code, Indian (XLV of 1860) - Section 97 - Right of Private Defence- Even if accused does not plead self-defence, Court can consider such plea if the same could arise from evidence.

Non-explanation of injuries sustained by the appellant entitled him to take the plea of private defence. It is well settled that, even if the accused does not plead self-defence, it is open to Court to consider such a plea if the same could arise from the evidence and material on record. The plea of self-defence can not be discarded merely on the ground that it was not specifically taken by the accused in his statement under Section 313 of the Code *(Kashiram vs. State of M.P.* AIR 2001 SC 2902 referred to). The burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence (*Salim Ziya v. State of U.P.* AIR 1979 SC 391 relied on). (Para 17)

Cases Referred :

Kanwar Singh Vs. Delhi Admn.; AIR 1965 SC 871, *QE Vs. Subba Naik;* 1988 ILR 21 Mad 249, *Kashiram Vs. State of M.P.;* AIR 2001 SC 2902, *Salim Ziya Vs. State of U.P.;* AIR 1979 SC 391, *Amjad Khan Vs. State of M.P.;* AIR 1952 SC 165.

S.C.Datt, with *G.P. Patel,* for the appellant.
Ramesh Shukla, Dy. Govt. Adv., for the State.

Cur. adv. vult.

JUDGMENT

R.C. Mishra, J. :–This appeal arises from the judgment dated 24.12.1996 passed by Sessions Judge, Khandwa in S.T. No. 176/1993, whereby the appellant has been convicted under Section 307 of the IPC and sentenced to undergo R.I. for 3 years. He is one amongst the persons, who were prosecuted and charged with the

offences punishable under Sections 148, 332 and 307 read with Section 149 of the IPC, for rioting and attacking the police patrol party with deadly weapons. However, for the reasons recorded in the impugned judgment only, the learned trial Judge acquitted the other eight accused of all and the appellant of the remaining charges.

2. The prosecution story, in short, may be narrated as under:-

(i) On 08.12.1992, in the wake of communal tension as a sequel to demolition of Babri Maszid at Ayodhya, curfew was clamped in the city of Khandwa to maintain law and order. Head Constable Bhagwan Choudhary (PW6), Constable Virendra Pratap Singh (PW4) and Constable Amar Singh (PW3) [for short 'Bhagwan, Virendra and Amar' were members of patrolling party, deployed in the disturbed area, under the control of Inspector Satyendra Kumar (PW5), the then SHO of police station Moghat Road.

(ii) At about 12.30 p.m., a wireless message was received to this effect that situation was explosive in Mundipura, a locality predominantly occupied by Muslims. The party led by Satyendra Kumar immediately proceeded towards Mundipura and in the transit area of Imlipura, joined the police force headed by Dy. S.P. G.S. Kushwaha (PW9). As they reached near the house of co-accused Altaf, the appellant and all the co-accused, armed with deadly weapons and exhorting each other to kill them saying that the police personnel had demolished the Babri Maszid, attacked them. First of all, the appellant struck Bhagwan on his chest with a gupti and Abdul Hamid dealt a sword blow that landed on his forehead; Altaf hit on his right shoulder with pharsa and Sheikh Jalil, expressing his intention to cut his hand, also assaulted him with a pharsa but he was able to save himself. At this point of time, Amar and Virendra came forward to prevent further attack on Bhagwan but they were also beaten by the other accused with lathies. G.S. Kushwaha also rushed to intervene but Sheikh Jameel made an unsuccessful attempt to kill him by dealing a sword blow on his neck.

(iii) Upon the FIR (Ex.P-19), lodged by Bhagwan, a case, under Sections 147, 148, 149, 353, 332 and 307 of the IPC was registered. He was sent to the main hospital along with Amar and Virendra. Dr. Narendra Singh Obeja (PWI) admitted Bhagwan to the hospital and referred him to the surgical specialist for further examination and treatment. He also advised X-ray examination of Bhagwan's left chest, Amar Singh's right leg and Virendra's left thumb but no bony injury could be noticed in the corresponding radiological examinations. However, Surgical

Specialist Gopal Krishna (PW7) described the incised injuries found on Bhagwan's chest as grievous and dangerous to life.

(iv) Sub-Inspector Antar Singh (PW8) seized bloodstained uniform of Bhagwan; apprehended the accused and recovered respective weapons at their instance. The seized weapons along with the clothes of Bhagwan were sent to FSL, Sagar for chemical examination. Noticing bloodstains thereon, the Chemical Examiner forwarded the exhibits to the Serologist for further examination. Although the Serologist also found bloodstains on trousers and shirt yet; he could not determine the origin of blood on gupti, allegedly seized from the appellant, due to disintegration.

3. The appellant as well as the other accused denied the charges. When examined, under Section 313 of the Code of Criminal Procedure (for short, 'the Code'), co-accused Sheikh Jameel asserted that the police party had picked up a quarrel with the female members of their family who, inviolation of the prohibitory order, had gone to fetch water for drinking. According to him, the police personnel not only assaulted the women folk but also fired gun shots in the air before entering into his house to beat him. The appellant also pleaded that the police party trespassed into his house at the time when his aunt was going to offer Namaz (prayer to God). As per his statement, the police officials first struck his aunt with sticks and on his expressing intention to make a complaint, not only belaboured him but also caused damage to his household goods and, in the process, they took away his wristwatch and camera.

4. The prosecution sought to bring home the charges by examining as many as 9 witnesses including the injured persons and the medical experts whereas the defence proved existence of injuries allegedly caused by the police officials to the appellant and co-accused Sheikh Jameel.

5. On consideration of the entire evidence on record, learned trial Judge, for the reasons assigned in the judgment under challenge, found the appellant guilty of attempting the murder of Bhagwan. He, accordingly, convicted and sentenced him as indicated hereinabove.

6. Legality and propriety of the conviction have been assailed on the following grounds: -

(i) The prosecution evidence, rejected as unreliable in respect of the other eight accused, could not have formed basis of conviction of the appellant.

(ii) Non-explanation of the injuries found on the person of the appellant was sufficient to conclude that the prosecution had not presented a true version of the occurrence.

(iii) Number and nature of injuries, sustained by the appellant, in conjunction with other evidence on record, probablised the plea of self-defence.

However, the learned Govt. Advocate, while making reference to the incriminating pieces of evidence, contended that the conviction was well-merited.

7. In order to appreciate the merits of the rival contentions in the right perspective, it is necessary to first advert to the medical evidence available on record.

8. Dr. Narendra Singh Obeja (PWI) proved existence of injuries found on the bodies of Amar, Virendra and Bhagwan as well as of those sustained by the appellant and co-accused Abdul Jameel. The respective injuries were described as under:-

Injuries on the body of Amar (PW3)

(i) Swelling on right little toe, tenderness present.

(ii) Abrasion lateral to right eye, linear 1" in length

Injuries on the body of Virendra (PW4)

(i) Abrasion on right thumb distal phalanx on the dorsal aspect, size ¼" x ¼". Swelling and tenderness present

(ii) Abrasion on right knee, size ¼" x ¼".

Injuries on the body of Bhagwan (PW6)

(i) Incised wound on left side of chest, inter-post stage near sternum, oblique placed, size 1¼" x ¼", bleeding present, margin clean cut.

(ii) Incised wound on left lateral to injury no. (i), size 1½" x ¼" x bleeding present oblique, margin clean cut

(iii) Incised wound on left side of forehead transverse. Clean cut margin, size 1½"x ¼" x ¼", bleeding present.

Injuries on the person of the appellant : -

(i) Lacerated wound on left parietal region

(ii) Swelling on right hand

Injury on the person of co-accused Abdul Jameel:-

Lacerated wound on scalp

9. Surgical Specialist Dr. Gopal Krishna Shrivastava (PW7) testified that the injuries no. (i) and (ii) on Bhagwan's chest were grievous in nature and dangerous to life whereas the Radiologist Dr. Narendra Kumar Jain (PW2) clearly admitted that bony injuries were found in the index and middle fingers of appellant's right hand.

10. Bhagwan (PW6) reiterated the allegation, as recorded at his instance by ASI Antar Singh (PW8) in the FIR (Ex.P-19), that it was the appellant who had dealt repeated blows with a gupti on his chest. Virendra (PW4) and Amar (PW3), though not able to particularize the blow, corroborated this fact that in a concerted attack, not only Bhagwan but they had also sustained injuries. However, none of the injured members of the police party came forward to explain as to how the above-mentioned injuries were sustained by the appellant and Abdul Jameel. The commanding officer namely G.S. Kushwaha (PW9) unequivocally admitted that he had not witnessed as to how the injuries found on the persons of Bhagwan, Amar and Virendra were caused. Although, he alleged that one of the members of the assembly namely Sheikh Jameel had dealt a sword blow on his neck yet, he could not identify the assailant amongst the accused in the dock. Moreover, statement made by Constables Virendra (PW4) and Amar (PW3), that they were assaulted with lathies while saving Bhagwan from further attack, was not found acceptable. This apart, Bhagwan's assertion to the effect that co-accused Abdul Hamid and Altaf had inflicted blows with sword and pharsa on his forehead and right shoulder respectively was also disregarded. However, despite these inconsistencies and infirmities in the statements of the prosecution witnesses, the learned trial Judge, in his endeavour to separate grain from the chaff, came to the conclusion that, in the light of evidence and surrounding circumstances, the appellant's role in causing both the incised injuries found on the Bhagwan's chest was proved beyond a reasonable doubt.

11. The maxim *"falsus in uno falsus in omnibus"* has no application in our Country. The fact that Bhagwan was disbelieved as against other co-accused namely Abdul Hamid and Altaf did not afford any reasonable ground to discard his evidence in its entirety. Learned trial Judge, therefore, did not commit any illegality in holding that the appellant was the author of the incised wounds noticed on Bhagwan's chest. Still, he completely misdirected himself in ignoring the grievous injuries found on the person of the appellant as the obvious consequence of reaction to his aforesaid overt act.

12. These injuries assumed importance in view of the admission made by Dy.S.P. G.S. Kushwaha (PW9) that, acting upon the credible information that unlicensed arms were concealed in the houses at Mundipura, the police party had started search operation. According to him, when he reached near the house of Altaf, the persons assembled there, started shouting that the police officials were responsible for demolition of Babri Masjid and attacked the patrolling police force with deadly weapons like sword and gupti. Constable Amar Singh (PW3) was also emphatic in stating that Bhagwan was assaulted at the time when the police personnel were about to conduct a raid in the house of Altaf.

13. Section 22 of the Arms Act, 1961 provides for search and seizure of arms or ammunition, concealed in a house or premises for any unlawful purpose. Accordingly, search for arms would be illegal if a Magistrate did not order it. Further, by virtue of

Section 37 of the Act, the search shall be carried out in accordance with the corresponding provisions of the Code. There is nothing on record to suggest that the mandatory provisions of the Code pertaining to recording of belief before raiding the houses were complied with. This Court is not oblivious of the principle that protection, under Section 99 of the IPC, to a public servant extends even for acts which will not be strictly justified by law (See : *Kanwar Singh vs. Delhi Admn.* AIR 1965 SC 871) yet, as indicated already, the act of raiding the residences of the appellant and other inmates of Mundipura, without recording the reason to believe that arms and ammunitions were hidden therein, was not justifiable. In other words, the search operation, being void, would not attract under Section 99 of the IPC.

14. Section 129 of the Code gives power to an officer-in-charge of police station, or in his absence, to any police officer not below the rank of Sub-Inspector to disperse an unlawful assembly by use of civil force. This provision is based on the principle of common law that the officers charged with maintenance of law and order can use only that much force as is necessary for disposal of an unlawful assembly and suppression of riot. As early as in 1893, Lord Bowen, in his report on Colliers's Strike and Riot, made the following recommendation :-

> "The degree of force which may lawfully used in the suppression of an unlawful assembly depends upon the nature of such assembly, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be obtained."
>
> (Quoted with approval in *QE vs. Subba Naik* 1898 ILR 21 Mad 249)

15. The word 'curfew' has not been defined in the Code or any other Statute pertaining to public order. In the middle Ages, the word 'curfew' was used for a regulation causing a bell to be rung every evening at a certain time as a signal for people to cover fires, put out lights, and retire *(Webster's New World Dictionary of the American Language)*. (In medieval Europe), in addition to the ringing of a bell at a fixed hour in the evening as a signal for covering or extinguishing fires, it also included : -

(i) An order establishing a specific time in the evening after which certain regulations apply, as that no children may still be outdoors.

(ii) A signal, usually made with a bell, announcing the start of the time of restrictions under the curfew.

(iii) the time of sounding a curfew. (Webster's Encyclopaedic Unabridged Dictionary of English Language).

16. Thus, in essence, curfew means the practice of ringing an evening (Shorter Oxford English Dictionary. Accordingly, the mere imposition of a curfew in a disturbed area by the District Magistrate would not clothe the police officer, authorised under Section 129 of the Code, with any extra statutory power.

17. Non-explanation of injuries sustained by the appellant entitled him to take the plea of private defence. It is well settled that, even if the accused does not plead self-defence, it is open to Court to consider such a plea if the same could arise from the evidence and material on record. The plea of self-defence can not be discarded merely on the ground that it was not specifically taken by the accused in his statement under Section 313 of the Code *(Kashiram vs. State of M.P.* AIR 2001 SC 2902 referred to). The burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence (*Salim Ziya v. State of U.P.* AIR 1979 SC 391 relied on).

18. Right of private defence cannot be weighed in golden scales is an oft-quoted axiom. *(Amjad Khan vs. State of M.P.* AIR 1952 SC 165 referred to). Since the appellant had no intention to kil Bhagwan, his act amounted to an offence under Section 308 whereas the injuries sustained by him had made the police officials liable for the offence under Section 325 of the IPC. Thus, on facts also, it is not possible to conclude that the right of private defence had been exceeded.

19. In this view of the matter, the convicting the appellant for inflicting the injuries, found on the body of Bhagwan, is not sustainable in law as he was also entitled to act in exercise of right of private defence of body as well as that of property.

20. Accordingly, the appeal is allowed and the impugned conviction and consequent sentence passed against the appellant are hereby set aside.

21. Appellant Wahid Khan is on bail. His bail bonds shall stand discharged.

Appeal allowed.

I.L.R. [2007] M. P., 1815
CIVIL REVISION
Before Mr. Justice K. K. Lahoti
9 October, 2007

REGISTRAR, MAHATMA GANDHI, CHITRAKOOT, GRAMODAYA VISHWAVIDYALAYA, CHITRAKOOT, DISTT. SATNA and ors. ...Applicants*
Vs.
M.C. MODI & COMPANY, JABALPUR ...Non-applicant

Contract Act, Indian (IX of 1872)–Section 23, Civil Procedure Code, 1908,

*C. R. No. 122/2007. (J)

Registrar, Mahatma Gandhi, Chitrakoot, Gramodaya Vishwavidyalaya, Chitrakoot, Dist. Satna vs. M.C. Modi & Company, Jabalpur, 2007

Section 20 (3), Order VII Rule 11 – Exclusion of jurisdiction of Court– Respondent submitting tender for supply of goods–Clause 9 of tender containing the term All disputes shall be subject to Satna Court–Dispute arose in respect of supply of goods–Civil Suit filed at Jabalpur– Jurisdiction of Court at Jabalpur challenged–Held–Part of cause of action also arose within territorial jurisdiction of Court at Jabalpur– No clause excluding jurisdiction of Court at Jabalpur and vesting exclusive jurisdiction to Satna Court–Plaintiff had not agreed to give exclusive jurisdiction to Civil Court at Satna–Plaintiff entitled to filed suit in Court at Jabalpur–Revision dismissed.

In the present case, no such clause was there excluding the jurisdiction of the other Courts or vesting exclusive jurisdiction alone or only jurisdiction to the Satna Court. The parties cannot by agreement confer jurisdiction where none exists on Court to which C.P.C. applies. But this principle does not apply when parties agree to submit exclusive jurisdiction on a Court. The parties may agree to have their dispute resolved by a Court where the cause of action or part of it arises and can exclude jurisdiction of other Court even where cause of action or part of it arises by a specific clause in this regard by agreeing in respect of alone, only or exclusive jurisdiction to a Court and excluding jurisdiction of the other Courts where the suit could have been filed and such vesting of the jurisdiction is not contrary to the public policy and in no way contravenes section 23 of the Contract Act.

As discussed hereinabove by clause 9, parties had not excluded the jurisdiction of other Courts and had not agreed to give exclusive jurisdiction to the Civil Court at Satna, hence the plaintiff was entitled to file a suit in the Court at Jabalpur. The trial Court has rightly rejected the application filed by the petitioners in which no fault/ jurisdictional error is found. This revision is without merit and is dismissed accordingly with no order as to costs. (Paras 13, 14)

Cases Referred :

A.B.C. Laminart Pvt.Ltd. v. A.P. Agencies, Salem, AIR 1989 SC 1239, *M/s. Femina Handloom of India v. M/s M.R. Verma and sons,* AIR 1993 Kerala 210, *M/s Sun Beverages (P) Ltd. v. M/s Vivek & Company;* 2002 (1) MPHT 121, *New Moga Transport Company v. United India Insurance Company Ltd.*, AIR 2004 SC 214, *Globe Transport Corporation v. Triveni Engineering Works;* (1983) 4 SCC 707.

Paritosh Gupta, for the applicants.

J.L. Soni, for the non-applicant

Cur. adv. vult.

ORDER

K. K. Lahoti, J. :–This revision is directed under Section 115 C.P.C. assailing the order dated 14.3.2007 passed by IInd Additional District Judge, Jabalpur in Civil

Registrar, Mahatma Gandhi, Chitrakoot, Gramodaya Vishwavidyalaya, Chitrakoot, Dist. Satna vs. M.C. Modi & Company, Jabalpur, 2007

Suit No.7B/2006 by which the petitioner's application under Order 7 rule 11 C.P.C. read with 151 C.P.C. dated 12.1.2007 was rejected.

2. This order has been assailed by the petitioners on the grounds that in the tender form, a condition was enumerated that all disputes shall be subject to "Satna Court" and the respondent by accepting this condition submitted his tender which was accepted. Thereafter a dispute arose in respect of the supply of the goods and as per the case of the respondent, goods were supplied as per terms of the supply order while the stand of the petitioners was that it was not in accordance with the supply order.

3. The petitioners filed an application under Order 7 rule 11 CPC before the trial Court and raised an objection regarding territorial jurisdiction of the trial Court on the ground that petitioner Mahatma Gandhi Chitrakoot Gramodaya Vishwavidyalaya Chitrakoot, Distt. Satna is a University established by the Government of M.P. under the Chitrakoot Gramodaya Vishwa Vidyalaya Adhiniyam, 1991 and the headquarter of the University is situated in the district of Satna. That the plaintiff submitted the tender form duly filled and signed. It means, the plaintiff had accepted the terms and conditions which were mentioned in the tender form and after reading and understanding the terms and conditions of the tender form fully, the plaintiff submitted his tender. In Clause 9 of the tender form, it was specifically provided that any dispute shall be subject to Satna Court jurisdiction, as University is situated in the district of Satna. The plaintiff accepting the terms and conditions of the tender submitted his tender, so the suit filed by the plaintiff in the Court of Jabalpur was not maintainable as it was having no territorial jurisdiction, and only Satna Court was having jurisdiction as per Clause 9 of the tender. By raising aforesaid objection, it was submitted that the suit filed by the plaintiff be dismissed on the ground of territorial jurisdiction.

4. The plaintiff replied to the aforesaid application and submitted that the Civil Court at Jabalpur is having jurisdiction because the entire process of filing tender, dispatch of goods, preparation of bills/vouchers of the goods were taken place at Jabalpur. The plaintiff is having its office at Jabalpur and the cause of action arose at Jabalpur, the suit before the Civil Court at Jabalpur is maintainable. It was denied that Satna Court is having exclusive jurisdiction. Respondent placed his reliance to the Apex Court judgment in *A.B.C. Laminart Pvt. Ltd. Vs. A.P.Agencies, Salem* AIR 1989 SC 1239, judgment of *Kerala High Court in M/s Femina Handloom of India Vs. M/s M.R.Verma and sons* AIR 1993 Kerala 210 and Single Bench judgment of this Court in *M/s Sun Beverages (P) Ltd. Vs. M/s Vivek & Company* 2002(1) M.P.H.T. 121 and submitted that the application filed by the respondent be dismissed.

5. The trial Court after hearing both parties found that between the parties, there is no specific agreement for exclusion of the jurisdiction of the Court at Jabalpur and vesting exclusive jurisdiction to Satna Court. In absence of this, when a part of cause

of action arose within the jurisdiction of Jabalpur Court, the Court at Jabalpur is having jurisdiction under Section 20(3) of C.P.C. Recording aforesaid finding and relying on the judgment of the Apex Court in *New Moga Transport Company Vs. United India Insurance Company Ltd* AIR 2004 SC 214, the trial Court rejected the application of the petitioner. This order dated 14.3.2007 is under challenged in this revision.

6. Learned counsel for petitioners submitted that the Court below erred in not properly construing Clause 9 of the tender in which it was specifically mentioned "all dispute shall be subject to Satna Court". Apart from this, Chitrakoot Vishwavidyalaya is constituted under the Mahatma Gandhi (Chitrakoot) Gramodaya Vishwa Vidhyalaya Adhiniyam, 1991 (hereinafter referred to as 'Adhiniyam') and under Section 3(5) of the Act, the headquarters of the University is at Chitrakut, District Satna, M.P. It is submitted that the trial Court erred in rejecting the application filed by the respondent which ought to have been allowed and the suit of the plaintiff/respondent was liable to be dismissed for want of territorial jurisdiction. Reliance is placed on the Apex Court judgment in *Globe Transport Corporation Vs. Triveni Engineering Works* (1983) 4 SCC 707. Per contra, learned counsel for respondent reiterated the contentions raised before the trial Court and placed his reliance to the judgment referred hereinabove.

7. To appreciate the rival contentions of the parties firstly factual position may be ascertained. In this case, it is not in dispute that the tender form provides Condition no.9 which reads as under:-

"All disputes shall be subject to Satna Court"

So far as other contentions in respect of supply of the goods, dispatch of it from Jabalpur, place of working of respondent/plaintiff at Jabalpur etc. are concerned, these are not in dispute. The petitioners have also placed reliance to Section 3 of the Adhiniyam which provides that headquarters of the University shall be at Chitrakoot, District Satna M.P. At this juncture, I would like to refer certain provisions of the Act which reads as under:-

> **Section 3:- Incorporation of the University:-** (1) There shall be established a University by the name of the Mahtma Gandhi Chitrakoot Gramodaya Vishwavidhyalaya which shall be consist of a Chancellor, A Vice Chancellor, a Pro-Vice Chancellor, a Board of Management, an Academic Council and other authorities and officers as provided in this Act or Statutes.
>
> (2) The University shall be a body corporate having perpetual succession and a common seal and shall sue and be sued by the said name.
>
> (3) Subject to the provisions of this Act the University shall be

competent to acquire and hold property, both movable and immovable, to lease, sell or otherwise transfer any movable or immovable property which may have become vested in or may have been acquired by it for the purpose of the University, and to contract and do all other things necessary for the purpose of this Act.

(4) In all suits and other legal proceedings by or against the University, the pleading shall be signed and verified by the Registrar and all processes in such suits and proceedings shall be issued to and served on the Registrar of the University.

(5) The headquarters of the University shall be at Chitrakut, District Satna, Madhya Pradesh.

Section 4: Territorial jurisdiction- With respect to teaching, research and extension programmes of rural development education the territorial jurisdiction and responsibility for this University shall extend to the entire State of Madhya Pradesh.

Except these, there is no other provision in the Act providing territorial jurisdiction of the Civil Court in respect of disputes with Vishwavidhyalaya. Section 4 though provides territorial jurisdiction in respect of teaching, research and extension programmes of rural development education and this specifically provides territorial jurisdiction and responsibility of this University shall extend to the entire State of Madhya Pradesh. In absence of exclusion of jurisdiction of any Civil Court by enactment, the Courts other then Satna Court are also having jurisdiction under Section 20(c) of the C.P.C., if cause of action wholly or in part arises within their jurisdiction. Section 3 of the Adhiniyam though provides that in all the suits and other legal proceedings by or against the University, the pleading shall be signed and verified by the Registrar who is the appropriate authority to whom notice of the proceedings is to be issued and served but does not provide exclusive jurisdiction of the Satna Court in respect of the legal proceedings by or against the University. In these circumstances, so far as territorial jurisdiction is concerned, the petitioners do not get any benefit of the provisions of the Adhiniyam of 1991.

8. Now Clause 9 of the tender may be seen. Though it provides that all disputes shall be subjected to Satna Court, but it does not specifically exclude or oust the jurisdiction of other Courts. In absence of exclusion or ouster of other Courts, Satna Court alone will not have exclusive jurisdiction, if the cause of action arises within the jurisdiction to other Courts.

9. The Apex Court in *A.B.C.Laminart Pvt. Ltd.* (supra) considering this aspect held thus:-

"When the Court has to decide the question of jurisdiction pursuant to

> an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, *ipso facto* take away jurisdiction of other Courts"

In this case, the clause is that all disputes shall be subject to Satna Court. Whether such clause ousts the jurisdiction of the other Court is to be seen. The clause when does not exclude jurisdiction of the other Court or provides exclusive or only or alone jurisdiction to the Satna Court, exclusion of other Court cannot be readily inferred. Where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty.

10. In *M/s Sun Beverages (P) Ltd* (supra) considering the similar clause in the agreement in which it was provided that "subject to Agra jurisdiction only", the learned Single Bench of this Court held that it has to be shown that the parties specifically agreed or acknowledged through agreement to exclude the jurisdiction of the Court envisaged under provision of Section 20 of the C.P.C. The aforesaid words themselves are not enough to indicate that they were a part of the agreement between both parties to oust jurisdiction resulting from any dispute out of the business transaction as settled between the parties.

11. In *M/s Femina Handloom of India Cannanore* (supra), Justice K.G.Balakrishnan, as his Lordship then was, considering section 20 of the C.P.C. regarding territorial jurisdiction held that the plaintiff who sent the goods to the defendant pursuant to an order placed by the defendant to send the goods, is entitled to maintain a suit in the court at the place from where he had despatched the goods to the purchaser and the action of the plaintiff was found justified in filling the suit at the place from where the goods were sent.

12. In *Globe Transport Corporation* (supra), the clause in the terms and conditions between the parties was that the Court in Jaipur City alone shall have jurisdiction in respect of all claims and matters arising under the consignment or of the goods entrusted for transportation. The Apex Court considering the aforesaid clause in which Jaipur City Court alone was vested with the jurisdiction, held that the other Courts were having no jurisdiction to entertain the suit. The Apex Court held that no doubt clause 17 of the Contract of Carriage confers exclusive jurisdiction on the Court at Jaipur and

excludes jurisdiction of other Courts and the aforesaid clause would be valid and effective.

13. In the present case, no such clause was there excluding the jurisdiction of the other Courts or vesting exclusive jurisdiction alone or only jurisdiction to the Satna Court. The parties cannot by agreement confer jurisdiction where none exists on Court to which C.P.C. applies. But this principle does not apply when parties agree to submit exclusive jurisdiction on a Court. The parties may agree to have their dispute resolved by a Court where the cause of action or part of it arises and can exclude jurisdiction of other Court even where cause of action or part of it arises by a specific clause in this regard by agreeing in respect of alone, only or exclusive jurisdiction to a Court and excluding jurisdiction of the other Courts where the suit could have been filed and such vesting of the jurisdiction is not contrary to the public policy and in no way contravenes section 23 of the Contract Act.

14. As discussed hereinabove by clause 9, parties had not excluded the jurisdiction of other Courts and had not agreed to give exclusive jurisdiction to the Civil Court at Satna, hence the plaintiff was entitled to file a suit in the Court at Jabalpur. The trial Court has rightly rejected the application filed by the petitioners in which no fault/ jurisdictional error is found. This revision is without merit and is dismissed accordingly, with no order as to costs.

Revision dismissed.

I.L.R. [2007] M. P., 1821

CRIMINAL REVISION

Before Mr. Justice S. C. Sinho

26 October, 2007

AJAY RAI ...Applicant*

Vs.

STATE OF M. P. ...Non-applicant

Prevention of Corruption Act (XLIX of 1988)–Section 19, Criminal Procedure Code, 1974, Section 300 - Invalid Sanction - Applicant tried for offences punishable under Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act - Trial Court acquitted applicant for want of valid sanction–Fresh Charge sheet filed–Held–Accused acquitted or discharged on the ground of invalid sanction for Prosecution - Filing of new charge sheet not barred by Section 300 of Criminal Procedure Code.

Thus it makes clear that any person once convicted , acquitted or discharged on the ground of invalid sanction for prosecution, initiation of filing of new charge sheet

*Cr. R. No. 1523/2006 (J)

is not barred by Section 300 of the the Code. It can not be said that because learned Special Judge has also placed reliance on *Mohd Iqbal Ahmad* (Supra), second challan can not be filed. Therefore, impugned order is neither illegal nor perverse.

(Para 9)

Cases Referred :

Mohd. Iqbal Ahmed Vs. State ofAndhra Pradesh; AIR 1979 SC 677, *State of Karnataka Vs. S. Nagraj Swami;* 2006 (1) SCC (Cri) 47.

Anil Khare, for the applicant.
G.S. Ahiuwalia, for the non-applicant.

Cur. adv. vult.

ORDER

S.C. SINHO, J. :–This revision petition u/s 397/401 of the Code of Criminal Procedure, 1973 (hereinafter it shall be referred as Code for short) has been filed by the petitioner against the order dated 31.03.06 passed by Additional Sessions Judge cum Special Judge (Lokayukta) Jabalpur in Special Case No. 2/06 whereby the objection filed on behalf of the petitioner in filing of Second charge sheet has been rejected.

2. No exhaustive statement of facts are necessary for disposal of this revision petition. Suffice it to state that a Special Criminal Case No. 3/2000 against the petitioner was filed under Sections 7 & 13 (1) (d) r/w 13 (2) of the Prevention of Corruption Act, 1988. After completion of the trial the learned Special Judge, (Lokayukta) vide judgment dated 13.3.2002 in Special Case No. 3/2000 has acquitted the petitioner. It was held that the sanction granted in the aforesaid case was not valid and applicant was acquitted in view of Apex Court Judgment in the case of *Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh,* A.I.R. 1979 SC 677, on the basis that the prosecution cannot be given an opportunity to filling up in lacuna by producing fresh evidence. It will be appropriate to re-produce last portion of para 4 which reads as under:-

> "Lastly, it was submitted by Mr. Rao that he should be given a chance to produce the materials before the Court to satisfy that the Sanctioning Authority had duly applied its mind to the facts constituting the offence. We are, however, unable to accede to this prayer which has been made a very stage. The prosecution had been afforded a full and complete opportunity at the trial stage to produce whatever material it liked and it had chosen to examine two witnesses but for reason best known to it did not produce the note which formed the subject-matter of the Resolution of the Sanctioning Authority -Exh. P-16. It is well settled that in a criminal case this court or for that matter any court should not ordinarily direct fresh evidence to fill up a lacuna deliberately left by the prosecution. The liberty of the subject was

put in jeopardy and it cannot be allowed to put in jeopardy and it cannot be allowed to put in jeopardy again at the instance of the prosecution which failed to avail of the opportunity afforded to it."

3. . Learned Advocate of the applicant Shri Anil Khare has stated that applicant was acquitted in view of the case of *Mohd. Iqbal Ahmed* (Supra) therefore a fresh challan can not be filed by non-applicant against applicant and it will amount to review of original judgment.

4. Learned counsel for the non-applicant has stated that in *Mohd. Iqbal case* (Supra), an opportunity was sought in the Supreme Court for filling up the lacuna, whereas in this case second challan is filed only after two years before Special Court and this point is fully covered in *State of Karnataka Vs. S. Nagraj Swami* in 2006 (1) SCC (Cri.) 47. Therefore this revision should be dismissed.

5. I have heard both the counsel and perused the record.

6. It will be profitable to reproduce Sub-Section (1) of Section 300 of Cr.P.C. which reads as under:

> **"300. Persons once convicted or acquitted not to be tried for same offence.-** (1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub section (2) thereof."
>
> The essential conditions for invoking the bar under the said section are :
>
> (i) the court had requisite jurisdiction to take cognizance and tried the accused, and
>
> (ii) the court has recorded an order of conviction or acquittal, and such conviction/acquittal remains in force.

7. Thus it is clear that if a proceeding is initiated without sanction, the same would be null and void. This position is also not challenged by learned Advocate of the applicant but his main objection was that applicant was acquitted while placing reliance on the case of *Mohd. Iqbal Ahmed* (Supra), therefore this will amount to be a retrial.

8. Hon'ble Apex Court in *State of Karnataka* (Supra), has held in para 25 reads as under:

> "25. In view of the aforementioned authoritative pronouncements, it

is not possible to agree with the decision of the High Court that the trial Court was bound to record either a judgment of conviction or acquittal, even after holding that the sanction was not valid. We have noticed herein before that even if a judgment of conviction or acquittal was recorded, the same would not make any distinction for the purpose of invoking the provisions of Section 300 of the Code as, even then, it would be held to have been rendered illegally and without jurisdiction."

9. Thus it makes clear that any person once convicted, acquitted or discharged on the ground of invalid sanction for prosecution initiation of filing of new charge sheet is not barred by Section 300 of the the Code. It can not be said that because learned Special Judge has also placed reliance on *Mohd Iqbal Ahmad* (Supra), second challan can not be filed. Therefore, impugned order is neither illegal nor perverse.

10. As the impugned order is reasonable in accordance with law, it is not a fit case where interference in the matter in a revision petition is called for.

11. It is further observed that the learned trial Judge will not be affected by the Judgment dated 13.3.2002 passed in Special Case No. 3/2000 while deciding this case.

This petition being devoid of any merit is, hereby dismissed.

Revision dismissed.

I.L.R. [2007] M. P., 1824
CRIMINAL REVISION
Before Mr. Justice Rakesh Saksena
15 November, 2007

ANIL KUMAR GUPTA, ...Applicant*
Vs.
STATE OF M. P. ...Non-applicant

A. Criminal Procedure Code, 1973 (II of 1974)–Section 464–Omission to frame, or absence or error in charge–Charge did not mention particulars and specific dates of each transaction with respect of particular complaint–Held–It did not result in any prejudice nor it occasioned failure of justice to applicant–Conviction recorded by Magistrate cannot be held to be invalid.

So far as the contention made by the learned counsel for the applicant that trial Court committed error in framing charge and that the charge was defective on account of not giving particulars and the specific dates of each transaction with respect to particular complainant, I am of the opinion that it did not result in any prejudice to

*Criminal Revision No. 853/2007.

accused nor it occasioned failure of justice to him. As such, merely on that ground the finding of conviction recorded by the Court of Magistrate, cannot be held to be invalid. (Para 15)

B. Penal Code Indian, (XLV of 1860)–Sections 467, 468–Forgery and making a false document–Applicant induced and deceived several persons to delivery money to him on assurance that he would return them by making it double–On demand, applicant issued cheques which could not encashed–Held–No allegation that cheques were false or fabricated–Signature of applicant on cheques not disputed–It cannot be held that cheques were forged with intent to defraud complainants–Ingredients of making false document not established–Conviction under Sections 467, 468 set aside–Appeal allowed in part.

On perusal of the prosecution evidence and the accusation in the present case, it is abundantly clear that the allegation is that accused had dishonestly obtained money from the complainants and had issued cheques to them which were not encashed. There is no allegation that the said cheques were false or fabricated. There is no dispute that the cheques bore the signatures of applicant. Thus, it cannot be held that the aforesaid cheques were forged with intent to defraud the complainants. Since the necessary ingredient of making false document has not been established by the prosecution, the conviction of accused/applicant for the offence under Section 467 and 468 of Indian Penal Code is not warranted and deserves to be set aside. (Para 17)

Chhotelal Mishra, with *B.R. Koshta,* for the applicant.
J.K. Jain, Govt. Adv. for the State.

Cur. adv. vult.

ORDER

RAKESH SAKSENA, J. :–Applicant has filed this revision against the order dated 24.3.2007, passed by Additional Sessions Judge (Fast Track Court), Amarpatan, District Satna, in Criminal Appeal No. 35/07, affirming the judgment and order dated 3.7.2006, passed by Judicial Magistrate First Class, Amarpatan, in Criminal Case No. 384/06, convicting the applicant under Section 420, 467 and 468 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for two years with fine of Rs. 1000/-, rigorous imprisonment for two years with fine of Rs. 2000/- and rigorous imprisonment for with fine of Rs. 2000/-, on each count respectively. Sentences directed to run consecutively.

2. In short, the prosecution case is that applicant/accused since before 3.2.1999 dishonestly induced and deceived people of village Dihiya Kala viz Vishwanath Kol, Surjdeen, Bhagwandeen, Ram Sushil, Ram Pratap, Ramhet, Dayali, Samaylal, Pachai, Samay Lal, Ram Khelawan, Balli, Parasi, Chhotelal, Ram Krapal, Balmik, Ganpat, Gorelal, Chavilal and Kanhai to deliver money to him on the assurance that he would return them

by making it double. On their demanding back their money, he issued cheques to them, which could not be encashed. He also did not repay their money. Some of these persons, when went to Bank, they were informed that there was no money in the account of accused. A report was submitted to police by 21 persons. Police registered the case under Section 420 and 467 of Indian Penal Code finding that applicant had cheated the complainants by dishonestly inducing them to deliver money. During investigation, it was found that there was no money in the bank account of applicant.

3. After investigation, a charge sheet was filed before the Court.

4. Learned Magistrate framed the charge under Sections 420, 467 and 468 of Indian Penal Code.

5. Applicant abjured the guilt and claimed to be tried.

6. During trial, prosecution examined 23 witnesses and produced 25 documents including the cheques issued by applicant to complainants.

7. Learned Magistrate, relying upon the evidence adduced by the prosecution, convicted the applicant/accused and sentenced him as mentioned above.

8. Aggrieved applicant preferred appeal before the Court of Sessions. His appeal was dismissed by Additional Sessions Judge, Satna.

9. Learned counsel for the applicant submits that the evidence adduced by the prosecution is not sufficient for bringing home the charge under Section 420 as well as under Sections 467 and 468 IPC. He submits that on the basis of adduced evidence, it cannot be held that the cheques, alleged to have been issued by the applicant, were forged or that he had forged any document. Therefore, the conviction of applicant for the offence under Section 467 and 468 of Indian Penal Code is illegal and deserves to be set aside. Counsel further submits that the charge framed by the Magistrate was defective on account of not giving particulars and the specific dates of each transaction with respect to particular complainant. Because no specific period of commission of offence was mentioned, therefore, he submits, that conviction of the applicant under Section 420 of IPC is also liable to be set aside.

10. Per contra, learned counsel for the State submits that there is overwhelming evidence on record. All the witnesses who are said to have been cheated by the applicant have been examined before the court and they have categorically deposed that applicant had dishonestly induced them to deliver money to him on assurance that he will return their money with interest more than which Banks give, but ultimately no money was returned to them and it was found that there was no money in the account of the applicant in the Bank. He had criminal intent of cheating from the very beginning when he had induced complainants to deliver money to him.

11. On perusal of evidence of Ram Sushil (PW-1), it is found that he has categorically stated that accused had demanded money from him on the pretext of investing it in the

business of Hay. He had given him Rs. 20,000/-. He had assured that he would get back his money from Allahabad Bank, where his money was deposited. He had issued him a cheque on 22nd February 2001 (Ex. P/1) for Rs. 35,000/-. When he went to Bank, he was informed by the Bank officials that there was no money in the account of accused. He admitted in the cross-examination that he had not submitted cheque in the Bank, but when he had gone to submit it, the Bank officials had informed him that there was no money in the account of accused. He had, therefore, given a complaint to local MLA. Ram Krapal (PW-2) stated that accused had obtained Rs. 25,000/- from him on the pretext that he would return the same after three months. Accused had given him a cheque of Allahabad Bank, but he came to know that there was no money in the Bank account of applicant. Similarly Smt. Jhalli (PW-3) stated that accused had obtained Rs. 20,000/- from her and had given a cheque of Rs. 24,000/- to her. When she went to Bank to encash it, there was no money in the Bank account of accused. She had complained to police. She had put her thumb impression on the complaint (Ex. P/2). Similarly, Ram Pratap Mishra (PW-4), Kandhai (PW-5), Ram Khelawan (PW-6), Vishwanath (PW-7), Balmik (PW-8), Lakhani (PW-9), Samay Lal (PW-10), Padasari Kol (PW-11), Bhagwandeen Yadav (PW-12), Ganpat (PW-13), Samay Lal, s/o Pachai (PW-14), Arjun Prasad Soni (PW-15), Gorelal (PW-16), Chhotelal (PW-17), Surijdeen (PW-18), Vrandawan (PW-20) and Pachai Kol (PW-21) testified that applicant had obtained money from them assuring that he would return money giving more interest on the money, but the cheques, given by the accused to them, were not encashed and the money was not returned to them.

12. S. Pal Sethi (PW-22), Senior Manger, Allahabad Bank, Ram Nagar, testified that he was Senior Manager in the Bank since 15th September 2003. He stated that there was an account of accused in the Bank which was Savings Account No. 1996. He deposed that on 10.2.1994 there was only balance of Rs. 17.00 in the account of accused. On 13.10.1998 the balance was Rs. 296/- only. On 26.6.1996 Rs. 7108/- were deposited, but on 6. 7.1999, Rs. 7150/- were withdrawn. He gave description of various cheques issue by the accused. He stated that there was no sufficient money in the account of accused for clearing the cheques. It is apparent that the testimony of prosecution witnesses, who had been deprived of their money on false assurance made by the accused, is corroborated by the testimony of S. Pal Sethi (PW-22). Kamlesh Prasad Pandey (PW-23), Branch Manager, Shahdol, also testified that accused Anil had opened an account in Shahdol Kshetriya Gramin Bank, Branch Papaid, Shahdol. The cheque book was issued to him. Only Rs. 500/- were deposited in the account of accused. Total balance in the account was Rs. 575/-.

13. On due consideration of the above evidence, it is established that applicant had dishonestly induced the complainants/witnesses to deliver money to him, which in total comes about to Rs. 6,81,090/-, with the intention to cause wrongful loss to them. Thus, it is clearly established that applicant committed offence of cheating punishable under Section 420 of Indian Penal Code.

14. On going through the impugned judgments of the courts below, I do not find any error or illegality in the appreciation of evidence done by them and holding accused guilty for the said offence. Accordingly, the finding of conviction of the accused under Section 420 of Indian Penal Code is affirmed.

15. So far as the contention made by the learned counsel for the applicant that trial Court committed error in framing charge and that the charge was defective on account of not giving particulars and the specific dates of each transaction with respect to particular complainant, I am of the opinion that it did not result in any prejudice to accused nor it occasioned failure of justice to him. As such, merely on that ground the finding of conviction recorded by the Court of Magistrate, cannot be held to be invalid. In this regard, provisions of Section 464 of Code of Criminal Procedure are relevant, which are reproduced hereunder:

> "464. Effect of omission to frame, or absence of, or error in, charge.- (1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity, in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby."

Thus, the aforesaid argument advanced by the learned counsel for the applicant is not acceptable.

16. So far as the conviction of accused under Section 467 and 468 of Indian Penal Code is concerned, for bringing home the charge of forgery, it is necessary that a false document or record should have been made with intent to cause damage or injury to any person or to cause any person damage in person or to part property with intent to commit fraud. The definition of offence of forgery is provided under Section 463 of Indian Penal Code, which reads as under:-

> "**463. Forgery.**-[whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury], to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

In section 464 of the Indian Penal Code, making of false document has been defined. Section 464 reads as under:

> "464. Making a false document.-[A person is said to make a false document of false electronic record-
>
> First-who dishonestly or fraudulently-

(a) Makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any digital signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the digital signature, with the intention of causing it to be believed that such document or part of document, electronic record or digital signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly-Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with digital signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly-who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.]."

17. On perusal of the prosecution evidence and the accusation in the present case, it is abundantly clear that the allegation is that accused had dishonestly obtained money from the complainants and had issued cheques to them which were not encashed. There is no allegation that the said cheques were false or fabricated. There is no dispute that the cheques bore the signatures of applicant. Thus, it cannot be held that the aforesaid cheques were forged with intent to defraud the complainants. Since the necessary ingredient of making false document has not been established by the prosecution, the conviction of accused/applicant for the offence under Section 467 and 468 of Indian Penal Code is not warranted and deserves to be set aside.

18. In the result, this revision is partly allowed. The conviction and sentence awarded to applicant for the offence under Section 420 of Indian Penal Code, by the courts below, is affirmed. However, conviction and sentences awarded to applicant under Sections 467 and 468 of Indian Penal Code are set aside. The amount of fine, if deposited, on conviction under Sections 467 and 468 of Indian Penal Code, shall be refunded to applicant.

Revision partly allowed.

I.L.R. [2007] M. P., 1830

INCOME-TAX REFERENCE

Before Mr. Justice Dipak Misra & Mr. Justice S. C. Sinho

20 September, 2007

COMMISSIONER, INCOME-TAX, JABALPUR .....Applicant*

Vs.

M/S CENTRAL INDIA GASES (P) LTD., JABALPUR ...Non-applicant

Income Tax Act, 1981–Section 32 (1)(ii)–Depreciation–Question whether Tribunal was justified in holding 100% depreciation is allowable on the gas cylinder as cost of each cylinder is below Rs. 5000 even though the cylinders were used for less than 180 days–Held–Section 31 (1)(ii) provides that where actual cost of any plant does not exceed Rs. 5000/-, actual cost thereof shall be allowed as deduction in respect of previous year in which such machinery or plant is first put to use by assessee for the purposes of his business or profession–Gas cylinders treated as plants under table of rates on which depreciation is admissible–Assets did not form part of block assets therefore, Section 32 (1)(ii) would be applicable–Tribunal was justified in holding 100% depreciation–Reference answered accordingly.

Under Rule 5 of the Income-tax Rules, 1962 gas cylinders including valves and regulators were treated as plants under the table of rates on which depreciation is admisssible. Rate of depreciation as mentioned in table is 100%.

The Tribunal as is perceptible has expressed the opinion that the assets did not form a part of block assets before deletion of the first proviso and, therefore, for the assessment year 1994-1995 the first proviso would be applicable.

(Paras 8 & 11)

Cases Referred :

Commissioner of Income Tax v. Dhall Enterprises & Engineers (P) Ltd.; (2006) 201 ITR (Guj.) 107 = (2006) 150 Taxman 499.

Sanjay Lal, for the applicant

A.P. Shrivastava, with *Sapan Usrethe* for the non-applicant.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J:–This is a reference under Section 256 (1) of the Income-tax Act, 1981 (for brevity 'the Act') by the Income-tax Appellate Tribunal, Jabalpur (for short 'the Tribunal') whereby the Tribunal has proposed the following question for opinion of this Court.

*I.T.R. No. 156/1998. (J)

"Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that 100% depreciation is allowable under Section 32 (1)(ii) of the Income-tax Act, 1961, on the gas cylinder as cost of each cylinder is below Rs. 5000/- even though the cylinder were used for less than 180 days ?

2. The facts which are requisite to be adumbrated for the purpose of answering the reference are that the assessee-company carries on a business for production and sale of industrial gases. As is evincible, it purchased empty gas cylinders and it is filled with industrial gas and sold in the market. For the assessment year 1994-1995 the assessee claimed total deduction amounting to Rs. 15,32,092.20 on the ground that it is entitled to complete exemption under Section 32 (1)(ii) of the Act read with the first proviso of the said provision. The Assessing Officer (AO) negatived the aforesaid stand on the ground that no individual cylinder can be treated as one plant or machinery and it cannot be used separately and the assets having been used for less than 180 days 50% depreciation would be allowable. Be it noted, the AO dealt with many other facets but we are only concerned with this aspect.

3. Being aggrieved by the order passed by the Assessing Officer the assessee-petitioner preferred an appeal before the CIT (Appeals) Jabalpur. The appellate authority expressed the opinion that the assessee is entitled only for normal depreciation and for the period in which the assets were purchased. It was observed by him that the business of the assessee is just like cooking gas system while cylinders are being given to the consumers on demand on the cost and where the cylinder is empty it is exchanged with the filled up cylinder. The CIT (Appeals) further opined that the cylinder has the status of cooking gas plant and there was no proponement that the cylinders were used for the purpose of manufacturing process or any conversion process of gas. Being of this view the CIT (Appeals) rejected the stand put forth by the assessee.

4. On an appeal being preferred before the Tribunal it took note of the fact that the cost of each cylinder purchased by the assessee was below Rs. 5000/- and came to hold that there was no dispute with regard to use of cylinders during the year under consideration for the purpose of business; that the first proviso to Section 32 (1) gets attracted to the case at hand; that the third proviso to the aforesaid provision which restricts the deduction in respect of assets falling within a block asset income of its users for less than 180 days has no application to the assets which do not form a part of the block; that plant or machinery with the actual cost of Rs. 5000/- or less is not covered by the concept of block assets and, therefore, they are out of the province of the third proviso; that by the Finance Act, 1995 the frist proviso to Section 32 (1)(ii) was deleted and thereafter the Central Board of Direct Tax (CBDT) circular/ memorandum was issued clarifying the basic feature for block assessment and how the all the items of plant and machinery including costing less than Rs. 5000/- will form

a part of block assessment and it allowed depreciation at the specified rate in accordance with Rule 5 of the Income-tax Rules; that the Assessing Officer himself had accepted that the assessee is the user of cylinders and that in the obtaining factual matrix the assessee was entitled to 100% depreciation of gas cylinders.

5. After the order was passed by the Tribunal the Revenue filed an application under Section 256 (2) of the Act and the Tribunal keeping in view the assertions made has sent the aforesaid reference for the opinion of this Court.

6. We have heard Mr. Sanjay Lal, learned counsel for the Revenue and Mr. A.P. Shrivastava, learned counsel with Mr. Sapan Usrethe for the assessee.

7. The question that falls for consideration is whether the gas cylinder used by the assessee is to be treated as plant and machinery and whether the use of less than 180 days of a cylinder would only entitle the assessee to get 50% depreciation. Section 43 (3) of the Act defines the term 'plant'. It reads as under :

> "43. Definitions of certain terms relevant to income from profits and gains of business of profession.
>
> (1) xx xx xx
>
> (2) xx xx xx
>
> (3) "plant" includes ships, vehicles, books, scientific aparatus and surgical equipment used for the purposes of the business or profession;"

8. Under Rule 5 of the Income-tax Rules, 1962 gas cylinders including valves and regulators were treated as plants under the table of rates on which depreciation is admisssible. Rate of depreciation as mentioned in table is 100%. Submission of Mr. Sanjay Lal, learned counsel for the Revenue is that the said table was effected from the Assessment Year 1984-1985 to the Assessment Year 1987-1988. It is unnecessary to emphasise, we are concerned with the Assessment Year 1994-1995. The said table was substituted with effect from 2.4.1987 making it applicable for the assessment year 1988-1989 to 2002-2003. In the said table the gas cylinders including valves and regulators have been treated as plants and 100% depreciation is admissible. Thus, the Assessment Year with which we are concerned, is covered by the same.

9. At this juncture, it is submitted by Mr. Sanjay Lal that the gas cylinders may be covered if 180 days use is proved. Section 32 as it stood at the relevant point of time under Sub-Section (1) provided depreciation in respect of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession. The said provision postulated that what would be the deduction read in conjunction, with Section 34. In the present case, it is quite clear that Section 34 is not attracted. Sub-section (1)(ii) of Section 32 provided that in case of any block of assets

what would be the percentage of written down value thereof. The first proviso reads as under :

> "32. Depreciation
>
> (1) xx xx
>
> (i) xx xx
>
> (ii) Provided that where the actual cost of any machinery or plant does not exceed (five thousand) rupees, the actual cost thereof shall be allowed as a deduction in respect of the previous year in which such machinery or plant is first put to use by the assessee for the purposes of his business or profession".

10. Be it placed on record, the Tribunal has placed reliance on the first proviso. The learned counsel for the assessee has also placed heavy reliance on the same. Per contra, Mr. Sanjay Lal, learned counsel for the Revenue has submitted that the third proviso would be applicable to the case at hand.The third proviso reads as under :

> "Provided also that where any asset falling within a block of assets is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this clause in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed under this clause in case of block of assets comprising such asset."

11. The Tribunal as is perceptible has expressed the opinion that the assets did not form a part of block assets before deletion of the first proviso and, therefore, for the assessment year 1994-1995 the first proviso would be applicable. The learned counsel has also submitted that the memorandum was issued by the CBDT to highlight how the Revenue had understood the provision. He has also commended us to the decision rendered in *Commissioner of Income-tax v. Dhall Enterprises & Engineers (P) Ltd.*, (2006) 201 CTR (Guj.) 107 : (2006) 150 Taxman 499 wherein a Division Bench of the High Court of Gujarat while dealing with the same referred to the legislative history and development of Section 32 and eventually came to hold as under :

> "10. Thus, it is apparent that the legislative intent in introducing the first proviso was to ensure that a taxpayer is not put to hassle of detailed calculation and accounting of depreciation allowance in respect of machinery or plant having small cost. As against that, the legislative intent in introducing the third proviso was to obviate the practice adopted by the taxpayers to claim full depreciation on an asset even if the asset is acquired towards the end of the year and used for only one

day during the previous year resulting in excessive allowance of depreciation in the year in which the asset is first put to use, thereby depleting the taxable profits of that year an amount which bears no relationship to the use of that asset for earning that income.

11. The scheme, therefore, that unfolds is that in cases of assets whose value does not exceed the prescribed monetary ceiling, neither the taxpayer nor the assessing authority must be called upon to undertake an elaborate exercise to compute the depreciation allowance by entering into detailed calculation followed by accounting entries from year to year. Therefore, to project the third proviso as overriding the first proviso is not warranted by the scheme of the act or the legislative intent.

12. It is settled position in law that proviso is normally used as a legislative tool to carve out an exception from the main provision which precedes the proviso. The first proviso makes it clear that in case of the machinery or plant whose actual cost does not exceed the specific monetary ceiling, such asset would not enter the block of assets and hence, there would be no occasion to work out such percentage of the written down value/actual cost. If the view canvassed by the Revenue is accepted, this would go against the legislative intent.

13. There is one more reason. The third proviso itself requires to restrict the depreciation allowance at 50 per cent of the amount calculated at the percentage prescribed udner cl. (ii) of sub-s. (1) of S.32 of the Act. As already noticed, the asset does not enter the block of assets and hence, there is no question of working out the prescribed percentage. Therefore, on this count also the third proviso cannot be invoked and applied becase it does not talk of restricting the value at 50 per cent of the actual cost."

12. Regard being had to the circular of the CBDT and the decision of the Gujarat High Court with we concur, we are of the considered opinion that the order of the Tribunal is absolutely flawless and accordingly, we answer the reference in the affirmative against the Revenue and in favour of the assessee.

Order accordingly.

I.L.R. [2007] M. P., 1835

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Deepak Verma & Mr. Justice Rakesh Saksena

14 September, 2007

KAMAL SINGH ...Applicant*

Vs.

STATE ...Non-applicant

Criminal Procedure Code, 1973 (II of 1974) - Sections 427, 482 - Sentences to run concurrently -Applicant convicted under Section 376/511 of I.P.C. and sentenced to 4 ½ years R.I. –Subsequently convicted under Section 302/34 and sentenced to imprisonment of life -Held-Appeals were preferred in both the cases before High Court - No prayer for making the sentences concurrent was made at that time - Separate application under Section 427 of Cr. P.C. not maintainable.

On taking into consideration the facts and circumstances of the present case in the light of above legal proposition, it is apparent that although in both the cases, appeals were preferred before the High Court but no prayer for making the sentences concurrent was made at that time. Similarly, no such prayer was made by petitioner before the trial Court when he was sentenced in subsequent case. As such separate application under the provision of section 427 of the Code is not maintainable. Similarly, the inherent powers under section 482 of the Code can also not be exercised in the present situation. Petition is therefore dismissed. (Para 7).

Case Referred :

M.R. Kudva vs. State of Andhra Pradesh; 2007 Cr.L.J. 763.

D. D. Bhargava, for the applicant.

Jai Deep Singh, Dy. G. A. for the State/non-applicant.

ORDER

The Order of the Court was delivered by RAKESH SAKSENA, J. :–Petitioner has filed this petition under sections 427 and 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') praying for a direction that sentence passed against him in Sessions Trial No. 7 of 1986, by Second Additional Sessions Judge, Sehore, to run concurrent with the sentence of life imprisonment awarded to him in Sessions Trial No. 63 of 1995 by First Additional Sessions Judge, Hoshangabad.

2. In Sessions Trial No. 7 of 1986 petitioner was convicted for the offence under section 376 read with section 511 of the I.P.C. and was sentenced to rigorous imprisonment for five years by order dated 26-04-1989. Appeal preferred by him against the said judgment was registered before the High Court as Criminal Appeal

*Misc. Criminal Case No. 7883/2006.

No. 426 of 1989. This appeal was disposed of by judgment dated 07-03-2000. His sentence of imprisonment was reduced to four and a half years, but in addition he was directed to pay Rs. 10,000/- (Rs. Ten thousand) by way of compensation to prosecutrix.

3. In Sessions Trial No. 63 of 1995 petitioner was convicted for the offence under section 302 read with section 149 of the I.P.C. by judgment dated 26-08-1997 and was sentenced to imprisonment for life by First Additional Sessions Judge, Hoshangabad. Appeal preferred by him against the said judgment was registered as Criminal Appeal No. 1878 of 1997. It was dismissed by judgment dated 05-01-2005. S. L. P. preferred against the said judgment was dismissed by the Apex Court on 13-07-2005.

4. Learned counsel for the petitioner submits that in view of the provisions of section 427 of the Code, petitioner who was convicted for the offence under section 376 read with section 511 of the I.P.C. and was sentenced to rigorous imprisonment for 4-1/2 years on 26-04-1989, has to undergo that sentence first and the subsequent sentence of life imprisonment awarded to him under section 302 read with section 149 of the I.P.C. on 26-08-1997, would commence after expiration of his previous sentence, therefore, it would be essential for securing the ends of justice that the sentences imposed upon him in both the cases be directed to run concurrently.

5. Learned counsel for the State opposing the submission made by the learned counsel for the petitioner, submits that having regard to the nature, facts and circumstances of both the cases, the petition filed by the petitioner deserves to be dismissed. He submits that petitioner had not made such prayer before the trial Courts as well as at the time of hearing of appeals before the High Court, therefore, section 427 of the Code cannot be made applicable at this stage when both the appeals have already been disposed of by the High Court.

6. We have heard the learned counsel for both the sides and perused the record. The factual and legal situation as obtained in the present case was discussed in detail by the Apex Court in the case of *M. R. Kudva vs. State of Andhra Pradesh* (2007 Cri. L. J. 763). In para 11 of the decision the Supreme Court observed :-

> "11. However, in this case the provision of Section 427 of the Code was not invoked in the original cases or in the appeals. A separate application was filed before the High Court after the special leave petitions were dismissed. Such an application, in our opinion, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature as it had not exercised such jurisdiction while passing the judgments in appeal. Section 482 of the Code was, therefore, not an appropriate remedy having regard to the fact that neither the Trial Judge, nor the High Court while passing the judgments of conviction and sentence indicated that the sentences passed against the appellant in both the cases shall run concurrently

or Section 427 would be attracted. The said provision, therefore, could not be applied in a separate and independent proceeding by the High Court. The appeal being devoid of any merit is dismissed."

7. On taking into consideration the facts and circumstances of the present case in the light of above legal proposition, it is apparent that although in both the cases, appeals were preferred before the High Court but no prayer for making the sentences concurrent was made at that time. Similarly, no such prayer was made by petitioner before the trial Court when he was sentenced in subsequent case. As such separate application under the provision of section 427 of the Code is not maintainable. Similarly, the inherent powers under section 482 of the Code can also not be exercised in the present situation. Petition is therefore dismissed.

Petition dismissed.

169
CR-13