I. L. R. (2008) MADHYA PRADESH

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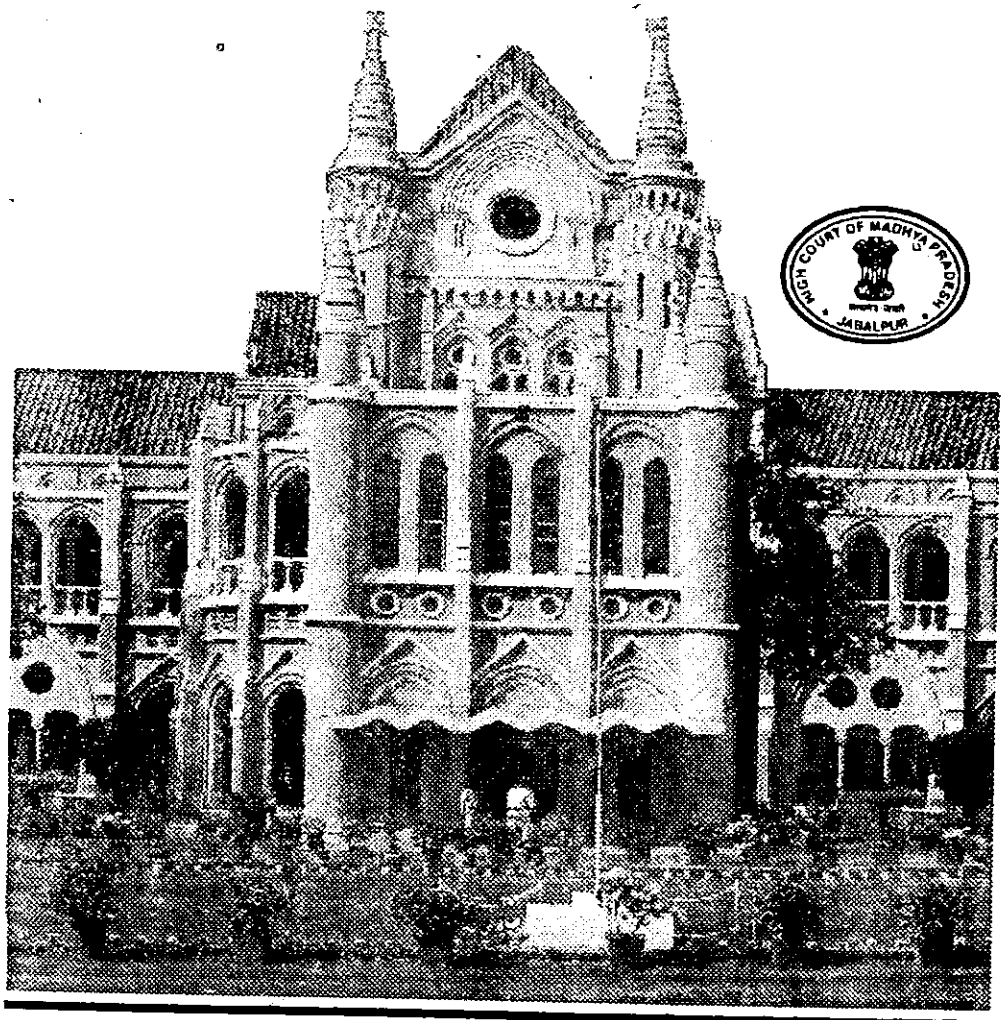

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Application for stay of execution of decree filed - Held - Hotel business is being run by or on behalf of appellant in premises in question - House also situated in prime and commercial locality of city - Execution of decree stayed subject to deposit of Rs. 10,000/- per month with Executing Court by appellant - Respondent entitled to withdraw the same on submitting solvent surety for amount withdrawn and undertaking to redeposit the same along with interest on arising the occasion and subject to decision of appeal. [Shashi Agrawal v. Ram Chandra Agrawal] ... 271

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namely Wednesbury unreasonableness and Procedural impropriety are grounds on which administrative action is subject to control by judicial review - Some of the Petitioners who were earlier granted contract for supply of DRT could not supply the DRT - Imposition of new condition has been prescribed to ensure smooth and sufficient supply of transformers - No illegality committed by imposing additional conditional - Petition dismissed. [Sharad Oswal v. Madhya Pradesh Poorva Kshetra Vidyut Vitran Company Ltd.], ...226

Constitution of India, Articles 14 & 16 - *Equal opportunity in the matter of public employment would be grossly violated if the appellant was not considered for the selection to the post of constable.* [Sandeep Kumar Richhariya v. State of M.P.] ...434

Constitution of India - Articles 14, 226 - *Judicial Review of Policy Decision - Payment of salary to its employees by account payee cheque - Petitioner awarded work contract by respondents - Senior Labour Officer issued impugned order directing petitioner to make payment of salary to its employees by account payee cheques - Held - SECL is making payment to its employees through Bank - Objects of Clause 31.1 to 31.3 of the Contract is to ensure payment to labourers/workmen - Contractor cannot be treated as an aggrieved person by virtue of impugned order - No illegality or breach of any statutory provision - Petition dismissed.* [M.N. Singh v. The South Eastern Coal Fields] ...44

Constitution of India, Article 16 - *Absorption - Respondent No.3 working as Sub-Engineer in Special Area Development Authority, Singrouli - Transferred in same capacity to Town Improvement Trust, Rewa in year 1987 and on abolition of Town Improvement Trust, Rewa w.e.f. 1994 has continue to work with Municipal Corporation, Rewa - On consideration of relevant fact - Services of respondent No.3 absorbed in Municipal Corporation - Held - Decision of authorities to absorb respondent No. 3 can not be arbitrary and illegal.* [Shiv Raj Singh v. State of M.P.] ...669

Constitution of India, Article 16 - *Seniority - Absorbed Deputationist - Computation of seniority - Services rendered in parent department - Held - Two posts in both departments equivalent - Services rendered in parent department for fixation of seniority are to be counted.* [Shiv Raj Singh v. State of M.P.]...669

Constitution of India, Articles 16, 21 - *M.P. Fundamental Rules, Rule 53 - Non payment of Subsistence Allowance - It must be shown - Delinquent officer was not in a position to participate in proceedings or that any other prejudice in effectively defending proceeding was caused to him - Respondent placed under suspension and was asked to collect Subsistence Allowance - Respondent collected Subsistence Allowance for some period - Attended departmental enquiry on some dates and thereafter absented - In ex-parte proceedings respondent was found guilty and his services were terminated -*

SAT dismissed application holding that respondent himself responsible for not receiving Subsistence Allowance - High Court quashed order of removal on ground of non payment of Subsistence Allowance holding that question of prejudice is irrelevant - Held - Finding of High Court that question of prejudice is irrelevant is not correct - Matter remanded back to High Court to decide the question of prejudice caused to respondent for non payment of Subsistence Allowance. [State Government of M.P. v. Shankarlal] ...615

Constitution of India, Articles 19(1)(a) and 19(2), Cinematograph Act (37 of 1952), Sections 5(a) & 13 - *A movie enjoys the guarantee under Article 19(1)(a) of Constitution - Article 19(2) of Constitution enables the State to make law imposing reasonable restrictions on the exercise of rights guaranteed under Article 19(1)(a) of Constitution - A film shall not be certified for public exhibition if in the opinion of the authority competent to grant certificate, the film or any part of it is against the interest of inter alia public order.* [UTV Software Communication v. State of M.P.] ...544

Constitution of India - Article 21 - *Allotment of agricultural land - Displaced families and encroachers entitled to allotment of agricultural land - State to make all possible efforts to locate Government or Private Land and allot such land to displaced families and encroachers if they opt for the same and refund 50% of the compensation received by them and if they also agree to other terms stipulated in R & R Policy.* [Narmada Bachao Andolan v. State of M.P.] ...509

Constitution of India - Article 21 - *Allotment of agricultural land to landless persons - State Government had decided to give grant of Rs. 49,300 to landless person instead of allotting land to them - Fundamental right under Article 21 not violated - Landless persons not entitled for allotment of agricultural land.* [Narmada Bachao Andolan v. State of M.P.] ...509

Constitution of India - Article 21 - *Major Son - Son who has become major on or before the date of notification under Section 4 of Land Acquisition Act will be treated as separate displaced family and would be entitled to allotment of agricultural land as far as possible in accordance with R & R Policy.* [Narmada Bachao Andolan v. State of M.P.] ...509

Constitution of India - Article 21 - *Protection of Life and Personal Liberty - Construction of Omkareshwar Dam - Rehabilitation - Rehabilitation and resettlement of displaced persons being part of fundamental right of displaced persons guaranteed under Article 21 of Constitution - They are to be rehabilitated and resettled in such manner that they are better off than what they were before their displacement - Rehabilitation and resettlement is constitutional obligation of State.* [Narmada Bachao Andolan v. State of M.P.] ...509

Constitution of India - Article 21–*Rehabilitation and Resettlement Plan, Paragraph 3,5 - Allotment of agricultural land - When agency undertaking*

construction of Dam assures in its R & R policy that it will offer agricultural land to displaced persons and later does not offer such agricultural land - Right under Article 21 of Constitution is violated - It is duty of Court to enforce R & R Policy and ensure allotment of agricultural land to displaced persons. [Narmada Bachao Andolan v. State of M.P.] ...509

Constitution of India - Article 136 - *Writ Petition filed by appellant disposed off by High Court with liberty to file representation - Appellant already submitted his representation - Held - Appellant could not question decision of High Court once he had submitted to decision of High Court by filing a departmental representation for reconsideration of his transfer.* [Prabir Banerjee v. Union of India] ...413

Constitution of India-Articles 136, 226 & 14-*Public employment-Employees engaged on contract basis have no right of regularization in public employment on the ground of long rendition of service-CAT directed for considering their cases for regularization-Employer's Writ Petition dismissed by the High Court-Special Leave granted by the Supreme Court-Case remitted back to the High Court to consider the case afresh in view of the decision in Uma Devi's case.* [Chief Commissioner of Income Tax v. Smt. Susheela Prasad] ...3

Constitution of India, Article 226 - *Delay in filing Writ Petition - In case of pension cause of action arises from month to month - In such case claim for disability pension should not be rejected only on ground of delay.* [Mohd. Dildar v. Union of India] ...*22

Constitution of India, Article 226 - *Deputationist - Just ground for curtailing the tenure - Ordinarily the terms of the deputation should not be curtailed except on just grounds - Appellant was posted on deputation in M.P. Rajya Krishi Vipnan Board for 1 year thereafter period of deputation was extended for 1 year i.e. upto 26.4.08 - By order dated 11.1.08 he was repatriated to his parent department - Order challenged in Writ Petition - S.B. held that appellant has no enforceable right in his favour to continue on deputation - Order challenged in Writ Appeal - Held - If the service of deputationist is not required by the organization in which the deputationist has been posted that organization may legitimately ask for curtailing the tenure of the deputationist in its organization - Appellate Court refused to interfere in the order of repatriation - Writ Appeal dismissed.* [C.R. Gaur v. State of M.P.] ...*15

Constitution of India, Article 226 - Estoppel - *Process of conducting written test and other particulars disclosed in circular - All 8 petitioners participated in written test - Out of them 6 petitioners were failed - Right to make complaint about manner of conducting written test after failing is not available - Failed petitioners estopped from challenging process of written test - Petition dismissed.* [Santosh Singh Chauhan v. State of M.P.] ... 690

Constitution of India, Article 226 - *Indian Railway Establishment Manual, Para 228 (1) - Erroneous promotions - Fixation of Seniority - A person lost promotion on account of administrative error - Should on promotion be assigned correct seniority vis-a-vis his juniors already promoted irrespective of date of promotion - Respondents 4 to 55 officiating as Diesel Assistant/Fireman at Bhopal - Considered for promotion in year 1992 due to administrative lapse - On promotion be assigned seniority w.e.f. 13-2-90 - Petitioners as Diesel Assistant came to Bhopal on request basis on different dates in year 1990, 1991 and 1992 - Department placed petitioners at the bottom of Respondent 4 to 55 - Order proper.* [S.C. Mehta v. Union of India] ...761

Constitution of India, Article 226 - *Locus Standi - Member of Trade Union has locus standi to invoke jurisdiction of High Court under Article 226 when there is an interdiction in an election process.* [R.K. Kathal v. Registrar, Trade Union] ...656

Constitution of India, Article 226, M.P. Civil Services (Classification, Control & Appeal) Rules, 1966, Rule 14 (5) (c) - *"Enquiry Officer" ought not to act as a "Presenting Officer" - Departmental proceedings - No Presenting Officer appointed as per rule 14 (5) (c) - Enquiry Officer played the role of Presenting Officer - Proceedings stand vitiated - Order of reversion from the post of Head Constable to post of Constable - Quashed.* [Ram Prakash v. State of M.P.] ...790

Constitution of India, Article 226, Ordinance of Dr. Harisingh Gour Vishwavidyalaya, Ordinance 5.22(2) - *Academic Issue - Petitioner applied for revaluation of subject - On revaluation two different examiners given different marks i.e. 58 and 45 - As per provision of Ordinance No. 5.22(2) Petitioner was given 45 marks in revaluation - Petitioner challenged this by way of Writ Petition, Writ Appeal and SLP but could not get any success - In present petition constitutional validity of Ordinance 5.22(2) challenged - Held - Challenge to constitutional validity of Ordinance cannot confer any benefit to Petitioner as the controversy of revaluation as far as Petitioner is concerned has been put to rest - Issue has become totally academic, therefore does not deserve advertence - Petition dismissed.* [Suman v. State of M.P.]...499

Constitution of India - Article 226 - *Public Interest Litigation - Sarva Shiksha Abhiyan Scheme - Officers who are suppose to implement the scheme - Purchased machinery worth more than Rs. 57 lacs from a company to give undue benefit to it, without calling for tenders and following due procedure - Commissioner, Gwalior Division in its report found all the officers guilty - High Court gave certain directions to State Government - Frame rules & guidelines for utilizing funds & to monitor functions of the officers appointed for implementation of the scheme and also directed for strict and serious action against the erring officers.* [Ramashankar Bharadwaj v. State of M.P.] ...449

Constitution of India - Article 226 - *Relaxation in conditions during pendency of Petition - Association made representation to respondents for relaxation in conditions - Conditions relaxed in view of representation - Held - Association itself took initiative and relaxation of conditions of N.I.T. does not amount to causing obstruction in course of justice or Contempt of Court.* [Sharad Oswal v. Madhya Pradesh Poorva Kshetra Vidyut Vitran Company Ltd.] ...226

Constitution of India, Article 226-*The Petitioner/Appellant supplied goods to Respondent-Respondent executed sixteen promissory notes in favour of Petitioner/Appellant for price of goods-The Respondent not paid the amount of PN on due date-A petition under Article 226 of Constitution filed-Petition allowed by Single Judge-Order challenged in Writ Appeal-Held-It is undisputed that petitioner has supplied goods in time and the respondent has executed P.N.-In the matter High Court can exercise Jurisdiction under Article 226-Order of Single Judge affirmed-Writ Appeal dismissed.* [Madhya Pradesh State Electricity Board v. M/s. Anand Transformers Pvt. Ltd.] ...28

Constitution of India - Articles 226/227-*Academic Issues - Courts should be reluctant to decide constitutional points merely as matters of academic importance.* [State of Madhya Pradesh v. M/s Shekhar Constructions] ...20

Constitution of India - Articles 226/227 - *Compassionate Appointment - Father of Petitioner died in harness in the year 1999 - Application for appointment on compassionate ground rejected on the basis of policy dated 1-9-2000 and not on the basis of policy dated 30-1-1997 which was in force at the time of death of father of Petitioner - Held - Order rejecting application on the basis of policy dated 1-9-2000 quashed - Respondents directed to re-consider the application for compassionate ground in view of policy dated 30-1-1997 which was prevalent at the time of death and date of submission of application - Petition allowed.* [Heeralal Baria v. M.P. State Electricity Board] ... 221

Constitution of India - Articles 226/227 - *Time Bound Promotion & Adverse Confidential Remarks - Case of Petitioner not considered by D.P.C. for time bound promotion after completion of 15 years of service - D.P.C. held in 1999 rejected the case of Petitioner on the ground of adverse confidential remark in the year 1998-99 - Whether D.P.C. should have considered service record of 5 years preceding the year when Petitioner completed 15 years of service or service record of 5 years preceding the date on which D.P.C. convened-Held-Words preceding 5 years mentioned in time bound promotion scheme are clear indicators of fact that authorities are required to consider record of the past 5 years preceding the date on which D.P.C. is convened and not preceding the date on which petitioner completed 15 years of service - Petition dismissed.* [M.L. Gole v. M.P. Electricity Board] ...246

Constitution of India - Articles 309, 311 - *Higher Pay Scale - Petitioner was granted higher pay Scale in the year 2000 after completion of 9 years*

of service - Penalty of censure imposed in the year 2004 - Respondents directed for recovery of Rs. 97,365/- on the ground that penalty of censure was imposed for the period prior to the date when petitioner became entitled to higher pay scale - Held - No disciplinary action/enquiry was pending or contemplated on the date when higher pay scale was granted - Order of punishment was passed on 20-10-2004 - It cannot be said that petitioner was undergoing punishment on due date - No ill effect of censure as no departmental enquiry was pending or contemplated and Petitioner was not undergoing any sort of punishment - Order for recovery of surplus amount not sustainable in law - Petition allowed. [Mohd. Ayub Khan v. Chairman-cum-Managing Director, M.P. Poorv Kshetra vidyut Vitran Co. Ltd.] ...438

Constitution of India - Articles 309, 311 - *Promotion - Sealed Cover Procedure/Review D.P.C. - Case of Petitioner not considered by D.P.C. for promotion as he was undergoing punishment of stoppage of one increment for two years - Appeal against order of punishment was pending - Held - As order of punishment had not attained finality, authorities should have adopted the sealed cover procedure - Order of punishment and appellate order has already been quashed by High Court - Allegations for which disciplinary proceeding was initiated has been wiped out - Case for promotion deserves to be considered by review D.P.C. - Consequential benefits would follow the outcome of review D.P.C. - Petition allowed.* [Raj Kishore Jha v. State of M.P.] 240

Constitution of India - Articles 311, 14 - *Natural Justice - Order passed in violation of - "Useless formality theory" - Petitioner appointed as Principal in Non-Government School although he had no requisite qualification - School taken over by State Govt. - Petitioner absorbed as Principal - Subsequently Order cancelled and was absorbed as Upper Division Teacher - No opportunity of hearing given before cancellation Order - Held - If person lacks basic qualification for the post then observance of principle of natural justice not necessary - Exception termed as "useless formality theory" - Petition dismissed.* [Rakesh Kumar Sharma v. State of M.P.] ...460

Constitution of India - Articles 311 & 16 - *Recovery of excess amount paid- Pay of Petitioner wrongly fixed by the respondents without there being any malafide or fraud or misrepresentation on the part of petitioner - Respondents cannot recover the amount already paid to Petitioner - Petition partly allowed.* [Shyam Paranjape v. State of M.P.] ...441

Constitution of India, Articles 311, 226 - *Departmental Enquiry - Adjournment - 10 days time sought by delinquent officer on 15-1-1991 on the ground that his witnesses are busy in local fairs -- Enquiry Officer in earlier part of order had directed department to produce documents till 13-2-1991 - Enquiry Officer closed the proceedings on 15-1-1991 itself - Held - Once the enquiry officer himself had directed that documents be filed latest*

by 13-2-1991 heavens were not to fall if the case was adjourned for 10 days to produce witnesses - Learned Single Judge was justified in interfering with inquiry proceedings. [Regional Manager v. Ram Prasad Mandal] ...673

Constitution of India, Articles 311, 226 - *Departmental Enquiry - No Confidence of Deptt. on delinquent officer - Such submission can be accepted if the enquiry was absolutely correct - The Departmental Authority including Enquiry Officer acted in highhanded or hasty manner - Action taken by department cannot be approved - Appeal dismissed with cost of Rs. 10,000/-.* [Regional Manager v. Ram Prasad Mandal] ...673

Constitution of India, Articles 311, 226 - *Departmental Enquiry - Non supply of documents - Enquiry Officer directed Presenting Officer to supply documents demanded from defence side - Documents not supplied - Held - Enquiry Officer did not reject the application of delinquent officer for production of documents on the ground that they are irrelevant - Direction of enquiry officer not challenged by Deptt. - Non supply of documents vitiated enquiry - Matter remanded back with direction to produce the copies of documents.* [Regional Manager v. Ram Prasad Mandal] ...673

Constitution of India, Articles 311, 226 - *Departmental Enquiry - Rule of Natural Justice - Once disciplinary authority disagrees with findings recorded by Enquiry Officer it has to issue notice to delinquent officer - It is immaterial that the findings are recorded partly in favour of delinquent officer and partly in favour of department.* [Regional Manager v. Ram Prasad Mandal] ...673

Constitution of India, Articles 311, 226 - *Departmental Enquiry - Witness - Stand of Deptt. that witnesses sought to be examined by delinquent officer were irrelevant - Held - Prejudging the issue in enquiry not permissible.* [Regional Manager v. Ram Prasad Mandal] ...673

Constitution of India, Articles 311, 226 - *Regulations 1976, Clause 17 (2) - Departmental Enquiry - Order of Appellate Authority - Reasons - Appeal dismissed by Appellate Authority without disclosing any reason - Held - Reasons are required to be recorded while passing administrative order except in cases where requirement is dispensed with expressly or by necessary implication.* [Regional Manager v. Ram Prasad Mandal] ...673

Contempt of Courts Act (70 of 1971) - Section 12 - *Contempt Jurisdiction must be exercised with scrupulous care only when a clear case beyond reasonable doubt is prima facie made out - Contempt Petition filed on the ground that non-applicants have willfully disobeyed order of the Court, in not deciding the representation - Held - The later part of the order completely wipes out directions, so deciding the representation would be a futile exercise - No Prima facie case made out -Application dismissed.* [Jyoti Simlot v. M.M. Uppadhyaya] ...249

Contract Act (9 of 1872), Section 8 - *Concluded Contract - By conduct - Instance of - Defendant submitted tender for supply of 3 ACW pumps - Offer of defendant accepted by Plaintiff - Letter of Intent was issued however, it was mentioned that detailed order indicating price break up and detailed terms and conditions are being mailed to defendant separately - Held - Acceptance of tender did not constitute concluded contract between parties as detailed terms and conditions price break up was yet to be disclosed by plaintiff.* [M.P. Power Generating Company Ltd., Jabalpur v. Flow More Private Ltd.]...810

Contract Act (9 of 1872), Section 8 - *Concluded Contract - No acceptance of detailed offer sent by Plaintiff to the defendant - On the contrary defendant had insisted for certain modifications - Plaintiff failed to communicate acceptance and at no point of time indicated that whether it was ready to accept defendants conditions or not - Plaintiff only insisted on execution of performance bond and agreement - At no point of time it was understood by parties that contract was to be carried out without execution of aforesaid documents - Parties were only negotiating and did not reach consensus ad idem necessary for enforceable contract - In absence of concluded contract plaintiff not entitled for extra costs of Rs. 19,35,410 which was incurred by getting the work done by some other agency - Appeal dismissed.* [M.P. Power Generating Company Ltd., Jabalpur v. Flow More Private Ltd.] ...810

Co-operative Societies Act, M.P., 1960 (17 of 1961) - Section 3(2), 55(2) - *Whether Deputy Registrar can decide the dispute - Held - Section 55(2) of Act, 1960 is specific provision - Legislature has authorized Registrar to appoint any officer not below the rank of Asstt. Registrar to decide the dispute - Section 55(2) has to be read independently of Section 3(2) of Act, 1960 - State Govt. by a Special or General order cannot override express specific provision made by State Legislature in Section 55(2) of the Act - Order of Tribunal set aside and matter remanded back for decision on merits.* [Ramanuj Tiwari v. M.P. State Co Operative Tribunal] ...216

Co-operative Societies Act, M.P. 1960 (17 of 1961), Sections 55(1), 95(3), Bank Karmachari Sewa (Niyojan, Nibandhan Tatha Unki Karya Stithi) Niyam, 1982, Rule 72(1) - *Reduction in age of superannuation - Age of superannuation reduced from 60 to 58 by amendment made by Registrar in Niyam, 1982 - Constitutional validity of amendment challenged on the ground that rule has not been laid before table of Legislative Assembly as required U/s 95(3) - Held - Section 95(3) relates to rules framed by State Govt. - It has no applicability to an order by which service conditions in Co-operative Society are framed by Registrar U/s 55(1) - Petition dismissed.* [Ganesh Dutt Pandey v. State of M.P.] ...457

Criminalization of Politics - *Any form is impermissible in democracy - The Citizens in democratic setup should not be compelled to suffer*

criminalization on the ground that they are helpless - A convict cannot be allowed to occupy an elected post where a statute clearly prohibits. [Shiv Singh Rawat v. State of M.P.] ...491

Criminal Procedure Code, 1973 (2 of 1974) - Section 125 - *"Unable to maintain herself" - Means available to deserted wife while she was living with her husband and would not take within itself the efforts made by wife after desertion to survive somehow - Where personal income of wife is insufficient she can claim maintenance U/s 125 Cr.P.C. - Unable to maintain herself does not mean wife must be absolutely destitute before she can apply for maintenance - Wife has some income from rent but insufficient to maintain herself - Rs. 1500/- per month granted by the Trial Court - Order maintained upto Supreme Court.* [Chaturbhuj v. Sita Bai] ...193

Criminal Procedure Code, 1973 (2 of 1974) - Section 146(1) - *Attachment of property and appointment of receiver - If after passing order u/s 145(1) Cr.P.C. the Magistrate considers the case to be one of emergency - Magistrate has to record reasons of satisfaction to the effect that it is a case of emergency - Only apprehension of breach of piece simplicitor cannot be said to be a valid ground for attachment of a property - Reasons leaking - Order is not sustainable in law.* [Yashwant v. Sachin] ...*14

Criminal Procedure Code, 1973 (2 of 1974) - Section 146(1) - *Object of attachment is to keep the property custodia legis so as to prevent the contesting parties from scramble for possession to obtain actual possession of subject of dispute during pendency of the proceeding.* [Yashwant v. Sachin] ...*14

Criminal Procedure Code, 1973 (2 of 1974) - Section 157 - *Delay in sending copy of F.I.R. to Magistrate - When evidence of eye witnesses are trustworthy, delay in sending copy of F.I.R. to Magistrate will not affect prosecution case.* [Radheshyam v. State of M. P.] ...354

Criminal Procedure Code, 1973 (2 of 1974) - Section 161 - *Delayed examination of witness - Effect - Incident took place on 14-4-1995 - Statements of witnesses recorded by police on 26th and 28th April - Held - No question put to Investigating Officer about delayed examination of witnesses - Factual explanation ought to have been obtained from I.O. - Defence cannot gain any advantage therefrom.* [Mithilesh v. State of M.P.] ...333

Criminal Procedure Code, 1973 (2 of 1974), Section 161 - *Statements recorded by police during investigation - Cannot be used for any other purpose except provided in Section 162 of Code - Any part of statement duly proved may be used by accused and with permission of Court by prosecution - Contradict such witness in the manner provided by Section 145 of Evidence Act.* [Dinesh v. State of M.P.] 945

Criminal Procedure Code, 1973 (2 of 1974), Section 178 (c), Penal Code, 1860, Section 498-A - *Offence punishable U/s 498-A I.P.C. is not a*

continuing offence - Admittedly as many as five out of the eight applicants did not commit any act of cruelty at Bhopal, no part of cause of action against them had arisen at Bhopal and against rest three applicants cause of action accrued at Unnao where most of alleged acts of cruelty committed - Offence U/s 498-A of I.P.C. must be tried at a Court at Unnao and not at Bhopal - Contrary view taken by Magistrate and approved by ASJ set aside - Petition U/s 482 allowed by the High Court with the direction to Trial Magistrate to return the charge sheet to SHO for presentation before a Court of competent jurisdiction at Unnao. [Taskeen Ahmed v. State of M.P.] ...*29

Criminal Procedure Code, 1973 (2 of 1974), Section 188, Prevention of Insults of National Honour Act, 1971, Section 2 - *Offences committed outside India - No enquiry or trial of such offence could be initiated in India except with the previous sanction of Central Government.* [In reference v. Prakash Kumar Thakur] ...591

Criminal Procedure Code, 1973 (2 of 1974) - Sections 223, 317(2) - *Separation of Trial - Joint or Separate trial is discretion of Trial Judge - Exercise of discretion would depend upon facts and circumstances of case - Splitting of joint trial is permissible if it does not result in prejudice to any one of the affected parties - Order of separate trial not going to result into any prejudice to applicant - Application dismissed.* [Manoj v. State of M.P.] ...404

Criminal Procedure Code, 1973 (2 of 1974) - Section 293 - Evidence Act, 1872, Section 45 - *Mere exhibiting hand writing expert report is no evidence unless proved by examining hand writing expert - Such expert does not come within the category of government scientific expert shown in section 293 (4).* [Ayyub v. State of M.P.] ...343

Criminal Procedure Code, 1973 (2 of 1974) - Section 362 - *Power of Review by Criminal Court - Is not a inherent power - No such power has been conferred by Code - Criminal Court cannot review it's own order or judgment except to the extent of correcting any clerical or arithmetical error.* [Sunita Jain v. Pawan Kumar Jain] ...424

Criminal Procedure Code, 1973 (2 of 1974), Section 389, Penal Code, 1860, Section 365 - *Suspension of Sentence - Appellant convicted U/s 365 of I.P.C. - Appellant is an educated person aged about 24 years - Having bright future - Bi-focal interest of justice to individual and society affected must be kept in mind - Appellant has been convicted U/s 365 - Remaining part of sentence shall remain suspended during pendency of appeal.* [Sohail Ali v. State of M. P.] ... 351

Criminal Procedure Code, 1973 (2 of 1974) - Sections 437, 439 - *Competent Court - Where an accused is arrested or detained by police or he appears or is brought before Court of Magistrate, in connection with any offence which may or may not be punishable with death or imprisonment for*

life - Application under Section 439 Cr.P.C. directly before Court of Sessions not maintainable - Competent Court would be Court of Magistrate to consider bail application under Section 437 Cr.P.C. [Yogesh Ganore v. State of M.P.]...606

Criminal Procedure Code, 1973 (2 of 1974) - Section 438 - *Maintainability of anticipatory bail application - If an application for anticipatory bail allowed and regular bail application rejected then anticipatory bail application would not be maintainable in higher Court - However, in peculiar circumstances of the matter application u/s 438 entertained and period of anticipatory bail extended by next 45 days.* [Fazilat Mohammad v. State of M.P.] ...*7

Criminal Procedure Code, 1973 (2 of 1974) Section 438- *Prima facie no case of cheating is made out against the applicant - Applicant entitled for anticipatory bail - State Govt. made a scheme for agriculturist for irrigation facilities - Applicant supplied requisite materials - Bank issued notices to the agriculturist for repayment of the loan - Agriculturists refused to repay on the ground that they did not get any benefit of the scheme - They made a complaint to the Collector - Matter enquired and on the direction of collector a criminal case registered against the applicant and Sub-Engineer u/s 420 I.P.C. - **Prima facie** it was not found that applicant has not supplied the required material - No case of cheating made out - Applicant deserves to be released on anticipatory bail.* [Ajit Kumar v. State of M. P.] ...400

Criminal Procedure Code, 1973 (2 of 1974) - Sections 438, 439 - *Regular bail - Competent Court - Where a persons is granted Anticipatory bail by a Court, in case where the offence is punishable with death or imprisonment for life or the Magistrate takes cognizance of such offence which is punishable with death or imprisonment for life - In such cases the court of Sessions would be the Competent Court to consider the regular bail application under section 439 Cr.P.C - Court of Magistrate would not be the Competent Court.* [Yogesh Ganore v. State of M.P.] ...606

Criminal Procedure Code, 1973 (2 of 1974) - Sections 451,457 - *Interim Custody-Applicants prayed for interim custody of cattles on the ground that they are owners - Revisional Court granted interim custody to applicants but imposed the condition of depositing Rs.3000 per cattle - Held - Applicants have been prima facie found rightful owners of cattles - No one else has claimed custody - Cattles should have been given after obtaining proper security - Condition imposed by Court extremely harsh - Application allowed.* [Munshi v. State of M.P.] ...187

Criminal Procedure Code, 1973 (2 of 1974) - Section 452 - *Disposal of property at conclusion of trial-Appellant tried for offences punishable under Sections 395, 397 and 396 - Appellant acquitted - Trial Court directed for retention of gun, cartridges and wrist watch seized from possession of*

appellant till conclusion of trial of absconding accused person - Held - Court has discretion to dispose property in any of three modes specified in Section 452 - Discretion is inherently judicial function - Manner of disposal is not to be made arbitrarily but judicially - When accused is acquitted Court should normally restore property to person from whose custody it was taken - Even if gun was used for commission of any offence for which absconding accused are to be tried, no useful purpose would be served by retaining custody for indefinite period - Property restored to appellant on certain conditions - Appeal allowed. [Munnilal Yadav v. State of M.P.] ...150

Criminal Procedure Code, 1973 (2 of 1974), Section 473 - *Powers U/s 473 are discretionary and wider than Section 5 of Limitation Act - Whenever a time bar challan is filed - Opportunity should be given to both parties to satisfy the Court for purpose of condonation of delay - Delay has to be condoned with exercise of judicial discretion as well as by speaking order - Trial Court took cognizance of offence without satisfying itself about delay - Order contrary to law - Quashed.* [Harishankar v. State of M.P.] ...977

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *High Court is duty bound to exercise its inherent jurisdiction - To prevent abuse of process of Court or to secure the ends of justice.* [Larsen & Toubro Ltd. v. Anand Bangad] ...600

Criminal Procedure Code, 1973 (2 of 1974) - Section 482 - *It is well settled that inherent power u/s 482 of Code must be exercised in rarest of rare* cases - *Principle for exercising power of quashing criminal Proceedings laid down in Bhajanlal's case.* [Sunita Jain v. Pawan Kumar Jain] ...424

Criminal Procedure Code, 1973 (2 of 1974) - Section 482 - *The action of framing of charge upheld by HC as well as SC - Thereafter HC in exercise of inherent power u/s 482 quash criminal Proceedings - Order amounts to review its own order - Order illegal, improper, contrary to law - Set aside.* [Sunita Jain v. Pawan Kumar Jain] ...424

Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 362 - *Modification in judgment not permissible in exercise of inherent power U/s 482 - Such powers can be exercised only when no other remedy is available with the litigant and no where a specific remedy is provided in Statute.* [Moolchand v. State of M.P.] ... *23

Criminal Trial - *Punchanama & memorandum - Proof and evidentiary value - Contains not admissible in evidence unless proved by witness in Court - Can be used for refreshing the memory and to corroborate the version of its author as per provision under Sections 157 and 159 of Evidence Act.* [Dashrath v. State of M.P.] ...360

Dowry Prohibition Act (28 of 1961), Section 3 - Dowry - *Dowry is a*

demand for property or valuable security having an inextricable nexus with marriage - No dowry was settled at the time of marriage - Question of abatement of giving dowry does not arise - Appellant cannot be convicted under Section 3. [Bhairon Singh v. State of M.P.] ...893

Electricity Duty Act, M.P. (10 of 1949) (as amended by the Act of 1985), Section 3, Table - Rates of Duty, Part-B, Clause 5 & Clause 8 - *Levy of Duty - Whether residential Colony or Township attached to a factory is a part of industry - Duty is levied at a different rate for cement industry and at a different rate for non-industrial purposes - Held - Law does not provide that residential colony/township would become part of industry and would become such an integral part of industry without which it would not be possible to run industry.* [Jaypee Rewa Cement v. State of M.P.] ...681

Electricity (Supply) Act (54 of 1948)-Section 49-*Deletion of condition of payment of interest on Security deposit-Appellant Board deleted the clauses 21(f) and (g) of Board's General Conditions for Supply of Electricity Energy and the Sale of Miscellaneous and General Charges which relates to agreement for payment of interest on security deposits-Single Judge held that such a course is permissible-Division Bench reversed the judgment of Single Judge-Held-Security Deposit is an adjustable advance payment of consumption charges-Board is required to make advance payment of material required for working of thermal plants-Board also required to make advance payments for purchase of power from Central Projects also-High Court has not considered the observations of Supreme court regarding permissibility to delete provisions for payment of interest on security deposits-Matter remanded back to High Court for a fresh consideration in the light of what has been stated regarding Board's powers to delete provision relating to payment of interest on security deposits.* [M.P. State Electricity Board v. Grasim Industries Ltd.] ...16

Entry Tax Act, M.P. (52 of 1976), Sections 7, 14, Entry Tax Rules, 1976, Rule 7 - *Entry Tax - Burden of proof - How discharged by dealer - By producing bill which does not contain rubber stamp endorsement as required to be affixed by selling dealer U/s 7 - Absence of stamp is prima facie proof of fact that goods sold by selling dealer were not of local origin.* [Goel Coal Co. through Partner Motilal Goel v. Additional Commissioner of Commercial Tax] ...794

Entry Tax Act, M.P. (52 of 1976), Sections 7, 14, Entry Tax Rules, 1976, Rule 7 - *Entry Tax - Whether non affixture of seal by selling dealer on bills as required U/s 7 of Act r/w Rule 7 would absolve dealer for payment of entry tax - Yes, in absence of any proof to the contrary.* [Goel Coal Co. through Partner Motilal Goel v. Additional Commissioner of Commercial Tax] ...794

Evidence Act (1 of 1872), Section 3- *Appreciation of evidence - Custodial death - Evidence of fellow police personnel - All of them refrained*

from admitting that injuries were caused by appellants during interrogation of deceased at police station - Their case diary statements indicating active involvement of the appellants - Deviation from their case diary statements did not assume much significance. [Ashok Kumar Jain v. State of M.P.] ...934

Evidence Act (1 of 1872), Section 3 - *Custodial death - If there is an evidence that a fatal injury was caused during the period when the person was in the police custody - Court may presume that police officer having custody of that person, was the author of such an injury.* [Ashok Kumar Jain v. State of M.P.] ...934

Evidence Act (1 of 1872), Section 3 - *Appreciation of evidence - News paper clippings reflecting the press release made by S.P. and the public reaction thereto - However news paper reports, not proved by evidence aliunde by the maker of the corresponding statement, are apparently inadmissible.* [Ashok Kumar Jain v. State of M.P.] ...934

Evidence Act (1 of 1872), Section 3 - *'Falsus in uno falsus in omnibus' has no application in India - Prosecution witnesses were disbelieved as against co-accused (since acquitted) on ground that their statement were inconsistent on material point - Not sufficient to reject the evidence of these witnesses its entirety - Duty of Court to separate grain from chaff.* [Ashok Kumar Jain v. State of M.P.] ...934

Evidence Act (1 of 1872), Section 32 - *Dying Declaration - Certificate of fitness - Certificate of fitness of deceased by Doctor is not necessary - If evidence on record is satisfying that deceased was in fit condition to give statement.* [Nasir v. State of M.P.] ...907

Evidence Act (1 of 1872), Section 32 - *Dying Declaration - Deceased suffered 80% 2nd and 3rd degree burn injuries - Looking to serious condition dying declaration recorded by Doctor immediately when she was admitted in Hospital - She survived for five days after incident - No intimation given to police - Dying declaration not recorded by Magistrate though sufficient time was there - No certificate affixed as to fit state of mind or she remained fully conscious - It cannot be held that doctor was satisfied that dying person is making conscious, voluntary and true statement - Dying Declaration not reliable.* [Kamlesh Jain v. State of M.P.] ...885

Evidence Act (1 of 1872) - Section 32 - *Dying Declaration-Proof - Police recorded statement of deceased during investigation - Carbon copy of same produced by accused in his defence - Burden to prove on accused is lighter than that of prosecution - When dying declaration relied upon by accused shows that it was case of accident, it is for prosecution to explain the circumstances under which it was recorded and to establish as to why it should be discarded - Nothing of this kind done by prosecution - Trial Court wrongly disbelieved the dying declaration.* [Rajesh v. State of M.P.] ...166

Evidence Act 1872, Sections 33, 138 - *Cross Examination of witness - Witness could not be cross examined solely due to any inaction or lapse on the part of defendants - Subsequently, witness became incapable of giving evidence - Examination in chief of witness could not be read in evidence.* [Ghasitibai v. Ramgopal Singh] ...872

Evidence Act (1 of 1872), Section 60 - *Hearsay Evidence - Dehati Nalishi got proved by its Scribe and not by Complainant - Dehati Nalishi cannot be considered in evidence - Being hit by law of hearsay evidence.* [Nan Singh v. State of M.P.] ...903

Evidence Act (1 of 1872), Section 67 - *Exhibit of document - Mere marking a document as exhibit does not dispense with its proof.* [Ghasitibai v. Ramgopal Singh] ...872

Evidence Act (1 of 1872) - Section 154 - *Hostile Witness - Seizure witnesses did not support seizure of Ganja from Accused - Prosecution did not declare them hostile - Defence can rely upon the evidence of these witness and it would be binding upon prosecution.* [Halku v. State of M.P.] ...574

Excise Act, M.P. (2 of 1915), Sections 25,28, General Licence Conditions, Liquor Policy 2006-2007 - *Clause 8.4 of Liquor Policy provides that licencee shall not be entitled to lift liquor against belatedly deposited licence fee - No provision that such belatedly deposited licence fee shall be liable to be forfeited - Forfeiture of money deposited with State Govt. has stringent consequences and same cannot be permitted without any express and enabling provision - Neither in Excise Laws nor in liquor policy the word forfeiture has been used - Amount lying with respondents against which no liquor was supplied is liable to be refunded - Petition allowed.* [Rajendra Singh Wadhwa v. State of M.P.] ...696

Excise Act, M.P. (2 of 1915) - Sections 46, 47 (Prior to amendment) - *Confiscation - Truck driver convicted under Section 34 of Act for transporting 294 boxes of foreign liquor - Trial Court ordered for confiscation of truck of appellant after due inquiry - Order of confiscation maintained by First Appellate Court as well as High Court - Held - Burden is on owner to establish that he had no reason to believe that offence was being or likely to be committed - Appellant failed to establish his lack of knowledge - On the facts of case in lieu of confiscation, vehicle be released to appellant on payment of sum of Rs. 30,000/- as fine - Appeal allowed.* [Kailash Chandra v. State of M.P.] ...421

Exoneration of Insurer - *Driver was not holding any kind of license as on the date of accident - The insurer has been rightly exonerated and given the liberty to recover the amount from the owner after making the payment to the claimant - In the light of decision of Apex Court in Pramod Kumar Agrawal & anr. v. Mushtari Begum & anr. (2004) 8 SCC 667.* [Aditya Soni v. Sanjay Gulati] ...*2

False affidavit before HC - *Respondent No. 9 filed affidavit on 23-10-07 stating that his appeal against conviction is still pending before HC - However appeal was dismissed on 24-04-02 - HC deprecate the conduct of respondent no. 9.* [Shiv Singh Rawat v. State of M.P.] ...491

Forest Act (16 of 1927), Section 52 - *Confiscation of Truck - Show Cause Notice to Registered Owner - Registered owner/petitioner executed power of attorney in favour of her husband - Husband present in truck when boulders were seized - He had contested the proceedings - No prejudice caused to petitioner who was adequately represented.* [Hadiya Begum v. State of M.P.] ...452

Forest Act (16 of 1927), Section 52 - *Confiscation of Truck - Transit Pass not produced at the time of seizure - Transit Pass which was produced by petitioner in course of enquiry bore different number - No illegality committed by Departmental Authorities as well as Revisional Court by not accepting transit pass.* [Hadiya Begum v. State of M.P.] ...452

Forest Act (16 of 1927), Section 52 - *Forest Produce - Boulders- Findings recorded by appellate authority that vehicle carrying boulders was chased by forest officials and was caught up on the road belonging to P.W.D. - No shadow of doubt that loading of boulders originated in forest land - Petition dismissed.* [Hadiya Begum v. State of M.P.] ...452

Forest Act (16 of 1927), Section 52-A - *"Person aggrieved" - Mean a person who has suffered legal injury or one who has been deprived with something which he would have entitled to obtain in usual course - Range Officer who initiated proceeding for confiscation U/s 52 of Act may be a person aggrieved - But not entitled to file an appeal U/s 52-A of Act - As such appeal has not been provided U/s 52-A of Act.* [Umashankar Usrete v. State of M.P.] ...779

Forest Act (16 of 1927), Section 52-A - *Provided an appeal against order of confiscation and not provided appeal against order of release of property - Appeal is a creature of statute and until and unless such appeal is provided under the act - Appellate authority has no jurisdiction to entertain appeal.* [Umashankar Usrete v. State of M.P.] ...779

Fundamental Rules - Rule 54-B - *Payment of Salary and allowances on re-instatement-Appellant placed under suspension as she was found absent from duty - Appellant was re-instated and thereafter disciplinary proceedings were initiated - Charge of absence was found proved and D.E.O. ordered that appellant shall not be entitled for pay and allowances during period of her suspension on principle of "no work no pay" - Writ petition dismissed on the ground that appeal is pending - Held - When competent authority finds some justification for suspension of Government servant he has to pass specific order indicating what amount of pay and allowances he would be*

entitled to during period of suspension after giving notice to government servant of quantum of pay and allowances proposed - Competent authority has to pass specific order in that regard after considering the representation submitted by Government Servant - Provisions of F.R. 54-B not followed before issuing- direction that appellant shall not be entitled to pay and allowances during period of suspension - Direction quashed - However appellant shall pursue her appeal against finding of guilt - Competent Authority to pass fresh orders in accordance with F.R. 54-B within one month - Appeal allowed. [Mahmoodan Khan v. State of M.P.] ...36

General Provident fund Rules, M.P. - Rule 14(7) - *Interest payable by subscriber on overdrawn amount - Amount of Rs. 15,858/- directed to be recovered on account of overpayment in G.P.F. account - Statement of account of G.P.F. not refuted or controverted by Petitioner - Held - State Govt. under statutory obligation to pay interest to subscriber of G.P.F. - No reason why subscriber would not pay interest on amount of overdrawals - Prayer for exoneration from interest liable to be rejected - Petition dismissed.* [Sitaram Vyas v. State of M.P.] ...243

Hindu Adoptions and Maintenance Act (78 of 1956), Section 10 - *Person who may be adopted - Appellant had already crossed age of 15 years and was married at the time of adoption - No pleading to the effect that there was any custom or usage permitting adoption of married boy or a body of more than 15 years of age - Appellant failed to prove custom or usage - Necessary requirements of Section 10 for valid adoption not complied with.* [Madan Lal v. Vinod Kumar] ...868

Hindu Adoptions and Maintenance Act (78 of 1956), Section 16 - *Registration of Adoption Deed - Presumption - Presumption would arise only when general conditions as laid down in Section 10 of Act are fulfilled.* [Madan Lal v. Vinod Kumar] ...868

Hindu Marriage Act (25 of 1955) - Section 9 - *Restitution of Conjugal Rights - Plaintiff filed suit for restitution of conjugal rights on the ground of desertion - Defendant denied the factum of marriage - Plaintiff proved by oral and documentary evidence that marriage was solemnized in accordance with customary rites and usage including Saptapadi and also proved that defendant deserted the plaintiff without any sufficient cause - Defendant did not appear for cross examination after filing his examination in chief on affidavit - Defendant's evidence cannot be read in evidence - Fails to rebut evidence of plaintiff - Suit rightly decreed - Appeal dismissed.* [Devendra Kumar Patle v. Manjushri Patle] ...*6

Hindu Marriage Act (25 of 1955), Section 24, Criminal Procedure Code, 1974 - Section 125 - *Maintenance U/s 125 of Code and alimony pendente lite U/s 24 of Act can be claimed by resorting to both these provisions*

- *The Court is competent under these provisions to grant relief to person concerned.* [Ashok Singh Pal v. Manjulata] ...749

Hindu Marriage Act (25 of 1955), Section 24, Criminal Procedure Code, 1974 - Section 125 - *Question of adjustment - When competent Court granted relief in both the provisions i.e. maintenance U/s 125 of Code and alimony U/s 24 of Act - There is no thumb-rule that adjustment to amount is to be granted in each & every case - Question of adjustment to be decided after taking into consideration totality of circumstances, amount granted and capacity of person directed for making payment - Family Court rejected application after evaluating totality of circumstances - Held - High Court not found any error of law or jurisdiction - Petition dismissed.* [Ashok Singh Pal v. Manjulata] ...749

Homicidal death - *Proof - Can be proved by examining the autopsy surgeon.* [Dashrath v. State of M.P.] ...360

Imposing costs - *Personal anxiety should not be permitted to create a concavity in the justice dispensing system, for such litigants irrefragably waste the time of Court and also pave the path of abuse of the process of law - Compelled to impose costs of Rs 5000/-.* [Suman v. State of M.P.] ...499

Income Tax Act (43 of 1961) - Section 48 - *Assessee who is running a dairy and sells cow milk - Income from the sale of calves - Can not be regarded as capital gain since the cost of acquisition is not a ascertainable.* [Deputy Commissioner of Income Tax v. Suniti Singh, Bhopal] ...594

Income Tax Act (43 of 1961), Section 131 - *Power regarding discovery, production of evidence etc. - Witness summoned and examined by Assessing Officer - Prayer to cross examine him rejected - Witness later on filing affidavit in variance of original statement - Held -Assessing Officer relied heavily on the statement of witness - It was obligatory on the part of assessing officer to allow the prayer for cross examination - Reference answered accordingly.* [Prakash Chand Nahta v. Commissioner of Income Tax, Jabalpur] ...967

Income Tax Act (43 of 1961) - Sections 276-C, 277, 278-B - *Concealment of Income - Complaint lodged by respondent against applicants for prosecution U/s 276-C, 277 and 278 B - Order of assessing officer set aside by ITAT - Held - Finding of Tribunal is conclusive and prosecution cannot be sustained - It will be an idle and empty formality to require applicants to have order of Tribunal exhibited as defence document and thereafter to wait for the judgment of acquittal - Prosecution quashed.* [Ssr Pirodia v. Union of India] ...408

Industrial Disputes Act (14 of 1947), Sections 2 (oo), 25-O, 25- F - *'Retrenchment' - Interpretation - Workman's application for classification under the provisions of M.P. Industrial Relations Act, pending before Labour*

Court, who has been in continuous service as daily wager clerk w.e.f. 6-8-1992 to 1999 - Employer terminated his services on the ground that the center was closed - Labour Court held that since the center was closed the workman will be entitled for retrenchment compensation in accordance with Section 25-FFF of Act - Held that employer has not taken permission for closure as per provisions of Section 25-O of Act and not lead cogent evidence to prove this fact - Therefore instead of retrenchment compensation High Court ordered for reinstatement of workman. [M.P. Rajya Beej Evam Farm Vikas Nigam v. Ashok Kumar] ...474

Industrial Employment (Standard Standing Orders) Rules, M.P. 1963 - Clause 2(vi) - *Classification - Respondent holding post of Chowkidar - Was asked to perform duties of Time Keeper on ad hoc basis to meet emergent requirement of additional work - Post of Time Keeper is higher and pay scale is also higher than that of post of Chowkidar - Respondent cannot claim classification to such higher post - Order passed by Industrial Court quashed - Employer's petition allowed.* [State of M.P. v. Gangaram Porwal] ...775

Land Acquisition Act (1 of 1894)-Section 17, 3-A(a)-*While issuing notification U/s 4 of the Act, urgency provisions were invoked-Petitioners have not at all taken any objection with regard to procedural deficiency or default in respect to issuance of the notification U/s 4/6 of the Act only controversy about offer of compensation in terms of section 17 [3 A (a)]-HELD-At the stage of while offering the said 80% compensation, the estimated value as suggested by Collector has to prevail, as landowners have opportunity to file their claim petitions with regard to the market value of the acquired land in response to notice U/s 9 of the Act-Petition dismissed.* [Mahesh Kumar v. State of M.P.] ...41

Land Acquisition Act (1 of 1894) - Section 18 - *Reference - Reference Court determined the market value on inadmissible piece of evidence i.e., basic valuation register - Market Value not determined in accordance with relevant factors - Matter remanded back to record evidence and render fresh decision.* [Shakuntala Devi v. Land Acquisition Officer, Satna-Rewa Railway Link Project] ...564

Land Acquisition Act (1 of 1894) - Section 18 - *Reference - Reference is not appeal - Case has to be proved by independent evidence - Reference has to be treated as original proceedings.* [Shakuntala Devi v. Land Acquisition Officer, Satna-Rewa Railway Link Project] ...564

Land Acquisition Act (1 of 1894), Sections 23, 51A - *Acquisition of Land - Relevant factors for determination of Market Value - Test of a Prudent Buyer has to be applied - Relevant considerations - Sale Deeds relating to closest or nearest piece of land carries more value - Distance of land covered under Sale Deeds from land acquired - Potential value on the date of*

notification and nature - In case of large piece of land grant of compensation per sq. ft. after certain deduction for development- Distance from city also relevant factor. [Shakuntala Devi v. Land Acquisition Officer, Satna-Rewa Railway Link Project] ...564

Limitation Act (36 of 1963), Section 5, Civil Procedure Code, 1908, Section 96 - *Appeal allowed by First Appellate Court without deciding application for condonation of delay - Held - First Appellate Court was not having any jurisdiction to decide appeal on merit without condoning delay - Matter remanded back to First Appellate Court to decide application under Section 5 of Indian Limitation Act - If delay is condoned then only appeal may be heard on merits - Appeal allowed.* [V.K. Verma v. Dawoodi Bohra Masjid Committee] ...314

Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983)- Section 19, Limitation Act, 1963, Sections 5, 29(2)-*Question whether in view of Section 29(2) of Adhiniyam, 1983, provisions of Sections 4 to 24 applies to revision filed under Adhiniyam, to condone delay referred to Larger Bench - Held - Provisions of Limitation Act do not apply to revision preferred under Section 19 of Adhiniyam, 1983.*[State of M.P. v. M/s Shekhar Constructions] ...20

Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983)-Section 19 - ***Suo Motu*** *power of Revision-High Court can exercise the power of revision* ***suo*** **motu** *within a reasonable period of time.* [State of M.P. v. M/s Shekhar Constructions] ...20

Medical & Dental Post-Graduate Entrance Test, 2007 Conduct of Examination and Admission Rules, Rules 21 (4), 21 (7), Post-Graduate Regulations 2000, Regulation 10 (3) - *Regulation 10 (3) prohibits migration of transfer of P.G. students from one medical college or institution to another - State Government could not have framed a rule for mutual transfer - Petitioners application for mutual transfer from Bhopal to Gwalior rejected - Held - Regulations, 2000 would govern field.* [Jagram Manjhi v. State of M.P.] ...*8

Medical & Dental Under-graduate Entrance Examination Rules, M.P. 2007 - Clauses 9.5, 10.1, 10.2, 10.3 - *Production of original documents and retention thereof by college - Purpose is that if the original documents are returned to the student after counseling it would enable him to participate in several other counseling and block several seats in various colleges thus depriving other eligible students from seeking admission.* [Aman Khanuja v. State of M.P.] ...469

Medical & Dental Under-graduate Entrance Examination Rules, M.P. 2007 - Clauses 9.5, 10.1, 10.2, 10.3 - *Purpose of retaining original documents - To prevent unwarranted anarchy and chaos in the field of admission - A student who takes the risk of admission in particular college can not afford*

to play with it by taking recourse to production of certificate to effect that all the original documents deposited with college - When there is a rule, the same has to follow, no deviation can be allowed. [Aman Khanuja v. State of M.P.] ...469

Motor Vehicles Act (59 of 1988) - *Second Schedule - Compensation - Multiplier - Age of appellant no.1/wife was 26 years at the time of accident - Income @ 2500 per month rightly assessed by Tribunal - However, Multiplier of 18 ought to have been applied instead of 17 - Rs. 4,05,000/- awarded in place of 2,55,000 towards loss of dependency - Appeal allowed.* [Akilabee v. Shyam Kumar] ...279

Motor Vehicles Act (59 of 1988) - Sections 2(28), 166 - *Motor Vehicle - JCB Machine-Claimants/Respondents going on a motor bike sustained grievous injuries due to rash and negligent driving of JCB by its driver - Held - JCB Machine moves on roads - It is used for constructions of Roads - Merely because it is not being registered by R.T.A as Motor Vehicle, cannot be said that it is not a motor vehicle under provisions of Act, 1988 - Claims Tribunal rightly held that JCB Machine is motor for the purposes of Act, 1988.* [New India Assurance Co. Ltd., Indore v. Balu] ...117

Motor Vehicles Act (59 of 1988) - Sections 2(30), 166 - *Whether liability to pay compensation can be fastened on financier? - No, Owner is liable - Owner means a person in whose name a motor vehicle stands registered or in relation to motor vehicle which is subject of a hire purchase agreement, owner is the person in possession of the vehicle under agreement - Vehicle is not in possession and control of financier - Financier not liable to pay compensation.* [Kapsi Yadav v. Pradeep @ Bablu] ... 289

Motor Vehicles Act (59 of 1988) - Sections 128, 166 - *Contributory Negligence - Three persons traveling on Motor cycle - Motor cycle dashed by truck coming from opposite direction causing injuries to appellants - Claims Tribunal deducted 50% of total award on account of contributory negligence on the part of driver of motor cycle - Held - Driver of offending truck not examined to state in what circumstances accident occurred - Spot map prepared in criminal case shows that motor byke was on left side of road - Merely because three persons were traveling on motor byke, it cannot be presumed that driver of Motor byke was equally liable for the accident, as there is no evidence on record in this regard - Tribunal committed error in holding that it was case of contributory negligence - Compensation enhanced by Rs. 20,000/- - Appeal allowed.* [Biharilal v. Pannalal] ...300

Motor Vehicles Act (59 of 1988), Section 140 - *No fault Liability - Insurer preferred appeal to recover the amount i.e. Rs. 50,000/- paid to the legal heir of deceased towards no fault liability on ground that claim petition dismissed - Held - It is an absolute liability under no fault liability upon the*

owner of the vehicle and insurer is liable to indemnify the owner - Interim award attended finality as it was not challenged - It can not be reopened - Insurance company not liable to get back Rs. 50,000/- paid in compliance of order passed U/s 140 of Act. [K.N. Agrawal v. M. R. Portfolio Services]...*16

Motor Vehicles Act (59 of 1988) - Section 140 - *No Fault Liability - Liability of Insurance Company in case of violation of conditions of policy - Once objections are raised by Insurance Company in regard to violation of conditions of policy - Tribunal is required to render a decision upon the issue - Section 140 does not contemplate that Insurance Company shall be liable to deposit amount while it has no fault in terms of Section 147(2) of Act - Order of Tribunal set aside - Tribunal directed to decide the objections raised by Insurance Company and decide applications afresh - Appeals allowed.* [Oriental Insurance Company v. Smt. Kantidevi] ...275

Motor Vehicles Act (59 of 1988) - Section 145 - *Liability of Insurance Company - Claim of appellants was that deceased died in accident while he was coming back in tractor trolley after administering fertilizers in his agricultural fields - Insurance Company denied its liability on the ground that in tractor trolley marriage party was being carried - Insurance company exonerated by Claims Tribunal - Held - F.I.R. which was lodged after accident mentions that marriage party was being carried - It is not necessary to examine lodger of F.I.R. as document was filed by claimants and they have relied upon - If entire evidence is considered in the light of F.I.R., the finding recorded by Tribunal is proper.* [Arun Kumar Patel v. Smt. Terasi Saket]...282

Motor Vehicles Act (59 of 1988) - Sections 145, 149 - *Liability of Insurance Company-Plying without valid permit - Claimants travelling in offending bus- Bus turned turtle due to rash and negligent driving of driver causing injuries to passengers - Insurance Company exonerated on the ground that offending bus was not possessing valid permit - Held - Offending vehicle was not possessing valid permit therefore, Insurance Company shall have right to recover the compensation from appellant as condition of policy was violated - Appeal dismissed.* [Meharban Singh v. Smt. Pushpabai] ...111

Motor Vehicles Act (59 of 1988), Section 147 (as amended w.e.f. 14.11.1994) *From the amended Section risk of owner traveling in the vehicle alongwith goods is clearly covered under the policy - Asharani's case was based on unamended provision - Tribunal has wrongly relied upon that decision - Insurer's liability is joint and several.* [Batul Begam v. Suresh Prasad Sahu] ...*4

Motor Vehicles Act (59 of 1988) - Section 147(2) - *Horse died in vehicular accident - Tribunal awarded cost of horse Rs. 35,000/- plus Rs. 10,000/- for loss of its future income - Insurer challenged the award - Held - No extra premium for covering additional risk of the property of third party was paid - Insurer's liability limited upto Rs. 6,000/- as per provision of*

section 147(2) - Appeal partly allowed. [New India Insurance Co. Ltd. v. Santosh,] ..322

Motor Vehicles Act (59 of 1988), Sections 147 & 166 - *Liability - Van belongs to a partnership firm - Being a partner of that firm driver (deceased) was also owner of illfated van - Risk of owner not insured as no premium paid to insurer in this respect - Held - Insurer not liable to pay compensation to legal heir of deceased/driver (owner).* [K.N. Agrawal v. M. R. Portfolio Services]...*16

Motor Vehicles Act (59 of 1988), Sections 163 A & 166 - *Out of one accident two applications arise one U/s 163 A and another U/s 166 - A compromise arrived at in proceeding initiated U/s 163 A - Such compromise will not have any bearing upon proceedings initiated U/s 166.* [Ratna Parashar v. Kusumlata] ...*26

Motor Vehicles Act (59 of 1988) - Section 166-*Application for Compensation- Deceased working as driver of truck - While deceased was checking nut bolts of wheels, bus belonging to respondent no.1 came from opposite direction and dashed against truck as a result of which deceased died - Mother and brother of deceased filed application for grant of compensation - Claim Petition allowed by Claims Tribunal - Appellants filed appeal for enhancement of compensation- Insurance Company filed cross objection alleging that brother of deceased is not legal representative and is not entitled for compensation - Held - Term "legal representative" not defined in Section 166 of Act, 1988 - "Legal Representative" defined in Section 2(11) of C.P.C. - For the purposes of Motor Vehicles Act, Legal Representative is one who suffers on account of death of person and need not necessarily be a wife, husband, parent or child - Any person in family who is dependent upon deceased is entitled to claim compensation - Appellant no.2 is a handicapped person and dependent upon deceased - Appellant no.2 therefore, held to be dependent upon his deceased brother and has suffered adversely on account of death of his brother - Claim petition on his behalf maintainable.* [Amna Bi v. M/S Royal Transport Service] ...125

Motor Vehicles Act (59 of 1988), Section 166, Civil Procedure Code, 1908, Order 9 Rule 9 - *Restoration of Claim Petition - Provision of Motor Vehicles Act regarding compensation has been enacted to do social justice with victim for road accident - Tribunal should adopt liberal attitude.* [Tikaram Sen v. T. Sandhya Rani] ...*12

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - Appellant, a young lady of 25 years sustained injuries on face for which she was operated - She remained hospitalized for 14 days - Claims Tribunal awarded Rs. 40,000/- - No amount was given for transport expenses, expenses incurred on attenders and loss of income- Appellant further entitled for Rs. 30,000/-.* [Monika v. Kamlesh] ...*11

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - Appellant sustained grievous injuries in thoracic, 10th vertebra and sustained permanent disability - He was treated in hospital - Though no medical bills have been proved but it cannot be held that he had not spent money on treatment, special diet and attendant - Looking to age, nature of injuries amount of Rs. 50,000 awarded in all heads with 7% p.a. from the date of filing of claim petition.* [Dinkar Joshi v. Nitin Tiwari] ...307

Motor Vehicles Act (59 of 1988), Section 166 - *Compensation - Claimant aged 4 and half years sustaining 40% permanent disability due to mal union of fracture of shaft femur and injury in the ankle also - As per II schedule - Being a non earning member notional income Rs. 15, 000/- p.a. - Annual loss of earning capacity 40% i.e. Rs. 6000/- - Multiplier of 15 applied - Future loss of earnings capacity 6,000 x 15 = Rs. 90,000/- plus Rs. 20,000/ - towards pain & suffering, medical expenditure, special diet etc. - Tribunal awarded Rs. 60,000/- - High Court enhanced the total compensation Rs. 1,10,000/- - Enhanced compensation carry interest @ 7% p.a. from the date of application till realization.* [Aditya Soni v. Sanjay Gulati] ...*2

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - Claimant aged 19 years - Spleen of claimant removed owing to injury sustained in accident - Claims Tribunal awarded 25,000/- for injury, pain & suffering plus 16,000/- for medical expenses & conveyance - Held - Function of spleen is to manage, fragile or abnormally shaped red blood cells and destroy them - Spleen also plays important role in body's defence mechanism - Compensation enhanced to Rs. 1,30,500/-.* [Kavita Sharma v. Ashwni Kumar] ...*9

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - Claim petition filed by appellant dismissed by Claims Tribunal - Claimant deposed that while he was going on foot, the offending car came from behind and dashed him as a result of which he suffered several injuries including facture of spinal cord - Driver of offending vehicle took him to hospital - Respondent averred that appellant was driving scooter and he fell down - He took the claimant to hospital out of sympathy and no accident took place with his car - Held - Vehicular accident is mentioned in bed head ticket - Doctor should have informed the police regarding vehicular accident - No mention in bed head ticket that appellant fell down from scooter - Respondent also did not state to doctor that appellant had fallen down from scooter - Respondent is held to be driving car rashly and negligently - Finding arrived by Tribunal in this respect set aside.* [Dinkar Joshi v. Nitin Tiwari] ... 307

Motor Vehicles Act (59 of 1988), Section 166 - *Compensation - Death of driver of jeep - Compensation of Rs. 2,10,000/- with interest of 6% p.a. from the date of filing of claim petition.* [Kavita v. Rajmati] ...*10

Motor Vehicles Act (59 of 1988), Section 166 - *Compensation -*

Deceased aged 32 years - His salary Rs. 3000/- per month plus daily allowance Rs. 50 - Total income Rs. 4,500/- per month - 1/3rd deduction towards self expenditure - 50% deduction due to negligence of driver - Monthly loss of dependency comes to Rs. 1,500/- i.e. 18,000/- p.a. - Multiplier of 17 applied - Loss of dependency Rs. 3,06,000/- plus Rs. 40,000/- under the customary heads - Claimants are entitled for Rs. 3,46,000/-. [Champa Pandey v. Hardayal Singh] ...*5

Motor Vehicles Act (59 of 1988), Section 166 - *Compensation - Deceased aged 50 years was traveling alongwith timber in truck - Truck turned turtle - Due to sustaining injuries died on the spot - Tribunal assessed the income of deceased at Rs. 15,000/- p.a. and multiplier of 11 applied - High Court re-appreciated the evidence - Deceased running bidi factory and also sells the timber - Assessed income of deceased Rs. 60,000/- p.a. - After deducting 1/3rd towards self expenditure loss of dependency comes to Rs. 40,000/- - Multiplier of 13 applied - Total loss of dependency Rs.5,20,000/ - plus 40,000/- under customary heads - Total compensation Rs. 5,60,000/-.* [Batul Begam v. Suresh Prasad Sahu] ...*4

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - Deceased earning Rs. 3000 per month - Deducting customary amount from annual income dependency of claimants comes to Rs. 24,000 p.a. - Multiplier of 18 applied - Claimants entitled to compensation of Rs. 4,32,000 apart from Rs. 30,000 towards loss of estate, funeral expenses, loss of life expectancy and Rs. 10,000 to widow for loss of consortium - Claimants entitled for compensation of Rs. 4,72,000 - Widow shall get 35% of compensation - Son shall get 35% of compensation - Parents of deceased shall get equally 30% of compensation - Appeal allowed.* [Jalisa Begum v. Jagdish Sahu] ...295

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - Deceased having 3 minor children apart from his wife and old parents - No justification for deducting ½ towards personal expenses - Deduction ought to have been ¼ towards personal expenses.* [Akilabee v. Shyamkumar]...279

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - Deceased working as second driver in truck - Offending jeep dashed deceased while he was repairing punctured wheel of truck - Monthly income of deceased assessed to be Rs. 2,500 per month - Loss of dependency comes to Rs. 20,000 p.a. after deducting 1/3 customary amount - Multiplier of 13 applicable as age of father and mother of deceased at the time of accident was 43 and 41 years respectively - Claimants entitled for Rs. 2,60,000/- apart from Rs. 30,000 under customary heads - Appeal allowed.* [Jhanak v. Santosh @ Monu] ...310

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation-Future Income- Truck Dumper hit the mini truck driven by Injured appellant as a*

result of which appellant suffered three fractures including one at tibia - Claims Tribunal awarded total sum of Rs. 72,000/- by way of compensation - Held - After fracture of tibia, it is doubtful if appellant can even drive again - Even if he pursues some other vocation, he would not be able to earn as such as he was earning - Disability suffered by appellant would surely reduce his earning capacity - Appellant required to be compensated for loss of earning - Loss of income assessed at Rs. 2,59,200 in addition to sum already awarded by Tribunal- Interest at the rate of 6% p.a. on enhanced amount be paid from the date of filing of claim petition till realization - Appeal allowed. [Sunil Kumar v. Ram Singh Gaud] ...1

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - Monthly income of the deceased assessed by claims Tribunal @ Rs. 8,000 per month on the basis of pay slip - Held - There is no sufficient evidence relating to income of deceased - No accounts of firm filed to demonstrate that deceased was being paid salary @ Rs. 8,000 per month - No documentary evidence to show academic qualification of deceased - Income of deceased should have been assessed @ Rs. 5,000 per month -Looking to age of claimants, multiplier of 15 should have been applied instead of 13 - Claimants entitled for Rs. 6 lacs towards loss of dependency instead of Rs. 8,32,000 as awarded by Claims Tribunal - Appeals disposed off.* [Varsha v. Uttaranchal Rajya Parivahan Nigam] ...304

Motor Vehicles Act (59 of 1988) - Section 166 - *Compensation - 3 years old daughter of claimants died in accident - Tribunal awarded Rs. 1,07,000/- - Held, in view of second Schedule - Notional income, deduction 1/3rd and applying multiplier 15- Loss of dependency 1,50,000 + 30,000 towards funeral expenses, loss of estate and love & affection HC awarded Rs. 1,80,000/-.* [Monika v. Kamlesh] ...*11

Motor Vehicles Act (59 of 1988), Section 166 - *Composite negligence - In case of head on collusion between two vehicles on middle of road - Doctrine of res ipsa loquitur attracted - Case of composite negligence proved.* [Ratna Parashar v. Kusumlata] ...*26

Motor Vehicles Act (59 of 1988), Sections 166 - *Due to accident both pillion riders sustained fracture in their femur bones - Sustained 40% disability - Tribunal found a case of contributory negligence and awarded 50% of amount assessed i.e. Rs. 45,900/- and Rs. 46,200/- respectively - High Court held to be a case of composite negligence and awarded Rs. 1,20,000/- to each claimant.* [Nanhelal Gontiya v. Harishchand] ...*24

Motor Vehicles Act (59 of 1988), Section 166, Employees State Insurance Act, 1948, Section 53 - *1948 Act is piece of welfare measurement and it does not debar victim of a road accident to ask for compensation under law of torts - Claimant had already received lump sum amount of*

compensation and is getting monthly disability pension from ESI as per provision of Section 53 of 1948 Act - On this ground his claim petition under Motor Vehicles Act cannot be rejected. [Ahmed Khan v. Sher Khan] 860

Motor Vehicles Act (59 of 1988), Section 166 - *Insurance Company exonerated on ground of breach of policy even then claimants would be entitled to recover amount of compensation awarded from Insurance Company - However Insurance Company will be at liberty to recover the same from owner of offending vehicle - The proposition laid down by S.C. in the case of Swaran Singh (2004) 3 SCC 297, Baljit Kaur (2004) 2 SCC 1 and Pramod Agrawal (2004) 8 SCC 667 still holds the field.* [Shivcharan Patel v. Govind @ Balkrishna Gautam] *28

Motor Vehicles Act (59 of 1988), Section 166 - *Jeep insured as private vehicle - Used as a taxi - Breach of policy condition - Insurance company rightly absolved - However in the view of Sarvan Singh's and Pramod Kumar Agrawal's case directions given that insurance company to satisfy the award and recover 50% from jeep owner and 50% from truck owner.* [Ratna Parashar v. Kusumlata] *26

Motor Vehicles Act (59 of 1988) - Section 166 - *Joint feasors-Deceased travelling in jeep which was dashed by truck as a result of which jeep skidded to certain distance and its three tyres came out due to accident - Some persons received grievous injuries and some died - Claims Tribunal held that both drivers were negligent and their contribution was determined at 50% each - Respondents were held liable to pay 50% of the award as driver, owner and insurance company of jeep were not made party - Held - Deceased was not driving jeep therefore, it cannot be held that he had contributed to accident - Accident has been caused by composite negligence of feasors - It is the choice of claimant to claim from owner, driver and insurer of both vehicles or any one of them - Conclusion of tribunal that as owner, driver and insurer of jeep have not been made party, therefore, 50% is to be deducted is absolutely unsustainable- Appeal allowed.* [Mahesh Matre v. Akhlesh Thakur] 120

Motor Vehicles Act (59 of 1988) - Section 166 - *Legal Representative - Appellant filed claim petition claiming himself to be Gurubhai of deceased Sadhu Harnamdas - Whether Gurubhai can be said to be legal representative - Held - If man becomes ascetic and severes all connection with his natural family, he becomes spiritual son of his preceptor - Appellant was residing in Ashram - He had no connection with his natural family -- Appellant entitled to maintain application as legal representative of deceased - Appellant entitled to get Rs. 64,500 in toto as compensation - Appeal partly allowed.* [Mahant Shyamdas Guru Mohandas v. Lalaram] 257

Motor Vehicles Act (59 of 1988), Section 166 - *Liability - Mechanical Failure - Jeep turned turtle due to sudden failure of brakes - Driver of jeep*

died - Reasonable care taken by owner in maintaining vehicle - Accident was outcome of mechanical defect - Owner and Insurer liable to make payment of compensation. [Kavita v. Rajmati] ...*10

Motor Vehicles Act (59 of 1988)-Section 166-*Maintainability of Claim Petition-Murder or Accidental Murder-Accident between offending truck and Mini Truck which was being driven by deceased-Driver of offending truck took deceased in his truck for satisfying the demand to make payment of compensation for loss caused to offending truck-Altercation took place between driver of truck and deceased-Deceased was dashed with truck-Rear wheel came over head resulting into death-Driver of truck convicted U/s 302 of I.P.C.-Claim rejected by Tribunal holding the case to be of murder and not accidental murder-HELD-If there is intention to kill person then such killing is murder-If act of murder was originally not intended but same was caused in furtherance of any other felonious act such murder is accidental murder-There was casual connection between initial accident-There was connection of subsequent events with accident-It was case of accidental murder-Claimants entitled for compensation.* [Khairunisha v. Subhash @ Punjabi] ...82

Motor Vehicles Act (59 of 1988) - Section 166 - *Mediclaim Policy - Amount reimbursed under the policy is not deductible from the amount of medical expenses.* [Monika v. Kamlesh] ...*11

Motor Vehicles Act (59 of 1988) , Section 166, Mohammedan Law, Sections 253, 254,268,308 - *Claimant - Claims Tribunal rejected claim of appellant no.1 on ground that she is not legally married wife of deceased and appellant no.2 is not son of deceased - Held - Father of deceased admitting that appellant no.1 is legally wedded wife and appellant no.2 is son of deceased - Interest of appellants and that of parents of deceased clashes therefore, it is not possible for him to falsely depose that appellant no.1 is wife and appellant no.2 is son of deceased - No evidence that alleged first husband of appellant no.1 ever objected her marriage with deceased on the ground that he has not given divorce - It shall be presumed that first husband had given divorce and only thereafter she contracted second marriage with deceased - Finding of Claims Tribunal that the marriage was illegal set aside - Appellants also entitled to get compensation.* [Jalisa Begum v. Jagdish Sahu] ... 295

Motor Vehicles Act (59 of 1988), Section 166 - *Negligence - Tribunal has dismissed the application on the ground that negligence of the driver is not pleaded - The truck went in a big ditch due to the steering pierced the chest and abdomen of the driver - Accident caused due to bad condition of road - However, driver was also negligent to the extent of 50% as he was not able to locate big ditch properly.* [Champa Pandey v. Hardayal Singh] ...*5

Motor Vehicle Act (59 of 1988) - Section 166 - *Tractor owner's daughter died due to accident caused by his own tractor - Due to shock his wife also died - Owner file claim petition against the driver and insurer - Tribunal awarded compensation Rs. 65,000/- - Insurer challenged the award - Owner does not come within purview of third party - Held - Petition is not filed in the capacity of owner but in the capacity of one of legal representative of deceased and sole legal representative of his wife - Award affirmed - Appeal Dismissed.* [New India Assurance Co. Ltd. v. Nandram Prajapati] ...325

Motor Vehicles Act (59 of 1988) - Section 166 - *Quantum of Compensation-Mother of Deceased and employer of deceased stated that deceased was earning Rs. 3,000/- per month as driver - This evidence cannot be ignored merely documentary evidence is not produced - Assessment of earning of deceased at Rs. 1,500/- by Claims Tribunal erroneous - Appellants entitled for compensation of Rs. 3,12,000/- - Appeal allowed.* [Amna Bi v. M/s Royal Transports Service] ...125

Motor Vehicles Act (59 of 1988), Sections 166 & 128 - *Case of pillion riders - It would be a case of composite negligence of both drivers - But not a case of contributory negligence.* [Nanhelal Gontiya v. Harishchand] ...*24

Motor Vehicles Act (59 of 1988), Sections 166 & 128 - *Rash or negligent - In contravention of Section 128 of Act moped driver allowed two persons to sit as pillion riders - A mini truck collided with the moped - As a result moped driver died and both pillion riders received injuries on their legs - Merely on these facts it can never be said that moped driver was rash or negligent - Unless it is proved that moped driver was driving vehicle in a high speed and vehicle was not in his control on account of allowing two persons to sit as pillion riders.* [Nanhelal Gontiya v. Harishchand] ...*24

Motor Vehicles Act (59 of 1988) - Sections 166, 173 - *Compensation-Quantum of - Deceased working as driver of jeep - Claims Tribunal assessed the monthly income of deceased as Rs. 2,000 per month and granted compensation of Rs. 2,63,000 - Held - Claimant deposed that deceased was earning Rs. 2000 per month by way of salary and Rs. 150 per day as allowance - Statement of claimant could not be impeached - Monthly income of Deceased held to be Rs. 3000 per month - Annual dependency comes to Rs. 24,000 per year - Multiplier of 16 applied as age of deceased was 40 years - Appellants entitled to Rs. 40,000 under customary heads - Appellants entitled to Rs. 4,24,000/- - Enhanced compensation amount shall carry interest @ 7% from the date of filing of claim petition - Appeal allowed.* [Durga Kori v. Ram Gopal] ...115

Motor Vehicles Act (59 of 1988), Section 168 - *Compensation - Deceased working as driver of tractor - Income of deceased assessed at Rs. 2000/- p.m. i.e. Rs. 24,000/- p.a. - After deducting 1/3rd towards personal*

expenses dependency comes to Rs. 16,000/- p.a. - Deceased aged about 24 years - Multiplier of 17 will be applicable - Compensation comes to Rs. 2,72,000/- - Rs. 28,000/- awarded towards damages under various heads - Claimants entitled to Rs. 3 Lakh with 7% interest on enhanced amount from date of appeal till realisation. [Shakuntala v. Ghanshyam Dhakad] ...*27

Motor Vehicles Act (59 of 1988), Section 168 - *Contributory negligence or negligence - Deceased sleeping in shadow beneath tractor trolley - Driver started tractor on reverse side - Head of deceased came under rear wheel - Claims Tribunal held that deceased had contributed to the extent of 50% - Held - Negligence means omission of duty or care as required by responsible man - Driver of tractor had full opportunity to avoid accident either by awakening deceased or by taking tractor forward - Claims Tribunal committed error in holding that deceased had contributed in the accident to the extent of 50% - Appeal allowed.* [Shakuntala v. Ghanshyam Dhakad] ...*27

Motor Vehicles Act (59 of 1988), Section 169 - *Civil Procedure Code, 1908, Order 47 Rule 1 - Review - Number of appeals filed against a award, which passed in regard to one accident - One appeal decided by DB & remaining appeals decided by SB - Single Bench held the case to be of composite negligence - In prior judgment Division Bench held the case to be of contributory negligence - DB's decision was not brought to the notice of Single Bench - Application for review cannot be dismissed in view of explanation of Order 47 Rule 1 - Application allowed.* [United India Insurance Co. Ltd. v. Nandlal] ...*13

Motor Vehicles Act (59 of 1988), Section 170 - *Owner (Respondent no.2) was driving offending vehicle, filed his written statement and affidavit but did not turn up for cross examination - Appellant filed application U/s 170 of Act seeking permission to contest claim on all grounds - Application dismissed without assigning any cogent reason and award passed by Tribunal - Held - Dismissal of application U/s 170 was without justification - As final award was passed within 6 weeks of order of dismissal of application - Appellant well within its right to challenge the order in appeal - Matter remanded back to Tribunal to allow Appellant to contest claim on all grounds which are available to Owner and Driver - Appeal allowed.* [New India Insurance Co. Ltd. v. Suresh Chand Sankla] ...863

Motoryan Karadhan Sanshodhan Adhiniyam, M.P. 2004 - Clause (g) of Entry IV of First Schedule - *Penalty imposed by taxation authority under Clause (g) of Entry IV of First Schedule - Provision declared unconstitutional by Supreme Court - Order imposing penalty quashed.* [Prakash Chandra Purohit v. The Transport Commissioner] ...234

M.P. Police Regulations - Regulation 70-A - *Out of turn promotion - Direction by High Court to grant out of turn promotion instead of directing*

authorities to consider the case for promotion - Respondent took part in Anti Dacoity Operation - Case of respondent strongly recommended by departmental officer for out of turn promotion in view of Regulation 70-A - Screening Committee without assigning reason turned down for grant of out of turn promotion - Writ Court directed to grant out of turn promotion - Held - No dispute that respondent had participated in Anti Dacoity Operation - No reasons recorded by Screening Committee that he is not fit for promotion - Nothing has been stated by State that respondent was not otherwise fit for promotion on any ground - High Court competent to pass such directions in appropriate cases - No ground to interfere in such direction nor such direction is contrary to law - However, while issuing promotion order appellants shall be free to consider that the respondent is not otherwise unsuitable for promotion. [State of M.P. v. Mahendra Kumar Sharma] ...208

Municipalities Act, M.P. (37 of 1961) - Section 47 - *Recalling of President - Three Fourth of the elected Councillors submitted proposal for recalling of Petitioner - Collector after satisfying himself sent proposal to State Govt. for further action - Before State Election Commission could declare election 2 Councillors submitted affidavit before Collector stating that their earlier affidavits were obtained under political pressure and same be treated as incorrect and cancelled - Held - Collector sent the proposal to State Govt. after due verification and satisfaction - Once proposal is sent by Collector, there is no provision empowering Collector, State Govt. or Election Commission to reconsider matter and to cancel or ignore the duly sent proposal - No illegality in proposal sent by Collector - Petition dismissed.* [Anil Kumar Jain v. State of M.P.] ...80

Mutual Transfer - *State Government permitting mutual transfer which is impermissible in law - State is not only in contravention of Regulations of the Medical Counsel of India but a step which epitomizes unwarranted attitude giving rise to unhealthy feeling in the minds of others.* [Jagram Manjhi v. State of M.P.] ...*8

Narcotics Drugs and Psychotropic Substances Act (61 of 1985) Conscious possession-*Bus tickets of both appellants recovered from the possession of appellant Shyamu Bai and both appellants were sitting adjacent to each other-A bag seized from the possession of appellant Gopal-On these facts it can not inferred that appellant Shyamu Bai was in conscious possession of the bag-It is possible that appellant Shyamu Bai has purchase the ticket on the request of appellant Gopal because the ladies are being given priority in purchasing bus tickets-Held-Conscious possession of Shyamu Bai not proved beyond reasonable doubt-Conviction and sentence set aside-Appeal of Shyamu Bai allowed.* [Gopal v. Central Bureau of Narcotics, Indore] ...131

Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Sections 8 read with 20 (a) (i) - *Cultivation of Ganja (Cannabis Plant) - Only 90 Ganja Plants were seized - No evidence that they were systematically grown - Absence of spot- map and photographs - Possibility of spontaneous growth of plants can not be ruled out Accused entitled to benefit of doubt - Acquitted.* [Nanda v. State of M.P.] ...589

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8(c), 20(b)(i) - *Possession of Ganja - Investigation Officer not in a position to identify appellants in Court to establish fact regarding seizure of Ganja - Seizure witnesses not supported prosecution case - Appellants entitled for acquittal.* [Halku v. State of M.P.] ...574

Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Sections 20b, 42(2), 50, 57 - *Non compliance of Mandatory provisions - Appellant was personally searched on information and ganja was seized - I.O. registered case under Section 34 Excise Act - Appellant was charged under Section 20 b of Act, 1985 - I.O. did not send copy of information to his immediate official superior as required under Section 42(2) - Compliance of provision of Section 50 was also necessary as ganja was seized from personal search of accused - Any report was also not sent to official superior within 48 hours - Appellant entitled for acquittal - Appeal allowed.* [Nannu v. State of M.P.] ... 346

Narcotics Drugs and Psychotropic Substances Act (61 of 1985)-Section 42 Compliance-*Search and seizure on public place in the presence of Gazetted Officer-Provision of Section 42 (2) N.D.P.S. Act would not apply-Gazetted Officer, Superintendent of Bureau was present-The compliance of Section 42 not necessary.*[Gopal v. Central Bureau of Narcotics, Indore] ...131

Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Section 42 (i) (ii) - *Power of entry, search, seizure and arrest without warrant or authorization - Recording of grounds of belief - Appellants apprehended in night - Grounds of belief to immediate superior officer not sent - Provision mandatory - Trial Vitiated.* [Halku v. State of M.P.] ...574

Narcotic Drugs And Psychotropic Substances Act (61 of 1985)-Section 42(2)- *Power of entry, search, seizure and arrest without warrant or authorisation - House of appellant searched on information received at Kotwali Sidhi - Gunny bag containing 1 Kg 100 grams of ganja recovered - Compliance of mandatory provision of Section 42(2) - Held Admittedly immediate official superior was out of headquarters- Acknowledgment of receipt of relevant entry of rojnamcha Sanha with covering letter given on his behalf by Constable contained crime number which could be ascertained only after recording of F.I.R.-F.I.R. recorded at 7 P.M. whereas relevant entry of rojnamcha Sanha with covering letter received by constable at 5 P.M.-*

Acknowledgment being post timed document indicative of fact that information was sent after arrest of appellant - Not established that search was carried out after complying with mandatory provision of Section 42(2)-Appellant acquitted - Appeal allowed. [Shakuntali Kol v. State of M.P.] ...153

Narcotics Drugs and Psychotropic Substances Act (61 of 1985) Section 50-*Accused carrying bag not concealed in the body-Search of such bag does not come within ambit of search of "Person" as mentioned U/s 50 N.D.P.S. Act -Held-Provisions of Section 50 would not apply in such case.* [Gopal v. Central Bureau of Narcotics, Indore] ... 131

Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Section 52 - *Analysis of sample - Seized article was sent for examination to Excise Inspector - Report is not clear that seized article was ganja or bhang - Seized article was not sent for chemical examination - In absence of chemical examination it cannot be established that seized article was ganja.* [Nannu v. State of M.P.] ...346

Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 53 - *Officer-in-charge of a police station U/s 53 of Act is not a "Police Officer" within meaning of Section 25 of Evidence Act.* [Kanhaiyalal v. Union of India] ...629

Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Section 55 - *Police to take charge of articles seized - No weighment panchnama prepared- Weight of Ganja shown only by guess - Sample not sealed on spot but in Police Station- Sample not drawn by Investigating Officer but by Town Inspector - No evidence that Ganja was kept in intact condition in Police Station - Appellants acquitted - Appeal allowed.* [Halku v. State of M.P.]...574

Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 67 - *A conviction can be maintained solely on the basis of a confession made U/s 67 of Act - Supreme Court maintained the conviction and sentence passed by High Court.* [Kanhaiyalal v. Union of India] ...629

Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 67 - Criminal Procedure Code, 1973, Section 161 - *A statement made U/s 67 of Act is not the same as a statement made U/s 161 of Code, unless made under threat or coercion - Statement made U/s 67 of Act to be used as confession against the person making it and excludes it from the operation of Sections 24 to 27 of Evidence Act.* [Kanhaiyalal v. Union of India] ...629

Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 67 - *Retracting the confession - Appellant made a confessional statement U/s 67 - Thereafter an application was made for retracting the confession - Neither any order passed on such application nor same proved during trial - Therefore, no evidence about retracting confession - Evidentiary value of confessional statement would not go down.* [Kanhaiyalal v. Union of India]...629

Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 67 r/w Section 42 - *An officer for the purposes of Section 67 of Act r/w Section 42 thereof is not a police officer, the bar U/ss 24 & 27 of Evidence Act can not attracted and the statement made by the person directed to appear before officer concerned may be relied upon as a confessional statement against such person.* [Kanhaiyalal v. Union of India] ...629

National Council for Teacher Education Act (73 of 1993) - Sections 3,12,14,15,16,17,20,21,29,30,32(2), NCTE (Recognition Norms and Procedure) Regulations 2005, NCTE (Procedure To Be Followed By the Regional Committees) Regulations 1995 - *Recognition to Institutions - Whether the Central Govt. in exercise of power under Section 29 of Act, 1993 can direct NCTE to stop recognition to any teacher training institutions falling within jurisdiction of Western Regional Committee of NCTE - Petitioner is college founded and established by a Society registered under Society Registrikaran Adhiniyam - NCTE is competent to grant recognition to Institution offering courses for training of teacher education - Petitioner submitted application for recognition along with requisite fee and also complying with other requisite norms - NCTE not issued formal order of recognition in view of direction given by Central Govt. under Section 29 of Act, not to grant recognition to any teacher training institution till comprehensive review is made or till further orders - Held - Language employed in Section 29 leaves no scintilla of doubt that Central Govt. can issue such direction - NCTE is bound by such directions in view of Section 29(1) of Act - Central Govt. issued direction as it has come to its notice that there has been uneven and disproportionate growth in number of recognition granted in various courses of Institutions and actual demand of teachers has been totally ignored - In view of reasons and objects and role assigned to Council and Central Govt. direction issued by Central Govt. is within the ambit and sweep of its powers and not dehors the statutory exercise of power.* [Amrit Vidya Peeth B.Ed. College v. State of M.P.] ...54

National Council for Teachers Education Act (73 of 1993), Section 14 (3) - *Conditional Recognition - Conditional recognition issued by NCTE - Conditional recognition could be ripened only after satisfying statutory requirements provided in regulations 7 and 8 of the Regulations as they are conditions precedent.* [Jan Seva Shiksha Samiti v. State of M.P.] ...706

National Council for Teachers Education Act (73 of 1993), Sections 14, 15 & 32 - *New B. Ed. College - Institutions are bound to follow regulations and University are required to respect regulations as they have overriding effect on University Statutes - Petition disposed off.* [Jan Seva Shiksha Samiti v. State of M.P.] ...706

National Council for Teachers Education Act (73 of 1993), Sections

14, 15 & 32. - *New B.Ed. College - Permission to start - N.C.T.E. is final authority to grant or refuse recognition - State Govt. cannot refuse No Objection Certificate.* [Jan Seva Shiksha Samiti v. State of M.P.] ...706

National Council for Teacher Education Act (73 of 1993) - Section 29- *Central Govt. issuing direction to NCTE not to grant affiliation till further orders as it is making comprehensive review of situation for taking necessary corrective measures - Direction was issued on 20-8-07 - Central Govt. directed to take final decision by end of January, 2008.* [Amrit Vidya Peeth B.Ed., College v. State of M.P.] ...54

National Security Act (65 of 1980), Section 3 - Detention order - Public Order or Law & Order - *Detenu caught hold of police personal and tried to snatch his revolver in a public place and thereafter ran away from custody of police - Act of detenu must have caused panic amongst public and has direct nexus with public order.* [Shanker Mihani v. State of M.P.] ...797

National Security Act (65 of 1980), Section 3 - *Grounds of Detention - Truthfulness - High Court while examining validity of an order of detention is not to examine truth or otherwise of allegation mentioned in grounds of detention - Has to assume that ground of detention is true.* [Shanker Mihani v. State of M.P.] ...797

National Security Act (65 of 1980), Section 3 - *Order of detention is essentially a precautionary measure - Based on reasonable prognosis of future behaviour of a person based on his past - Such past conduct may consist of one single act or of a series of acts - Two incidents of 22-12-2006 and 5-1-2007 mentioned in grounds of detention order - Can form a reasonable basis for satisfaction of detaining authority that unless petitioner is detained in custody U/s 3 of Act - He is likely to repeat simtlar activities in future which will in danger public order.* [Shanker Mihani v. State of M.P.] ...797

National Security Act (65 of 1980), Section 3 - *Stale incidents which are remote to date of order of detention cannot constitute basis for passing order of detention - Order of detention passed on 10-10-2007 - Incidents of years from 1994 to 2006 prior to one year before date of order were stale incidents - Could not constitute basis for detention.* [Shanker Mihani v. State of M.P.] ...797

Negotiable Instruments Act (26 of 1881)-Section 80-*No rate of interest shown in PN-Section 80 will come into play-interest @ 18 p.a. is payable w.e.f. due date of payment till realization.* [Madhya Pradesh State Electricity Board v. M/s. Anand Transformers Pvt. Ltd.] ...28

Negotiable Instruments Act (26 of 1881), Section 138, Criminal Procedure Code, 1974, Section 357(3) - *Compensation - Deterrent provisions contained in Section 138 of Act are devised to ensure sanctity to the amount*

paid by cheque but not for recovery of amount. [Marry Jani Kumrawat v. Krishnakant] ...955

Negotiable Instruments Act (26 of 1881), Section 138, Criminal Procedure Code, 1974, Section 357(3) - *Compensation - Dishonour of cheque occasions to party is harassment of initiating proceedings against such party and pursuing litigation in which inconvenience is suffered in addition to expenses incurred - This loss deserves to be compensated.* [Marry Jani Kumrawat v. Krishnakant] ...955

Negotiable Instruments Act (26 of 1881), Section 138, Criminal Procedure Code, 1974, Section 357(3) - *Compensation - Power to grant compensation animates only from Section 357 (3) of Code and not from Section 138 of Act - If fine is imposed, amount of compensation cannot be arbitrary or unreasonable and should be lesser than amount which can be granted by Civil Court - Criminal Court is not a substitution for a Civil Court.* [Marry Jani Kumrawat v. Krishnakant] ...955

Negotiable Instruments Act (26 of 1881) - Section 138-*Demand in notice-No demand for payment of cheque amount but for entire outstanding amount-Notice is not legal-Complaint not maintainable on such notice.* [Rahul Builders v. M/S Arihant Fertilizers and Chemical] ...189

Negotiable Instruments Act (26 of 1881) - Section 138-*It contemplates service of notice and payment of amount of cheque within 15 days from the date of receipt thereof-Does not contemplates 15 days notice.* [M/S Rahul Builders v. M/S Arihant Fertilizers and Chemical] ...189

Negotiable Instruments Act (26 of 1881), Section 138 Proviso B - *Notice issued for demanding whole of amount due i.e. Rs. 8 lakh without specifying amount of cheque concerned i.e. Rs. 2 lakh - Not a valid notice U/s 138 - On basis of such notice - Criminal proceedings are an abuse of process of Court - Proceedings quashed.* [Mahendralal Shivhare v. State of M.P.] ...*20

Panchayat (Gram Panchayat Ke Sarpanch Tatha Up-Sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President Tatha Vice-President Ke Virudh Avishwas Prastav) Niyam, M.P. 1994 - Rule 5 - *Invalid Vote - Intention of voter - One vote containing the sign of (✓) on the back side of ballot paper - Vote was declared invalid - Held - Any mark put on the back side of ballot paper will not convey any intention - Moreover, symbol is put on the ballot paper in a reverse manner (∧) - Intention must be in a manner which is provided under Law - No mark put by voter in horizontal columns showing his intention for or against no confidence motion - No confidence motion was not validly passed for want of requisite strength - Petition allowed.* [Sunita Patel v. Collector] ...443

Panchayat (Gram Panchayat Ke Sarpanch Tatha Up-Sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President TathaVice-President Ke Virudh Avishwas Prastav) Niyam, 1994, Rule 5, M.P. Panchayat Nirvachan Niyam, M.P. 1995, Rule 76 - *Application of Niyam, 1994 in no confidence motion - Niyam, 1994 are applicable to meeting of No Confidence motion with regard to procedure which is liable to be observed in such meetings.* [Sunita Patel v. Collector] ...443

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 5, M.P. Municipalities Act, 1961, Section 30 - *Registration of voter -Election of respondent no.3 on the post of President Municipal Council challenged on the ground that his name was also recorded in voter list of Gram Panchayat Lakhahar - Held - Person is not prevented from getting his name entered in electoral roll of Municipal Council, if his name is already registered in electoral roll of village - Proviso to Section 30 of Act, 1961prohibits person from getting registered in electoral roll for more than one ward or for any ward more than one - No allegation that name of respondent no.3 was already entered in voter list of more than one ward - Respondent no. 3 was not disqualified from contesting municipal election - Petition dismissed.* [Rajaram Ahirwar v. State of M.P.] 236

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 21, M.P. Panchyat (Gram Panchyat Ke Sarpanch Tatha Up-Sarpanch Janpad Panchayat Tatha Zila Panchyat Ke President Tatha Vice-president Ke Virudh Avishwas Prastav) Niyam, 1994 - *No Confidence Motion - No confidence motion was declared as failed - Panchas started protesting on the ground that they were misled - Presiding officer set aside first process of election and conducted the meeting afresh - In subsequent meeting no confidence motion passed - Appellant (Sarpanch) filed dispute under Section 21 (4) before Collector - Collector set aside both proceedings and directed for holding fresh meeting - Single Judge found no infirmity in Collector's order - Held - No steps were taken by any party to challenge motion passed in earlier part of day - Presiding officer did not have any power to adjudicate whether first meeting was nullity or not - Presiding officer did not have any power to set aside the result of first meeting and to convene another meeting for consideration of motion - Collector did not have power to go behind the motion challenged by Sarpanch - Order passed by Collector quashed - However, person aggrieved by result of first meeting shall be at liberty to assail the same before appropriate forum - Appeal allowed.* [Naval Singh v. Collector, Khargone] ... 204

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994) - Section 21(4) (Gram Panchayat Ke Sarpanch Tatha Up-Sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President TathaVice-President Ke Virudh Avishwas Prastav) Niyam, 1994, - *Maintainability of appeal before*

Collector - No confidence motion against Sarpanch was declared failed - One of the Panchas filed a dispute before Collector under Section 21(4) - Collector declared the no confidence motion as has been passed - Held - Only Sarpanch or Up Sarpanch against whom no confidence motion is passed may prefer a dispute - Appeal at the instance of Panch is not maintainable. [Sunita Patel v. Collector] ...443

Panchayat Raj Avam Gram Swraj Adhiniyam, M.P. 1993(1 of 1994) - Section 36 (1) (a)(ii) - *Disqualified - No person shall be eligible to be an office - bearer of Panchayat - Who sentenced to imprisonment for not less than six month unless a period of five years has elapsed since his release - Respondent no. 9 was convicted u/s 326 IPC for the period of three years on 28/9/2000 remained in custody till 2003 - There after on 26/12/2004 filed nomination papers for member of Janpad Panchyat and elected as president in January, 2005 - At the time of filing nomination paper he was not qualified to contest - Cease to continue to hold the post of president of Janpad Panchayat.* [Shiv Singh Rawat v. State of M.P.] ...491

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993(1 of 1994) - Section 75 (First Proviso) - *Duty of Bank towards account holder - On the instructions of Registrar of Stamps Bank had debited in petitioner's account 1% additional duty i.e. Rs. 6,97,000/- - In view of the amendment in Section 75 of Act Additional duty shall not exceed the amount of stamp duty payable thereupon - Bank has no authority either under Contractual Law or under Bank Laws to deduct any amount without giving prior information to account holder (petitioner) - Any adjustment without prior information to account holder (petitioner) in fact some times may amount to misappropriation and breach of trust - High Court directed the Bank to repay amount which was in excess of liability with interest to petitioner.* [APL International Ltd. v. State of M.P.] ...495

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994) - Section 122 - *Tribunal Directed for recounting of invalid votes only on the ground that the margin of victory is less and number of invalid votes are very high - Recounting of votes cannot be ordered without proper evidence and pleadings - Matter remanded back to Tribunal to decide the issue afresh after taking note of Pleadings, Evidence and Documents.* [Kamlesh Bai v. Upper Commissioner Bhopal and Hosangabad Division] ...465

Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rule, M.P. 2005, M.P. Panchayat Raj Adhiniyam, 1993, Section 53, Constitution of India, 243-J - *Power of State Government in relation to functions of Panchayats - State Government may by general or special order, add to any of functions of Panchayats or withdraw functions and duties entrusted to such Panchayats, when State Government undertakes the*

execution of any of the functions entrusted to Panchayat. [Ajay Tripathi v. State of M.P.] ...782

Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rule, M.P. 2005, Rule 6, M.P. Panchayat Raj Adhiniyam, 1993, Section 47 - *Rule 6 of Rules, 2005 not ultra vires the Constitution or Section 47 or other provisions of Panchayats Act, 1993.* [Ajay Tripathi v. State of M.P.] ...782

Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rule, M.P. 2005, Rule 6, M.P. Panchayat Raj Adhiniyam, 1993, Preamble, Constitution of India, 243-G - *Constitutional validity of Rules, 2005 challenged being violative of Preamble of Act, 1993 - Held - Power to appoint or power of local administration or power for development activities has not been withdrawn - Under Rules,2005, appointing authority is Panchayat and has effective control over Samvida Shala Shikshak - Rules 2005 do not run contrary to preamble of Act.* [Ajay Tripathi v. State of M.P.] ...782

Penal Code (45 of 1860), Section 34 - *Common Intention - Two accused coming on a auto-rickshaw caused 6 stab injuries to deceased on vital parts of body and thereafter fled away on the same auto-rickshaw - Both were sharing common intention and had assaulted deceased in further of common intention - Respondent Nos. 1 & 3 who caused injury by choori convicted under Section 302 r/w Section 34 - Appeal of State partly allowed.* [Nasir v. State of M.P.] ...907

Penal Code (45 of 1860) - Section 141 - *Unlawful Assembly - All accused persons pelted stones at the house of deceased and witnesses - When they did not come out, their houses were set on fire - As deceased and his family members came out, he and his sons were assaulted by accused persons - Since the appellants were members of unlawful assembly they constructively become liable for the act of other members of that assembly - Individual act was not required to be proved - Conviction upheld - Appeal dismissed.* [Bhaddu v. State of M.P.] ...363

Penal Code (45 of 1860), Sections 147, 324/149, Probation of Offenders Act, 1958, Section 4 - *Incident took place about 20 years back when applicants no. 1 and 3 were 25 and 24 years of age and applicant no.2 was 60 years of age - Applicants first offenders - Maximum punishment under Section 324 prescribed is 3 years - Benefit of Act can be extended if offence is punishable with imprisonment upto 7 years and accused is first offender - Applicants entitled for benefit of Section 4 of Act - Revision allowed partly.* [Jawaharlal v. State of M.P.] ...960

Penal Code (45 of 1860), Sections 177,199, 218, Criminal Procedure Code, 1974, Section 482 - *A complaint filed by Jr. Engineer against a dead person U/s 138 of Electricity Act - When this fact came into the knowledge of*

Court - Proceedings were dropped - Show cause notice issued against Jr. Engineer why he has filed complaint against dead person - Thereafter, applicant working as CMD was directed to conduct enquiry - Applicant submitted the report that sons of deceased had given false information at the time of inspection - Report of applicant not accepted by Special Judge and issued show cause notice as to why he be not punished U/ss 177, 199 and 218 of Code - Held - No material before Special Judge on the basis of which report of applicant could be disbelieved - Conclusions drawn by Special Judge on imaginary grounds only - Show cause notice to applicant totally unwarranted and an abuse of process of law - Petition allowed. [Sanjay Mohase v. State of M.P.] ...974

Penal Code (45 of 1860), Section 300 - *A sudden quarrel between appellant and his wife (deceased) on spur of moment and in heat of passion, without premeditation appellant suddenly dealt one blow of hammer on head of deceased with force - Bones of her skull broken into several pieces and she died - Shows an intention of causing her death or at least causing such bodily injury as was likely to cause her death - Liable to be punished under Part-I of Section 304 I.P.C.* [Vijay Gupta v. State of M.P.] ...918

Penal Code (45 of 1860) - Section 300 Exception 1 - *Sudden and Grave Provocation - Number of persons killed the deceased, caused injuries to injured witnesses and set their houses on fire - Benefit of 1st Exception of Section 300 cannot be given to offenders who sought provocation as excuse for killing or doing harm to any person - The act must be done under immediate impulse of provocation - Provocation must be such as will upset person of ordinary sense and calmness - It cannot be held that all of them lost their power of control and committed offence - Defence of sudden and grave provocation not available.* [Bhaddu v. State of M.P.] ... 363

Penal Code (45 of 1860) - Section 302 - *Appreciation of evidence - Dehati Nalishi recorded on 7.5.1997 at 6.30 p.m. and crime was also registered at 8.30 p.m. against the accused - He was available but arrested on 8.5.1997 at 3 p.m. - Shows that on 7.5.1997 police was not having clear and sufficient information against the accused - A strong circumstance in favour of accused.* [Abhay v. State of M. P.] ...373

Penal Code (45 of 1860) - Section 302 - *Appreciation of evidence - Delay in recording statement of eye witness itself not a serious infirmity of prosecution case - Eye witness did not disclose name of assailant to anybody and to police - He alleges that sister-in-law of deceased lodged Dehati Nalishi in his presence but his name was not shown as an eye witness - His statement not taken by I.O. just after lodging Dehati Nalishi - Two inferences are possible that either the police was not knowing that eye-witness witnessed the incident and Dehati Nalishi was recorded later on ante-dated and ante-*

time, wherein the name of eye witness is mentioned and second inference that eye witness was a got up witness - Held - Conduct of witness highly unnatural and abnormal - Testimony discarded. [Abhay v. State of M. P.]...373

Penal Code (45 Of 1860) - Section 302 - *Appreciation of evidence - Sister-in-law of deceased claims to be an eye witness - She accompanied with other villagers to hospital but in M.L.C. report it was not stated that deceased was brought by her - Although being literate she did not disclose name of assailant to her husband or to police nor to her advocate brother-in-law and not to villagers as well - Her conduct was highly unnatural - her testimony cannot be relied upon.* [Abhay v. State of M. P.] ...373

Penal Code (45 of 1860), Section 302 - *Deceased patient of mental illness - Her behaviour was uncommon and unusual - Doctor has not firmly opined that it is a case of Homicidal death - No injuries found on the body of deceased - Dying Declaration recorded prior to F.I.R. - Case history also written subsequent to recording of Dying Declaration - Circumstances raises reasonable doubt about truthfulness of conduct of I.O. and Doctor who had recorded dying declaration - Appellant acquitted - Appeal allowed.* [Kamlesh Jain v. State of M.P.] ...885

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 3 - *Circumstantial evidence - Appellant's wife died due to 95% burn injuries - At the time of occurrence appellant was not in house as he went to evacuate - Merely because deceased suffered burn injuries inside the room and appellant has not offered any explanation - On the basis of presumption appellant can not be roped - Can not be convicted on conjectures and surmises - Conviction U/s 302 and 201 I.P.C. set aside.* [Lakhan Lal v. State of M.P.] ...*19

Penal Code (45 of 1860) - Section 302 - *Murder - Circumstantial Evidence - Last Seen Together - Brother of deceased did not disclose in his statement under Section 161 of Cr.P.C. that he himself had seen deceased in the company of appellants - Witness stating in Court evidence that he himself had seen the deceased in the company of appellant several times on that day - Contradictions and omissions are on material point - No reliance can be placed on such a statement.* [Sanjay Gour v. State of M. P.] ...390

Penal Code (45 of 1860), Section 302 - *Murder - Interested and Partisan Witnesses - Three reports lodged in respect of one incident - Two reports suppressed by Prosecution - Report which was produced was not proved - There is nothing to prove authenticity of statement of interested and partisan witnesses - Difficult to place reliance on testimonies of interested witnesses - Appellants acquitted - Appeal allowed.* [Nan Singh v. State of M.P.] ...903

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Penal Code (45 of 1860) - Section 302 - *100% burns - Rule of Nines - Circumstantial Evidence - Second wife of appellant found died in her house with 100% burns - Trial Court ruled out possibility of suicide as deceased had suffered 100% burns - Trial Court held that in view of extent of burns it was not possible for deceased to have completely drenched herself in kerosene and then to set her on fire - Held - Degree and extent of burns are counted on the basis of formula known as Rule of Nines - Even if a small portion of head is burnt the percentage of body surface would remain 9 - Rule of Nines does not contemplate or imply that whole body should have been affected by burns - Under these circumstances it is not necessary that there should have been 100% burns in case of each and every part of body - Trial Court also ignored that even if small part of body is smeared with kerosene possibility of burns extending to dry part of body is not ruled out - Conclusion drawn by Trial Court ruling out possibility of suicide not proper - Appeal allowed.* [Thakurlal v. State of M.P.] ...170

Penal Code (45 of 1860) - Sections 302 read with 34 - *Common Intention - It is doubtful that appellant no. 2 had caught the deceased, pinned in his grip till appellant no. 3 had caused him all the four injuries by a knife - Therefore it is not proved that the appellant no. 2 was sharing the same intention of causing death of the deceased along with appellant no. 3 - Appellant no. 2 can not held liable under section 302/34.* [Fayyum v. State of M.P.] ...327

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by deceased and witnesses - Appellant assaulted deceased with a lathi on his chest - Other accused persons inflicted lathi blows on the neck and waist of deceased - 3 ribs were found fractured and lungs were found ruptured at the site of fractures - Cause of death was respiratory failure due to shock resulting from laceration of lungs - Held - Appellant did not know that who is urinating in front of his house - He assaulted the deceased on a spur of moment - There was no premeditation, motive or intention to cause death - Appellant also did not repeat the blow - Exception 4 of Section 300 of I.P.C. is attracted - Appellant convicted under Section 304 Part II - Appeal partly allowed. [Prem Singh v. State of M.P.] ...176

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Penal Code (45 of 1860), Section 354 - *Material variance between two dying declarations - Allegedly, appellant and two accused persons intercepted deceased when she was all alone coming to home - Accused persons pressed her breast and kissed her with intention of outraging her modesty - Deceased came to her house and poured kerosene oil on herself and ignited by match stick - First oral dying declaration - When in hospital she told her father that appellant molested her and outraged her modesty - Second dying declaration recorded by Naib Tehsildar in which she did not disclose the name of the appellant as assailant but stated that 2 boys molested her - Held - It shows that appellant was not previously known to deceased that is why she did not name him in second dying declaration - In the circumstances, oral dying declaration which was given by deceased to her father is not reliable - Trial Court committed error in relying upon oral dying declaration of father of deceased - Conviction and Sentence of appellant U/s 354 of I.P.C. set aside - Appeal allowed.* [Mohammed Laique v. State of M. P.]...*21

Penal Code (45 of 1860) - Section 376 - *Rape - Prosecutrix coming back to home after taking vegetables from uncle - Appellant threw her on ground and committed sexual intercourse with her - Prosecutrix informed the incident immediately to her mother - Incident took place at about 8 P.M. - FIR lodged at 11 P.M. - Held - Soon after incident the same narrated by prosecutrix to her mother and father - Report was lodged promptly - FIR fully corroborated by testimony of prosecutrix and her parents - No apparent reason to falsely implicate accused after scatting her own prestige and honour - Conviction of appellant upheld - Appeal dismissed.* [Jandel Singh v. State of M.P.] ...396

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evidence that which appellant was having which kind of deadly weapon at the time of commission of dacoiti-Held-Conviction U/s 397 set aside-Appeal partly allowed. [Ranchhod v. State of M.P.] ...148

Penal Code (45 of 1860) - Section 420 - *Cheating - Inducement which is important ingredient of offence is missing no offence of cheating is made out against petitioners.* [Larsen & Toubro Ltd. v. Anand Bangad] ...600

Penal Code (45 of 1860) - Section 498 A - *Conviction based on letters purported to be written by deceased (wife of appellant) and oral evidence of parents of deceased - No evidence produced that letters were written by deceased - Hand writing expert report filed but not duly proved - No explanation sought in accused statement regarding contents of letters - Such letters can't be used as evidence - Material omission and contradiction in oral evidence - Cruelty by husband (appellant) not proved - Conviction and sentence set aside - Appeal allowed.* [Ayyub v. State of M.P.] ...343

Penal Code (45 of 1860), Section 498-A - *Cruelty - Wife died by drowning in well - Appellant used to beat and harass his wife for securing his job through her brothers, to get sale deed of a house and Rs. 1 lakh - What has happened on day of incident is within knowledge of husband and wife - Wife is no more - No women will end her life without intolerable miseries, troubles, tortures and harassments - Death of wife not reported to authorities or brothers of deceased - Earlier report of harassment was not made to avoid further harassment - Appellant rightly convicted under Section 498-A of I.P.C. - Appeal dismissed.* [Bhairon Singh v. State of M.P.] ...893

Penal Code (45 of 1860), Section 498 A - *Prosecution witnesses have given a positive evidence that appellant was ill-treating deceased (wife) and was causing marpeet to her - Trial Court has rightly convicted appellant U/s 498A I.P.C. - Conviction and Sentence affirmed by High Court.* [Lakhan Lal v. State of M.P.] ...*19

Police Regulations - Regulation 70-A - *Out of turn promotion - Prior Approval by DGP is sine-qua-non - No office order regarding promotion issued - Petitioner cannot be treated to have been promoted in accordance with law - DGP within his power to refuse grant of approval for out of turn promotion.* [Hassan Khan v. State of M.P.] ...742

Police Regulations - Regulation 70-A - *Refusal to accord approval - Opportunity of Hearing - Petitioner given out of turn promotion on the strength of a wireless message sent by I.G. to D.G.P. for grant of approval - Refusal to grant approval by DGP - Does not amount to Reversion - No opportunity required - However, purpose of petitioner is served if post decisional opportunity of hearing is granted to him - Petition disposed of accordingly.* [Hassan Khan v. State of M.P.] ...742

Police Regulations - Regulations 238, 240, M.P. Civil Services (Classification, Control and Appeal) Rules, 1966, Rule 19 - *Dismissal from service on conviction-Petitioner convicted for offences punishable under Sections 304-B, 498-A/34 of I.P.C. and under Section 3 /4 of Dowry Prohibition Act - Appeal against judgment and sentence pending before Appellate Court - Petitioner removed from service on account of his conviction - Held - Service of Petitioner is governed by Rules, 1966 - Detailed procedure prescribed for conducting departmental enquiry is excluded in view of non-obstante clause in Rule 19 - Regulation 238 of Police Regulations cannot be read in isolation and has to be read subservient to Rule 19 of Rules, 1966 along with Regulation 240 - Police Regulations are only by way of executive instructions and Rules, 1966 have precedence over the Police Regulations - No illegality in impugned order - However, if petitioner succeeds in his appeal he may approach the authorities for reconsideration of his case - Petition dismissed.* [Shiv Babu v. State of M.P.] ...75

Practice and Procedure - *Duty of counsel to place before the Single Bench earlier decision passed by the Division Bench.* [United India Insurance Co. Ltd. v. Nandlal] ...*13

Practice & Procedure - *Strict rule of pleddings are not applicable in proceedings under the Protection of Women from Domestic Violence Act, 2005 - Wife did not refer name of her foster son in original application before JMFC - However Appellate Court granted Rs. 500/- maintenance to foster son - Order upheld by High Court.* [Razzak Khan v. Shahnaz Khan] ...963

Prevention of Corruption Act (49 of 1988) - Section 13(1)(d) - *Illegal gratification - Demand of money made by SHO - No demand made by appellant nor party to any agreement - Appellant posted as Head Constable not in a position to show favour or render any service in connection with his official duty - Money accepted by appellant for giving the same to SHO - Where demand of bribe is not proved, accused cannot be convicted - Appeal allowed.* [Chironjilal v. State of M. P.] ...922

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act (46 of 1988) - Section 3 - *Maintainability or continuance - Whether a Writ Petition of habeas corpus in the case of preventive detention can be maintainable/continue even after the period of detention is over - Yes - If the effect of detention is forfeiture of the property of detenu - High Court can go into legality, propriety and validity of the order of detention - However, can not issue writ of habeas corpus on efflux of the period of detention.* [Kailashbai v. Union of India] ...768

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act (46 of 1988) - Section 3 - *Satisfaction of Detaining Authority - At the time of passing detention order - Subjective satisfaction is required*

to be derived from some objective criteria and cannot be capricious or whimsical - Eminent possibility of release of detenu must be based on cogent material - Order suffers from undue delay of 8 ½ months after incarceration of detenu - No cogent material has been placed before Detaining Authority to reached the satisfaction - Order unsustainable in law. [Kailashbai v. Union of India] ...768

Probation of Offenders Act (20 of 1958) - Section 4 - *Release on Probation - There should be equilibrium between guilt and punishment - Undue sympathy would do more harm to justice by undermining public confidence in efficacy of law - Every Court has duty to award proper sentence having regard to nature and manner of execution of offence - Appellant not entitled to be released on probation.* [Radheshyam v. State of M.P.] ...354

Protection of Women from Domestic Violence Act (43 of 2005), Section 17 - *Right to reside in a shared household - Whether divorcee wife has right to reside in an ancestral house of husband - Yes, every woman in a domestic relationship has right to reside in the shared house.* [Razzak Khan v. Shahnaz Khan] ...963

Protection of Women from Domestic Violence Act (43 of 2005), Section 19 (1) (f) - *Alternate accommodation or to pay rent for the same - The claim for alternative accommodation can only be made against husband - Wife is entitled a right to residence in a shared house belonging to husband or house which belongs to joint family of which husband is a member.* [Razzak Khan v. Shahnaz Khan] ...963

Registration Act (16 of 1908), Sections 17(b), 49 - *Admissibility of Unregistered relinquishment deed - Unregistered relinquishment deed in respect of immovable property is inadmissible in evidence - Admission in unregistered document which amounted to declaration of title in the property could not be used in evidence.* [Ghasitibai v. Ramgopal Singh] ...872

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989) - Section 3(1)(v) - *Interference with enjoyment of rights over any land-Appellant caused his cattle to enter upon fields of complainant and caused damage to crop and field - Held - The damage was not caused on account of complainant being member of Scheduled Caste - Conviction of appellant under Section 3(1)(v) of Act not proper - Appellant acquitted for offence under Section 3(1)(v) of Act - Appeal partly allowed.* [Jagannath v. State of M.P.] ... 162

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989)-Section 3(1)(ix), Criminal Procedure Code, 1974, Section 154 - *Delay in lodging F.I.R-Prosecutrix a girl aged about 10 years was going from Bhopal to Patan along with her parents - They alighted at Jharkheda to change bus - Father sat near a hotel and girl also went there -*

Appellant went there and caused her to sit in his lap - Appellant inserted his finger in her vagina - Girl and her parents proceeded to Patan to attend marriage - Lodged F.I.R. after returning therefrom - Held - Delay in lodging F.I.R. has been properly explained by prosecution - It cannot be said that appellant has been falsely implicated - Girl is not resident of Jharkheda - No reason to implicate appellant falsely - Appeal Dismissed. [D.N. Bharthare v. State of M.P.] ...156

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989) - Sections 3(2)(iv), 3(2)(v) - *Section 3(2)(v) provides that a person who commits crime on ground that such person is a member of SC or ST, but these words are missing in Section 3(2)(iv) of Act - Requirement of knowledge of accused that victim is member of S.C. or S.T. is not in Section 3(2)(iv) - Court when record conviction U/s 3(2)(iv) has no discretion but to award sentence of life imprisonment.* [Bhupendra v. State of M.P.] ...950

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002)-Sections 2(f), (ha), (j), 11, 13(4), 17, 34, 37, Recover of Debts Due to Banks and Financial Institutions Act, 1993, Sections 1(4), 2(g) (o) (zd)(ze) (zf) , 3(1), 17, Civil Procedure Code, 1908, Order VII Rule 11-*Bar of Jurisdiction of Civil Court-Plaintiff purchased house from borrower for Rs. 8,27,000/- --Plaintiff/purchaser thereafter came to know that first floor portion was under mortgage and bank has taken action under Act, 2002-Suit filed for declaration that plaintiffs are absolute purchaser-Defendant/Bank filed application under Order VII Rule 11 C.P.C. contending suit as not maintainable-Held-Debt as defined in Section 2(ha) Act 1993 is not regulated by financial constraint-Section 13(4) of Act 2002 not applicable only to cases where amount of debt due is more than Rs. Ten Lacs-Section 17 of Act 2002 cause no fetter on power of D.R.T. to entertain application only in those cases were debt is above Rs. Ten Lacs-D.R.T. empowered to deal with matter under Section 17 of Act 2002-Section 14 of Act 1993 cannot govern applicability of Act 2002-Operation of Section 17 of Act 2002 is unfettered by amount of loan that has been taken-There is remedy of filing appeal/application under Section 17 of Act 2002-Jurisdiction of Civil Court barred under Section 34 of Act 2002-Appeal dismissed.* [Manoj Kumar Jain v. Corporation Bank] ...88

Service Law - *Inter-Commissionerate Transfer - Validity - Group 'B', 'C' and 'D' employees of Central Board of Excise and Customs - Whether can be transferred from one Zone to another - Circulars dated 19-2-2004 and 9-3-2004 issued by the Deptt. Of Revenue - Held - Circulars deals with inter-commissionerate transfers on compassionate ground and are not applicable in case of transfer on administrative ground from Indore to Nagpur Zone - Transfer is governed by Circulars dated 24-8-1984, 16-1-2003 and 24-8-2004 - Both Zones have common cadre as Chief Commissioner of Bhopal*

Zone is Cadre Controlling Authority, therefore, transfer was permissible - Appeal dismissed. [Prabir Banerjee v. Union of India] ...413

Specific Relief Act (47 of 1963), Sections 10,12, Contract Act, 1872, Section 55 - *Agreement to sell - Time when essence of Contract - Vendor accepting part payment of consideration amount after stipulated period - It amounts to extension of fresh limitation to perform contract - Appellants by receiving such payment waived the right to say that time was essence of contract - Stipulated time was not the essence of contract between parties.* [Shankar Lal pandey v. Tarachand Kulparia] ...824

Specific Relief Act (47 of 1963), Section 15 - *Who may obtain Specific Performance - Order of Specific Performance can be passed against any party to agreement.* [Rajkunwar Bai v. Murlidhar] ...855

Specific Relief Act (47 of 1963), Section 16(c) - *Readiness and willingness - Oral evidence led by plaintiff regarding his readiness and willingness reliable - Merely in the lack of any documentary evidence it could not be inferred that plaintiff was not ready and willing to perform his part of contract.* [Shankar Lal pandey v. Tarachand Kulparia] ...824

Specific Relief Act (47 of 1963), Section 20 - *Rights of purchaser against co-owner who is not a party to agreement and no money paid to such co-owner - Agreement to sell entered into by Bapu Singh, one of co-owners - Another co-owner, Rajkunwarbai not a party to agreement - No money paid to Rajkunwarbai - After death of Bapu Singh, she became owner of share of Bapu Singh along with other L.Rs. - Held - Rajkunwarbai was not a party to agreement - Therefore even if Rajkunwarbai became one of the co-owners of the share of Bapu Singh alongwith other L.Rs. - No decree for Specific Performance of Contract can be passed under facts and circumstances of case.* [Rajkunwar Bai v. Murlidhar] ...855

Specific Relief Act (47 of 1963), Section 20 - *Specific Performance of Contract - Conduct of parties - Agreement to sell entered into in the year 1987 - Substantial Sale Consideration paid in 1987 - Suit for Specific Performance of Contract filed in 1990 - Held - There was no justification for waiting for filing of suit for a period of three years.* [Rajkunwar Bai v. Murlidhar] ...855

Stamp Act (2 of 1899) - Sections 2(9)(10), 3, 27, 47, Schedule 1-A (item 23) - *"Conveyance" - Payment of stamp duty - Market value on the date of execution of the document was a decisive factor - Stamp duty was payable on market value of property at the time of registration of sale deed and not as per price fixed under agreement to sell or in decree of Court - Indian Stamp Act is a taxing statute and is to be construed strictly.* [State of M.P. v. Dilip Kumar Sangni] ...480

State Administrative Service Rules, M.P. 1975, Rule 21 - *Senior Pay*

Scale - 'Seniority-cum-merit' - An employee who is senior and otherwise eligible for promotion has to be promoted if there is no adverse material against him - Comparison of inter se merit and rejecting senior employee after evaluating inter se merit - Not permissible. [Ashok Kumar Vajpayee v. State of M.P.] ...736

State Administrative Service Rules, M.P. 1975, Rule 21 - *Senior Pay Scale - 'Seniority-cum-merit' - Normally when proceedings of DPC are held to be improper - Matter is required to be remanded back for fresh consideration - However, petitioner has received Good, Very Good and Outstanding grading - No useful purpose will be served by remanding matter back - Petitioner is entitled to be promoted on basis of principle of 'seniority-cum-merit' - Petitioner granted senior pay scale with all other consequential benefit.* [Ashok Kumar Vajpayee v. State of M.P.] ...736

State Administrative Service Rules, M.P. 1975, Rule 21 - *Senior Pay Scale - 'Seniority-cum-merit' - Petitioner not granted senior pay scale on ground that he had not obtained four Very Good and one Good entry in his five preceding Annual Confidential Reports - Held - Admittedly promotion is to be granted on 'Seniority-cum-merit' basis - DPC evaluating case on principle of 'merit-cum-seniority' - Not permissible.* [Ashok Kumar Vajpayee v. State of M.P.] ...736

Succession Act (39 of 1925), Section 63 - *Execution of unprivileged Wills - Attesting witnesses did not state that the testator of Will had put her signature in their presence and they had put their signatures in presence of testator - Witnesses have simply proved their signatures on Will and signature of testator - Held - Statement cannot be stretched up to the extent in order to hold or infer that the attestation has been proved in terms of Section 63 (c) - Execution of Will not proved since attestation is not proved - Appeal dismissed.* [Deependra Singh @ Deepak Parihar v. Shakuntala Pal] ...803

Sympathetic consideration - *Respondent wrongly promoted as Sr. Accountant - Holding the post since last 17 years and reaching the age of superannuation by the end of this month i.e. 31-12-2007 - Therefore it would not be appropriate now to revert the respondent to the post of Accountant for very short period - However he would be deemed to have retired from the post of Accountant and his pensionary and retiral benefits would be fixed by treating him as Accountant althroughout.* [Union of India v. Narendra Singh] ... 621

The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998 - *Rules are framed by the President of India in consultation with the Comptroller & Auditor General of India in exercise of power under clause 5 of Article 148 of Constitution - Thus rules are statutory in nature.* [Union of India v. Narendra Singh] ... 621

The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998, Rules 3 & 12 - Fundamental Rules, 1922, Rule 31-A - *If promotion is given wrongly the employee can not be prevented from applying the rules and in correcting the mistake - Mistakes are mistakes and can be corrected by following due process of law - Respondent wrongly promoted though he was not eligible and qualified for the post of Sr. Accountant - After giving show cause notice order of promotion cancelled - Proper.* [Union of India v. Narendra Singh] ... 621

The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998, Rule 5 - *Exercising the power of relaxation - Court or Tribunal can not exercise the power of relaxation - The question as to relaxation of rules was finally decided by Tribunal - Therefore it can not be said that the Tribunal's direction was limited to the 'consideration' of the case of respondent.* [Union of India v. Narendra Singh] ...621

The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998, Rule 5 - *Power of Relaxation - Rule 5 conferred power on the Comptroller & Auditor General of India to relax rules - Such power should be exercised 'with respect to any class or category of persons' - Normally power should be invoked if eligible candidates are not available for promotion or for valid grounds/reasons - The power however should not be exercised to perpetuate a mistake - Respondent wrongly promoted though he was not eligible and qualified - His promotion order cancelled - Deputy Accountant General did not find any valid reason/ground to relax rules - Held - Reasons recorded by Dy. Accountant General were in conformity with the statutory rules.* [Union of India v. Narendra Singh] ...621

The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998, Rule 5-A - *Exercising the Power of Relaxation - Such power should be exercised to the extent as may be necessary to ensure satisfactory working or removing hardship in just and equitable manner but the government can not consciously and deliberately deviate from the rules exercising the power of Relaxation.* [Union of India v. Narendra Singh]...621

Trade Unions Act (16 of 1926) - Section 23-J - *Power of Registrar of Trade Unions - Registrar has no jurisdiction to entertain election dispute.* [R.K. Kathal v. Registrar, Trade Union] ...656

Trade Unions Act (16 of 1926), Section 23-J - *Power of Registrar of Trade Unions to stay election - Registrar, Trade Unions does not have powers of Court - In absence of any express provision Election Tribunal does not have any power to grant temporary injunction - Registrar, Trade Unions could not have encroached upon an area and passed an order of stay relating to election.* [R.K. Kathal v. Registrar, Trade Union] ...656

Transfer of Property Act (4 of 1882), Section 48 - *Priority of Rights*

created by Transfer - Subsequent purchaser resident of same locality - Having knowledge of earlier agreement - Subsequent sale deed executed during subsistence of agreement - It does not give any right to subsequent purchaser over the plaintiff - Subsequent purchaser bound to perform contract by executing sale deed in favour of plaintiff - Appeal dismissed. [Shankar Lal Pandey v. Tarachand Kulparia] ...824

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 - Section 2(1) - *Maintainability of Writ Appeal - Co-operative Tribunal had taken a view that Registrar cannot authorize Deputy Registrar to decide a dispute - Held - An error of law made by Tribunal can be corrected by High Court under Article 226 - Petition was not only under Article 227 of the Constitution of India but also under Article 226 - Order passed by Single Judge is order under Article 226 of Constitution of India - Writ Petition maintainable.* [Ramanuj Tiwari v. M.P. State Co Operative Tribunal] ...216

Vanijyak Kar Adhiniyam, M.P. 1994 (5 of 1995) - Section 2(w) - *Taxable Turnover - Subsequent cancellation of registration certificate of selling dealer - Transaction made by Petitioner with various selling dealers when their registration certificate were valid - Subsequent cancellation of registration certificate with retrospective effect would not effect the deduction claimed by petitioner.* [Jai Mahadev Traders, Gwalior v. State of M.P.] ...765

Wild Life (Protection) Act (53 of 1972) (as amended by Act 44 of 1991 w.e.f. Oct. 2, 1991), Sections 50(1)(c) & 39 (1)(d), Criminal Procedure Code, 1973, Section 451 - *Provisions of Section 50 of Act and amendments made there under do not in any way affect the Magistrate's power to make an order of interim release of the vehicle U/s 451 of Code - Provision of Section 39(1)(d) would come into play after a court found the accusation and allegations true and recorded the finding that seized article was used in commission of offence - Madhukar Rao's F.B. decision of High Court approved.* [State of M.P. v. Madhukar Rao] ...640

Wild Life (Protection) Act (53 of 1972) (as amended by Act 44 of 1991 w.e.f. Oct. 2, 1991), Section 50 (4) - *Expression used in sub-section is "according to law" and not "according to provisions of the Act" - According to law undoubtedly widens the scope and plainly indicates the application of the provisions of the Cr.P.C.* [State of M.P. v. Madhukar Rao] ...640

WORDS AND PHRASES :

Executive Instructions - *Determination of Seniority - Employees whose services have been taken over by Municipal Corporation - Statutory rules silent - On the basis of executive instructions issued by State Government - As per executive instructions - Seniority shall be determined from initial dates of appointment - If post and pay scale are same in both departments - Seniority of appellants and respondent No.3 has to be determined in accordance with executive instructions.* [Shiv Raj Singh v. State of M.P.] ...669

"Includes" - *Use of word includes enlarges meaning of expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include.* [Jaypee Rewa Cement v. State of M.P.] ...681

Legitimate Expectation and interest-*Interim order was passed that institutions may admit students provisionally at their own risk without accepting fess from them and if they accept fees from students they would be ready to face consequences if petition is decided against them - Held - Grant of recognition is condition precedent before any institution proceeds in any other matter like affiliation etc. - It is inconceivable how an institution without recognition can nurture idea to admit students - Educational institution has to maintain the sacredness of concept behind imparting education - Commercialization of course under 1993 Act is impermissible- Benefit of Legitimate Expectation and their interest cannot be given - Petition dismissed.* [Amrit Vidya Peeth B.Ed., College v. State of M.P.] ...54

Prospective Operation - *Pending Proceedings - Order passed by Taxing officer imposing penalty was under challenge before different forums - Relevant provisions of imposing penalty declared unconstitutional by Supreme Court - High Court empowered to examine effect of invalidity and also empowered to waive penalty - Effect of declaration of law as unconstitutional can be considered in pending proceedings - Writ Court rightly quashed the orders and directed for refund of amount of penalty.* [Appellate Authority/ Transport Commissioner, M.P. v. The Divisional Manager M.P. Rajya Parivahan Nigam] ... 199

Wrong mentioning of provision - *Mere wrong mention of provision when power can be exercised under different provision by itself is not sufficient ground to deny justice.* [Bablu Mandal v. Smt. Vandana Bhowmik] ...180

Workmen's Compensation Act (8 of 1923) - Section 3 - *Employer's liability for compensation - Deceased working as cleaner/helper on tractor/ trolley of Respondent No.1 - Deceased going to field of employer on tractor/ trolley - Unknown miscreants attacked deceased by sticks - Looted money from deceased and put tractor/trolley on fire - Deceased succumbed to injuries later on - Held - Accident which resulted in death of deceased occurred during course of and arising out of his employment with the use of vehicle - Act of felony was robbery by miscreants - Beating was caused in the process of robbery - Cause of death was incidental to act of Robbery - As act of felony was to commit robbery therefore, death of deceased was caused accidentally - Insurer and Insured liable to suffer liability arising out of accident - Appeal dismissed.* [United India Insurance Co. Ltd. v. Umed Kunwarbai] ...251

Workmen's Compensation Act (8 of 1923), Section 10 (Proviso) -

Notice to claim - Proviso provides that Commissioner may entertain and decide any claim to compensation in any case notwithstanding that notice has not been given - If he is satisfied that the failure so to do give the notice or prefer the claim, was due to sufficient cause - Even in absence of an application by claimant for invoking such discretion it is provided under proviso of Section 10 of the Act - Commissioner ought to have entertain claim by invoking such discretion in favour of claimant to do real justice. [S.N. Bihari v. Western Coal Field] ...836

Workmen's Compensation Act (8 of 1923), Section 10 (1) - *Limitation - Claimant sustained occupational disease while he was in service of respondents - Claimant in service even on the date of filing of claim - Claimant had recurring and continuous cause of action - Claim cannot be dismissed as barred by time.* [S.N. Bihari v. Western Coal Field] ...836

Workmen's Compensation Act (8 of 1923) - Section 12(1) - *Principal Employer - Deceased employed by Contractor died while maintaining transformer - Maintenance work was given to contractor by NCL - Commissioner granted compensation but absolved NCL from liability - Held, work of maintenance of transformer is part of the trade or business of NCL - Being Principal employer can not escape the liability to pay compensation - Appeal allowed.* [Harihar Singh v. Mst. Dilau] ... 268

JUSTICE SUBHASH CHANDRA VYAS

Born on 18th April, 1946, Joined as Civil Judge in July, 1970. Promoted in Higher Judicial Service in the year 1987 and posted and worked as Addl. District and Sessions Judge at various places. Promoted as Distt. & Sessions Judge in the year 1995. In May 1997 posted as Registrar, High Court of MP Bench at Indore and worked there till September, 2003. Posted as Distt. & Sessions Judge, Gwalior and worked there since 30th Sept., 03 till Oct.05. Appointed as Addl. Judge of High Court of Madhya Pradesh in October, 2005. Took oath on 18.10.05 and since then working as Judge of High Court till date. Thereafter, confirmed as the Judge, High Court of Madhya Pradesh in the month of March, 2008. Superannuated on 18th of April, 2008.

We wish his Lordship a healthy, happy and prosperous life.

Farewell

Hon'ble Mr. S. K. Kulshrestha, Adm. J. bids farewell to the demitting Judge :-

We have assembled here to bid farewell to Brother Justice S.C.Vyas who demits his Office as a Judge, today.

Hon'ble Justice Vyas had not only been academically par excellence, his work throughout has also indicated his competence and dexterity and has endeared him to one and all. His method of working and the objective approach towards decision of the cases has generated marked reverence for him.

Brother Justice Vyas was born on 18th of April, 1946 at Rajgarh and despite being a Science Student, he preferred to join law after completion of his degree in Science. His merit also indicated his academic soundness in law subjects as he passed the LL.B. Examination as topper in Madhav College, Ujjain and stood second in the merit list of the University.

Though, Brother Vyas had opted for Science stream having different destination in mind, on being persuaded by his Lawyer Brother Shri Bhagwandas Vyas and Shri Hariprasad Vyas, he became a student of law and after obtaining the degree, he started practising as a Lawyer. Even though, the merit and qualities of Brother Vyas had become ostensible at the inceptive stage of practice and there was early recognition of his bright future at Bar. On the advice of his father, he chose to join Judiciary and, accordingly, upon his selection on the basis of his merit, he became a Civil Judge in subordinate Judicial Service in the year 1970 from where he was promoted a Civil Judge Class-1 on 5.7.1982. Thereafter, Brother Vyas was bestowed with promotions in rapid succession as CJM on 27.9.1984 and as an officiating District Judge on 18.10.1987. He was promoted as District and Sessions Judge, in the year 1995 and thereafter posted as Registrar, High Court, Bench Indore. During his posting as Registrar, his adroitness was admired by the Bar and Bench and he handled all matters with great ease and efficiency indicating a good admixture of Administrative and Judicial capability. He was later posted as District and Sessions Judge, Gwalior which position he adorned till his elevation on 18.10.2005. The equanimity, patience and benevolence of Shri Justice Vyas was patent and he displayed a marked degree of transparency during his incumbency as a Judge of this Court in all his actions. Despite heavy work, he remained tranquil and did not let the enormity to hamper his efficiency.

Since it is a Constitutional imperative, Brother Vyas is demitting his Office today despite his good health and agility. We are going to lose a good Judge and a good human being full of compassion in the retirement of Shri Justice Vyas.

On behalf of my Brother and Sister Judges I wish Brother Vyas a long life full of happiness and comforts and I am confident that he would ever remain as cheerful as he has always been.

On behalf of Central Government Shri Vinay Zelawat, Asstt. Solicitor General of India, bids farewell :-

अंततोगत्वा आज वह क्षण हमारे समक्ष विद्यमान है जिसे हम टालना चाहते थे। माननीय न्यायमूर्ति श्री एस. सी. व्यास साहब का इस उच्च न्यायालय के न्यायाधीश के रुप में आखरी दिन है। लेकिन इस न्यायालय की दीवारें आपके कार्यकाल की इबारतों को हमेशा याद रखेंगी। एक सामान्य सा लगने वाला यह व्यक्तित्व कितना विशिष्ट है यह आज कोई हमारे मन से पूछे। आज मुझे यह कहने में कोई संकोच नहीं है कि आपका जीवन हमेशा निष्काम कर्मयोगी सा रहा जिसके मन में हमेशा पीड़ित पक्ष के लिये दया, करुणा, आदर एवं स्नेह विद्यमान रहा। साथ ही आपके मन में समाज की भी चिंता रही। आपने हमेशा अभिभाषकों की गरिमा का पूरा ध्यान रखा तथा आपने कभी भी उनकी भावनाओं को ठेस नहीं पहुंचाई। हमने आपको विभिन्न रुपों में कार्य करते हुए देखा है। हम में से अधिकांश ने आपके समक्ष काम भी किया है। हमने आपको हमेशा एक समान मिट्टी से जुड़ा व्यक्ति पाया है जो बेहद भला, सहज, सरल और गरिमामय है। यही एक न्यायाधीश की सफलता है जो 'न्यायपथ' में मील का पत्थर मानी जाती है।

माननीय न्यायमूर्ति श्री व्यास साहब, सेवानिवृत्ति का यह पल एक न्यायधीश के जीवन में बिरला अवसर होता है। इस दिन अभिभाषक उस न्यायधीश पर अपना फैसला सुनाते हैं जिन्होंने अपने कार्यकाल में हजारों फैसले सुनाये हैं। यही वह कसौटी होती है जो यह परखती है कि उनका कार्यकाल शुद्ध सोने सा रहा अथवा पीतल, तांबे या मिश्र धातु का। हम सबका फैसला यह है कि आपका कार्यकाल शतप्रतिशत स्वर्णिम रहा है। यही कारण है कि आज इस अवसर पर आपके साथ है अभिभाषकों का अपार स्नेह और सद्भावना।

आज हम आपके जाने से व्यथित एवं भावुक हैं। आपकी विदाई बेटी की बिदाई समान है जो पराई होकर भी अपनी होती है। जिसकी यादें घर के हर कोने में महकती है तथा जिसकी कमी हमेशा मन में खलती है। लेकिन शायद यही जीवन है। इस विदाई की बेला में हम सब की सद्भावना एवं शुभकामनाएं आपके साथ हैं। मैं आपके संबंध में अन्य वक्ताओं द्वारा जो उद्गार व्यक्त किए गए उनमें सहभागी हूं। मैं अपने स्वयं, भारत सरकार एवं अपने साथियों की ओर से आपके प्रति आदर एवं सद्भावनाएं व्यक्त करता हूं। आप यहां से विदा होने के पश्चात् भी हमेशा हमारे मन में बसे रहेंगे। आप स्वस्थ, सुखी, प्रसन्न एवं सक्रिय रहें, यही कामना है। आपके एवं श्रीमती व्यास के प्रति मैं आदर व्यक्त करता हूं। आपके भावी जीवन के प्रति हम सभी की ओर से हार्दिक शुभकामनायें।

Shri A. S. Kutumbale, Addl. Adv. General of M. P. bids farewell :-

My Lord, today is the last day of your Lordship's tenure as a Judge of this Hon'ble Court and the last day becomes painful if a popular person retires from service.

My Lord, your Lordship had born at Rajgarh on 18.4.1946, and after completing graduation in science obtained Bachlors degree in Law from Madhav College, Ujjain, and started practising as an Advocate at Rajgarh. Your Lordship's father was in education Department. I know your Lordship's family for more than 40 years as your Lordship's elder brother Mr. H.B.Vyas who is an eminent Advocate of Rajgarh, and I have visited Rajgarh several times with my father in my early days before I joined the profession and even after that I used to get cases from your Lordship's brother.

Your Lordship was selected as Civil Judge in the year 1970 and during this period your Lordship was posted at many places in the State.

In the year 2001-02 when I was elected as President of the High Court Bar Association your Lordship was posted as Registrar of this Hon'ble Court and I used to visit the Chamber for solving the day to day problems virtually on every alternate day, and the support given by you, proved to be beneficial to the Bar Association. Your Lordship has created a record of functioning successfully as Registrar for 6 years.

As a Judge of lower judiciary your Lordship gained vast experience in dealing cases of all the laws of the State.

On 18th Oct. 2005, your Lordship was appointed as Judge of this Hon'ble Court. The tenure of a Judge is decided and looking to the age the tenure was less than 3 years.

As a Judge of this Hon'ble Court your Lordship gained popularity because of good behaviour and patient hearing of the matters and mostly heard the bail matters and were liberal in granting bails.

Unfortunately, your Lordship's Court room was not a fixed one, and on many occasions your Lordship was required to Sit in different Court rooms.

Retirement from service is really painful, but looking to the temperament. I am sure that your Lordship would certainly enjoy the life nicely and would keep yourself busy in other works.

My Lord the Administrative Judge, I also fully associate with the views expressed by the President H. C. Bar Association.

At this juncture I on my behalf, and on behalf of Law Officers of A.G. Office and also on behalf of State Govt. wish a happy and peaceful retired life and also pray the God to keep you healthy.

On behalf of High Court Bar Association, Shri V. K. Jain , President Bar Association, Indore, bids farewell :-

Today we assembled here for farewell ovation of our one of the most beloved and respected Judge Hon'ble Mr. Justice S. C. Vyas with whom we are associated since last 38 years since the time of his joining judicial service.

Justice Vyas was born on 18.4.1946 and after completion of his education, he was selected and joined judicial service as Civil Judge Class-II in the year 1970. Because of his undoubted ability, competence and dedication towards his duties, he was promoted as Civil Judge, Class-I, CJM, Additional District Judge, District Judge and also as the Registrar of the High Court before his elevation to the Bench.

His life is an example of reaching a person from bottom to top. Throughout his career, he has been a very popular and respected judge. Justice Vyas never hesitate in passing orders and judgements once he is convienced with facts and law. I myself is a witness of his working as ADJ, DJ, Registrar and Judge of this Court. We always find him very well behaved and gentleman person and he always maintained the dignity and decorum of the court alongwith dignity and respect of the lawyers. The environment

in his court always remained very pleasant. In the last I must say that the experience of the Bar with justice Vyas as the judge and person remained good and memorable.

I on behalf of the members of the Bar wish him good luck and healthy, peaceful and active life.

Farewell speech delivered by Hon'ble Shri Justice S. C. Vyas :–

On this occasion, first of all I bow down and salute to the lotus feet of Almighty Lord Krishna for showering tremendous blessings on me by giving me birth as a human being; providing me all faculties intact and for providing me a little brain to think. It is only a great kindness of Almighty that I could become a Judge of this High Court and have adorned this high chair, though I was not fully capable and worthy of it with all my short comings and weaknesses. I am also grateful to my parents; my wife and all members of my family who have given full support; courage; co-operation and good atmosphere and provided me all necessary facilities to perform my duties honestly; sincerely in a worry free atmosphere. I am overwhelmed by the kind words which have been spoken about me on this occasion, overlooking my weaknesses and pardoning me of all the mistakes which I might have committed. I am grateful to all of you for searching of some good qualities of which I was not aware and probably which I do not possess up to that extent.

Today I have completed almost 40 years in the field of law. Initially first two years I had practiced as an advocate at a small place Rajgarh and thereafter posted as a Judge of subordinate Court and was doing the same work in different capacities at various places of the State. I found that the members of Bar where I had worked, were the real teacher who taught me law in different forms and expressed the real meaning of the words which were used by law makers. I found that even the members of Bar of Tehsil places were not second to any one so far as the knowledge of law and the manner of cross examination to the witness is concerned, I learnt mostly from their experience and knowledge and they have shown me the path up to this highest court of the State.

Here at Indore also, I had worked in different capacities. In the year 1995, when I was posted in District Court as Addl. Distt. Judge and was to perform duties as Officiating District Judge, though, the period was only of 100 days, but, I found the real difference between senior studious and fully devoted lawyers and others who were attending the cases half-heartedly. When I had performed the duty of Registrar in High Court for a long period of 6 1/2 years, then I judged the members of High Court Bar from all the corners and developed great feelings of respect and honour to them looking to their deep knowledge of law and study of facts of a particular case. All these experiences shaped me in all respect in my career as a Judge and my knowledge was enriched greatly during the said period and when finally I was elevated as a Judge of this High Court and took oath, it all helped me in performing my duties in a better way.

It is said that members of the bar are Judges of a Judge and they pronounce their verdict on the date of retirement of the Judge. Today is the said occasion and I

am happy that overlooking my all short comings and weaknesses, you have atleast not recognized me as a poor Judge.

When I took oath of the office on 18th Oct., 05, in reply of the ovation of welcome, I reminded myself the words of Hon. Mr. Justice R. C. Lahoti, Former C. J. of India from the speech delivered by His Lordship on the occasion of a Law Day regarding excellence in a Judge. Those words are still in my mind and continuously hammering me to remind my duties. His Lordship said that, " An excellent Judge is impartial and fearless", lie is independent of the executive and the legislature but equally important; he is independent of his own predilections and prejudices. He is free of Isms'. He is patient and courteous, but realizes that he is the manager of court time. He pays full attention to the arguments advanced before him, but is duty bound to curb irrelevant and frivolous arguments. He is learned in the law, but has the humility to learn from the arguments advanced by Counsel. He delivers judgments in time.

I have tried my level best to my fullest capacity to achieve these qualities. How far I was successful is to be judged in the time to come. I also kept in my mind the words which I had stated at the time of my elevation while taking oath of the office. Particularly the words that, " I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India and that I will duly and faithfully and to the best of ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill will. This declaration has been followed by me to my best of ability during my tenure.

I again express my gratitude to all of you for the kind words which have been stated about me and for extending fullest co-operation and assistance in performing my duties as a Judge of this High Court in the short tenure of 2 1/2 years. Though the tenure might be short, but, I am confident that it will not vanish in air like a air bubble, but, will at least be stored in the form of a small particle of sand somewhere near the big ocean of law.

I am leaving this place with heavy heart and emotions, but as a fully satisfied person, having no further desires. I shall be living at Indore as a common man with you all. Wish you all a very good luck. Good bye.

Anjali Banerjee, for the respondent

M.A. No. 2600/2006 (Jabalpur), D/- 13 December, 2007.

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(13)

N.K. Mody, J.

UNITED INDIA INSURANCE CO. LTD.
Vs.
NANDLAL & ors.

A. Motor Vehicles Act (59 of 1988), Section 169 - Civil Procedure Code, 1908, Order 47 Rule 1 - Review - Number of appeals filed against a award, which passed in regard to one accident - One appeal decided by DB & remaining appeals decided by SB - Single Bench held the case to be of composite negligence - In prior judgment Division Bench held the case to be of contributory negligence - DB's decision was not brought to the notice of Single Bench - Application for review cannot be dismissed in view of explanation of Order 47 Rule 1 - Application allowed. AIR 2005 SC 592 (Case Rel.).

B. Practice and Procedure - Duty of counsel to place before the Single Bench earlier decision passed by the Division Bench.

L.N. Soni with *Anand Soni,* for the applicant

Vijay Singh Chouhan, for the non-applicant nos. 1 & 2.

Sameer Verma, for the non-applicant nos. 3 to 6.

M.C.C. No. 725/2007 (Indore), D/- 4 December, 2007

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(14)

S.C. Vyas, J

YASHWANT
Vs.
SACHIN & ors.

A. Criminal Procedure Code, 1973 (2 of 1974) - Section 146(1) - Attachment of property and appointment of receiver - If after passing order u/s 145(1) Cr.P.C. the Magistrate considers the case to be one of emergency - Magistrate has to record reasons of satisfaction to the effect that it is a case of emergency - Only apprehension of breach of piece simplicitor cannot be said to be a valid ground for attachment of a property - Reasons leaking - Order is not sustainable in law. 1991 (3) Crimes 549, 1993 (2) Crimes 596 (Cases Ref.).

B. Criminal Procedure Code, 1973 (2 of 1974) - Section 146(1) - Object of attachment is to keep the property *custodia legis* so as to prevent the contesting

parties from scramble for possession to obtain actual possession of subject of dispute during pendency of the proceeding.

Jai Singh and *A.S. Rathore,* for the applicant.

V.P. Saraf, for the non-applicant.

Raghuveer Singh Chouhan, Public Prosecutor for the non-applicant/State.

Rajendra Dayal, for the objectors.

M.Cr.C. No. 3907/2007 (Indore), D/-11 January, 2008.

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(15)

A.K. Patnaik, C.J. & Shantanu Kemkar, J.

C.R. GAUR
Vs.
STATE OF M.P. & ors.

Constitution of India, Article 226 - Deputationist - Just ground for curtailing the tenure - Ordinarily the terms of the deputation should not be curtailed except on just grounds - Appellant was posted on deputation in M.P. Rajya Krishi Vipnan Board for 1 year thereafter period of deputation was extended for 1 year i.e. upto 26.4.08 - By order dated 11.1.08 he was repatriated to his parent department - Order challenged in Writ Petition - S.B. held that appellant has no enforceable right in his favour to continue on deputation - Order challenged in Writ Appeal - Held - If the service of deputationist is not required by the organization in which the deputationist has been posted that organization may legitimately ask for curtailing the tenure of the deputationist in its organization - Appellate Court refused to interfere in the order of repatriation - Writ Appeal dismissed. (2005) 8 SCC 394 (Ref.)

R.K. Tiwari, for the appellant,
Vivekanand Awasthy, G.A. for the respondents

W.A. No. 291/2008 (Jabalpur), D/- 31 March, 2008.

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(16)

Arun Mishra & S.A. Naqvi, JJ.

K.N. AGRAWAL
Vs.
M. R. PORTFOLIO SERVICES & anr.

A. Motor Vehicles Act (59 of 1988), Sections 147 & 166 - Liability - Van belongs to a partnership firm - Being a partner of that firm driver (deceased) was also owner of illfated van - Risk of owner not insured as no premium paid to insurer in this respect - Held - Insurer not liable to pay compensation to legal heir of deceased/driver (owner). 1999 (2) MPLJ 231 (Case Rel.)

B. Motor Vehicles Act (59 of 1988), Section 140 - No fault Liability - Insurer preferred appeal to recover the amount i.e. Rs. 50,000/- paid to the legal heir of deceased towards no fault liability on ground that claim petition dismissed - Held - It is an absolute liability under no fault liability upon the owner of the vehicle and insurer is liable to indemnify the owner - Interim award attended finality as it was not challenged - It can not be reopened - Insurance company not liable to get back Rs. 50,000/- paid in compliance of order passed U/s 140 of Act. 1990 ACJ 373, (1996) 2 SCC 736 (Cases Ref.)

R.K. Verma, for the appellant,

N.S. Ruprah, for the respondents.

M.A. No. 1073/2002 (Jabalpur), D/- 7 February, 2008.

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(17)

Sushma Shrivastava, J. KALURAM
Vs.
STATE OF M.P.

Penal Code (45 of 1860), Section 379, Electricity Act, 1910, Sections 39 & 50 - Person aggrieved - Junior Engineer, who was an officer-in-charge was competent to file a complaint of theft of electricity committed in the concerned area - As an aggrieved person and the prosecution could be initiated at his instance - Conviction of appellant U/s 379 I.P.C. r/w Section 39 of Electricity Act does not suffer from any legal or factual infirmity - Conviction maintained - However being a very old case sentence reduced to the period already undergone. 2003 Cr. LJ 2936 (MP) (Foll.)

Ashok Chakravarti, for the applicant

Nidhi Verma, Panel Lawyer for the non-applicant/State

Cr. Rev. No. 1320/1998 (Jabalpur), D/- 25 March, 2008.

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(18)

A.K. Shrivastava & S.C. Sinho, JJ. LAKHAN @ LAAKHAN
Vs.
STATE OF M.P.

Penal Code (45 of 1860), Section 302 or 304 Part-II - Appellant dealt a single blow of gupti on right thigh of deceased - Not a vital part of body - Deceased died due to shock and hemorrhage - Stab injury was sufficient to cause his death in ordinary course of nature - Can not be said that appellant was having any intention to cause death to deceased - Though it can be inferred that appellant having knowledge that by causing injury by gupti life of a person may come to end

-- Appellant committed an offence not U/s 302 but U/s 304 Part-II I.P.C. (2006) 5 SCC 425 (foll.)

Mukesh Pandey, for the appellant

R.S. Patel, Addl. Adv. Gen. for the respondent

Cr. A. No. 1691/2006 (Jabalpur), D/- 4 January, 2008.

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(19)

A.K. Shrivastava & S.C. Sinho, JJ

LAKHAN LAL
Vs.
STATE OF M.P.

A. Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 3- Circumstantial evidence - Appellant's wife died due to 95% burn injuries - At the time of occurrence appellant was not in house as he went to evacuate - Merely because deceased suffered burn injuries inside the room and appellant has not offered any explanation - On the basis of presumption appellant can not be roped - Can not be convicted on conjectures and surmises - Conviction U/s 302 and 201 I.P.C. set aside. (2002) 7 SCC 317, AIR 2007 SC 3050, (2006) 3 SCC 161 (foll.)

B. Penal Code (45 of 1860), Section 498 A - Prosecution witnesses have given a positive evidence that appellant was ill-treating deceased (wife) and was causing marpeet to her - Trial Court has rightly convicted appellant U/s 498A I.P.C. - Conviction and Sentence affirmed by High Court.

D.C. Jain, for the appellant,

R.S. Patel, Addl. Adv. Gen. for the respondent

Cr. A. No. 2348/1998 (Jabalpur), D/- 10 Jaunary, 2008.

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(20)

B.M.Gupta, J.

MAHENDRALAL SHIVHARE
Vs.
STATE OF M.P. & anr.

Negotiable Instruments Act (26 of 1881), Section 138 Proviso B - Notice issued for demanding whole of amount due i.e. Rs. 8 lakh without specifying amount of cheque concerned i.e. Rs. 2 lakh - Not a valid notice U/s 138 - On basis of such notice - Criminal proceedings are an abuse of process of Court - Proceedings quashed. ILR (2008) MP 189 (foll.)

An amount of Rs. 8 lakh was due on the applicant. Against the said amount, two cheques amounting to Rs. 2 lakh each were drawn by the applicant in favour of non-applicant No.2. One out of those two cheques was dishonored by the bank. Instead of demanding the amount of the said cheque of Rs. 2 lakhs, a demand

indicates that in case the whole of the amount is not paid then the action under the Act will be taken. The notice does not appear to be issued for a specific demand of the amount of the cheque concerned. Hence it can not be said to be a valid notice. Hon'ble Apex Court in the case of *M/s Rahul Builders v. M/s Arihant Fertilizers and Chemical & anr.* , ILR (2008) MP 189 has taken a similar view. In the light of this judgment of the Apex Court, in absence of valid notice, criminal proceedings against the applicant appears to be an abuse of process of Court. Consequently petition allowed and criminal proceedings against the applicant for the offence punishable U/s 138 of the Act is quashed.

Vivek Mishra, for the applicant

V.S. Chaturvedi, P.P. for the non-applicant No.1/State,

Arvind Dwivedi, for the non-applicant No.2

M.Cr.C. No. 1178/2008 (Gwalior), D/- 17 March, 2008.

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(21)

S.A. Naqvi, J.

MOHAMMED LAIQUE
Vs.
STATE OF M. P.

Penal Code (45 of 1860), Section 354 - Material variance between two dying declarations - Allegedly, appellant and two accused persons intercepted deceased when she was all alone coming to home - Accused persons pressed her breast and kissed her with intention of outraging her modesty - Deceased came to her house and poured kerosene oil on herself and ignited by match stick - First oral dying declaration - When in hospital she told her father that appellant molested her and outraged her modesty - Second dying declaration recorded by Naib Tehsildar in which she did not disclose the name of the appellant as assailant but stated that 2 boys molested her - Held - It shows that appellant was not previously known to deceased that is why she did not name him in second dying declaration - In the circumstances, oral dying declaration which was given by deceased to her father is not reliable - Trial Court committed error in relying upon oral dying declaration of father of deceased - Conviction and Sentence of appellant U/s 354 of I.P.C. set aside - Appeal allowed.

Pramod Thakre, for the appellant,

Sudesh Verma, for the respondent

Cr. A. No. 24/1994 (Jabalpur), D/- 8 February, 2008.

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(22)

A.K. Patnaik, C.J. & Shantanu Kemkar, J.

MOHD. DILDAR
Vs.
UNION OF INDIA & ors.

Constitution of India, Article 226 - Delay in filing Writ Petition - In case of pension cause of action arises from month to month - In such case claim for disability pension should not be rejected only on ground of delay.

Appellant was working as GDR Lans Nayak in 4 Grenadiers Regimental Centre since 1974. After rendering service for about 9 ½ years he was discharged from service on medical ground. He had not completed requisite pensionable services of 15 years, he was not paid pension. He has applied for medically disability pension but it was refused vide memo dated 25-12-96. Thereafter he filed Writ Petition which was dismissed by Single Bench on ground that there has been delay of 25 years from the date of discharge from service and 11years from the date of final communication. Aggrieved appellant has filed Writ Appeal. Appellate Court held that in case of pension cause of action arises from month to month. Therefore Writ Petition cannot be dismissed on ground of delay. Order of Single Bench set aside and remit the matter to the file of Single Bench. AIR 2007 SC 1330 (Foll.)

Piyush Bhatnagar, for the appellant
Dharmendra Sharma, ASJ for the respondents

W.A. No. 169/2008 (Jabalpur), D/- 31 March, 2008.

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(23)

A.P. Shrivastava, J.

MOOLCHAND & anr.
Vs.
STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 362 - Modification in judgment not permissible in exercise of inherent power U/s 482 - Such powers can be exercised only when no other remedy is available with the litigant and no where a specific remedy is provided in Statute.

The petition has been filed U/s 482 of Cr.P.C. for modification in the judgment passed by the High Court in Cr. Appeal, whereby the High Court maintained the conviction of petitioners U/ss148, 324/149, 323/149 & 342. However, Jail Sentence is reduced. Petitioner No.2 seeks modification in the judgment to the effect that he being a government servant, the order of conviction will not come in the way of his service career. High Court held that this is not a matter in which power of review can be exercised by High Court because it does not come in the purview of clerical or arithmetical error. Petition dismissed. AIR 1981 SC 736 (Foll.)

Prabal Solanki, for the applicants

V.S. Chaturvedi, P.P. for the non-applicant/State

M.Cr.C. No. 6533/2007 (Gwalior), D/- 1 February, 2008.

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(24)

A.K. Shrivastava & S.A. Naqvi, JJ.

NANHELAL GONTIYA
Vs.
HARISHCHAND & ors.

A. Motor Vehicles Act (59 of 1988), Sections 166 & 128 - Rash or negligent - In contravention of Section 128 of Act moped driver allowed two persons to sit as pillion riders - A mini truck collided with the moped - As a result moped driver died and both pillion riders received injuries on their legs - Merely on these facts it can never be said that moped driver was rash or negligent - Unless it is proved that moped driver was driving vehicle in a high speed and vehicle was not in his control on account of allowing two persons to sit as pillion riders. 1980 ACJ 178 (Rel.)

B. Motor Vehicles Act (59 of 1988), Sections 166 & 128 - Case of pillion riders - It would be a case of composite negligence of both drivers - But not a case of contributory negligence. 2007 (3) MPHT 221 (Rel.)

C. Motor Vehicles Act (59 of 1988), Sections 166 - Due to accident both pillion riders sustained fracture in their femur bones - Sustained 40% disability - Tribunal found a case of contributory negligence and awarded 50% of amount assessed i.e. Rs. 45,900/- and Rs. 46,200/- respectively - High Court held to be a case of composite negligence and awarded Rs. 1,20,000/- to each claimant.

(Please also see Full Bench decision reported in ILR (2007) M.P. 1323)

Aparna Singh, for the appellant,
Harpreet Ruprah, for the respondent No.3

M.A. No. 2494/2007 (Jabalpur), D/- 22 January, 2008.

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(25)

A.K. Shrivastava, J.

RAMRANI & ors.
Vs.
DURGA BAI & ors.

Civil Procedure Code (5 of 1908), Order 6 Rule 2 - Variance between pleading and proof - A case can not be based on grounds outside plea of parties - Case which is pleaded that has to be found - Appellate Court can not make out a new case which is not pleaded - The case of deriving title in suit property on account of partition is totally lacking from pleadings - Decision can not be passed outside the pleadings - Pleadings in plaint, plaintiff has acquired Bhumiswami

right by adverse possession -- To prove this pleading no evidence has been laid by plaintiff - Judgment and decree passed by First Appellate Court set aside and that of Trial Court restored. AIR 1953 SC 235, (2003) 8 SCC 740, AIR 1977 SC 890 (relied.)

Ashish Shroti, for the appellants,

A.K. Jain & Sangeeta Umate, for the respondents

S.A. No. 453/1993 (Jabalpur), D/- 31 January, 2008.

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(26)

Rajendra Menon & Sanjay Yadav, JJ. & ors.

RATNA PARASHAR
Vs.
KUSUMLATA & anr.

A. Motor Vehicles Act (59 of 1988), Section 166 - Composite negligence - In case of head on collusion between two vehicles on middle of road - Doctrine of *res ipsa loquitur* attracted - Case of composite negligence proved.

A jeep met with an accident with a truck at loop road. There was head on collusion between the vehicles. In the result of accident 4 occupants including jeep driver died. A criminal case was registered U/ss 304 A, 279 and 337 I.P.C. against the truck driver. The Jeep was insured with New India Assurance Co. Ltd. The occupants of the jeep were passengers having paid fare. Thus the vehicle was used as a taxi in breach of the policy. Parents of jeep driver preferred a claim U/s 163A. Tribunal awarded compensation Rs. 1,36,000/-. Parents of driver preferred an appeal before High Court, which was compromised by the parties. Claimants of the deceased have filed application U/s 166. Tribunal disbelieving the ocular evidence relied upon the version of FIR, holding that the negligence of the jeep driver since was not proved and therefore, the dis-entitlement. High Court held that the spot map prepared in the criminal case will reveal that head on collusion is almost in the middle of road and in equity demand that the doctrine *res ipsa loquitur* should be invoked. Both drivers of jeep and truck were equally responsible for the accident and the claimants of the deceased are entitled for compensation.

B. Motor Vehicles Act (59 of 1988), Sections 163 A & 166 - Out of one accident two applications arise one U/s 163 A and another U/s 166 - A compromise arrived at in proceeding initiated U/s 163 A - Such compromise will not have any bearing upon proceedings initiated U/s 166.

C. Motor Vehicles Act (59 of 1988), Section 166 - Jeep insured as private vehicle - Used as a taxi - Breach of policy condition - Insurance company rightly absolved - However in the view of Sarvan Singh's and Pramod Kumar

Agrawal's case directions given that insurance company to satisfy the award and recover 50% from jeep owner and 50% from truck owner. AIR 2004 SC 1531, 2004 ACJ 1903 (SC) (Cases followed).

Meena Singhal, for the appellants,

R.V. Sharma, for the respondent No.2/Insurance Company

M.A. No. 692/2001 (Gwalior), D/- 7 February, 2008.

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(27)

S.Samvatsar & Abhay M. Naik, JJ. SHAKUNTALA & ors.
Vs.
GHANSHYAM DHAKAD & ors.

A. Motor Vehicles Act (59 of 1988), Section 168 - Contributory negligence or negligence - Deceased sleeping in shadow beneath tractor trolley - Driver started tractor on reverse side - Head of deceased came under rear wheel - Claims Tribunal held that deceased had contributed to the extent of 50% - Held - Negligence means omission of duty or care as required by responsible man - Driver of tractor had full opportunity to avoid accident either by awakening deceased or by taking tractor forward - Claims Tribunal committed error in holding that deceased had contributed in the accident to the extent of 50% - Appeal allowed. 2004 (1) TAC 3 (SC) (Rel.)

B. Motor Vehicles Act (59 of 1988), Section 168 - Compensation - Deceased working as driver of tractor - Income of deceased assessed at Rs. 2000/- p.m. i.e. Rs. 24,000/- p.a. - After deducting 1/3rd towards personal expenses dependency comes to Rs. 16,000/- p.a. - Deceased aged about 24 years - Multiplier of 17 will be applicable - Compensation comes to Rs. 2,72,000/- - Rs. 28,000/- awarded towards damages under various heads - Claimants entitled to Rs. 3 Lakh with 7% interest on enhanced amount from date of appeal till realisation.

Anand Bhardwaj, for the appellants,

Amit Bansal, for the respondent No.3 Insurance Company

M.A. No. 55/2003 (Gwalior), D/- 13 March, 2008.

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(28)

Arun Mishra & Sanjay Yadav, JJ. SHIVCHARAN PATEL
Vs.
GOVIND @ BALKRISHNA GAUTAM & ors.

Motor Vehicles Act (59 of 1988), Section 166 - Insurance Company exonerated on ground of breach of policy even then claimants would be entitled to

recover amount of compensation awarded from Insurance Company - However Insurance Company will be at liberty to recover the same from owner of offending vehicle - The proposition laid down by S.C. in the case of Swaran Singh (2004) 3 SCC 297, Baljit Kaur (2004) 2 SCC 1 and Pramod Agrawal (2004) 8 SCC 667 still holds the field. (2007) AIR SCW 1505, (2005) 12 SCC 243, (2003) 2 SCC 339, (2004) 2 SCC 1, (2004) 8 SCC 697, (2007) 5 SCC 428 (Cases Ref.).

D.P. Patel, for the appellant,
Mangesh Tamrakar, for the respondent No.1,
N.S. Ruprah, for the respondent No.2

M.A. No. 3680/2006 (Jabalpur), D/- 12 December, 2007.

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(29)

R.C. Mishra, J.

TASKEEN AHMED & ors.
Vs.
STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Section 178 (c), Penal Code, Indian 1860, Section 498-A - Offence punishable U/s 498-A I.P.C. is not a continuing offence - Admittedly as many as five out of the eight applicants did not commit any act of cruelty at Bhopal, no part of cause of action against them had arisen at Bhopal and against rest three applicants cause of action accrued at Unnao where most of alleged acts of cruelty committed - Offence U/s 498-A of I.P.C. must be tried at a Court at Unnao and not at Bhopal - Contrary view taken by Magistrate and approved by ASJ set aside - Petition U/s 482 allowed by the High Court with the direction to Trial Magistrate to return the charge sheet to SHO for presentation before a Court of competent jurisdiction at Unnao. (2004) 8 SCC 100, AIR 2005 SC 1989, (2007) 1 SCC 262 (Cases Rel.)

Ahadulla Usmani, for the applicants,
A.K. Das, Panel Lawyer for non-applicant No.1/State,
Riyaz Mohd., for non-applicant No.2

M.Cr.C. No. 11886/2007 (Jabalpur), D/- 4 March, 2008.

I.L.R. [2008] M. P., 615

SUPREME COURT OF INDIA

Before Mr. Justice S.B. Sinha & Mr. Justice Harjit Singh Bedi

13 December, 2007*

STATE GOVERNMENT OF M.P. & ors. ...Appellants

Vs.

SHANKARLAL ...Respondent

Constitution of India, Articles 16, 21 - M.P. Fundamental Rules, Rule 53-Non payment of Subsistence Allowance - It must be shown - Delinquent officer was not in a position to participate in proceedings or that any other prejudice in effectively defending proceeding was caused to him - Respondent placed under suspension and was asked to collect Subsistence Allowance - Respondent collected Subsistence Allowance for some period - Attended departmental enquiry on some dates and thereafter absented - In ex-parte proceedings respondent was found guilty and his services were terminated - SAT dismissed application holding that respondent himself responsible for not receiving Subsistence Allowance - High Court quashed order of removal on ground of non payment of Subsistence Allowance holding that question of prejudice is irrelevant - Held - Finding of High Court that question of prejudice is irrelevant is not correct - Matter remanded back to High Court to decide the question of prejudice caused to respondent for non payment of Subsistence Allowance.

Cases referred : (Paras 14 & 16)

AIR 1987 SC 2257, (2000) 7 SCC 90, (2004) 1 SCC 281, (2005) 8 SCC 211.

JUDGMENT

The Judgment of the Court was delivered by **S. B. Sinha, J.**–Respondent was appointed as a Lower Division Clerk in the Public Works Department on 25.9.1971. He was promoted as Upper Division Clerk on 1.1.1979.

2. A departmental proceeding was initiated against him. He was placed under suspension by an order dated 4.9.1982. In the said order of suspension, it was clearly stipulated that subsistence allowance would be paid to him in terms of Rule 53 of the Fundamental Rules. On or about 19.6.1982, he was transferred from Katni to Barhi. He did not join at Barhi after the order of suspension was passed. It appears that a communication was issued to him on 5.10.1983 asking him to collect the subsistence allowance stating :

> "You are suspended by the Superintending Engineer PWD (B&R) Jabalpur Circle, Jabalpur vide order No.1164/E-11-19 of 74 dated 4.9.82 and suspension order was sent to you, but you have refused to take it.

*C.A. No. 587/2005

(2) Charge sheet was issued by. SEJC vide No.2067/E-11-19 of 74 dated 16.10.82, and sent through peon and 2 sub-Engineer of this Division, but you have refused to take it.

(3) Executive Engineer, PWD (E/M) Dn. Jabalpur Enquiry officer of your D.E. case have served the notice for facing the DE and attending their office, but you have refused to take it.

Please arrange to take the above letters from their officer and produced to the undersigned, so that further action, for sanction of suspension allowance and other dues, can be taken by this officer.

Please also explain for your not joining in Barhi Sub Division with Head Quarters at Barhi after suspension & why your absence from Barhi should not be considered as willful absence from Head quarters and action taken accordingly."

3. For a few days, namely, on 2.11.1983, 22.11.1983, 9.12.1983 and 20.1.1984, he took part in the departmental proceedings. On those days, some witnesses on behalf of the department were examined and cross-examined. But on 24.2.1984, he absented himself. A telegram was sent to him asking him to submit his list of witnesses and defence on 12.3.1984. He did not comply therewith. He also did not take part in the departmental proceedings on 29.3.1984. Another chance was given to him to appear before the enquiry officer on 19.4.1984 but even on the said date he was not present. He although was present on 5.5.1984, but did not take part in the hearing in the said proceeding stating that he had filed an appeal before this Court.

We may place on record that neither any number has been put in the said purported S.L.P. nor the same was registered, although according to the respondent, who had appeared in person before us, the said SLP was still pending.

4. On subsequent dates, he absented himself and, thus, did not take part in the enquiry proceedings. Out of 18 dates fixed for hearing, the respondent was present only on five days. In the aforementioned situation, an ex parte departmental proceeding was held wherein he was found guilty of the charges levelled against him. We may also place on record that he collected his subsistence allowance for the period 4.9.1982 to 20.9.1982 in January 1985 and thereafter payment till September 1984 was made in February 1987. His services, however, were terminated by an order dated 28.5.1985. The amount of subsistence allowance of the respondent was raised from 50% to 75% on 14.6.1985.

5. He preferred an appeal thereagainst which was dismissed by the Chief Engineer being the appellate authority on 15.11.1999.

6. An original application was filed by him before the State Administrative Tribunal wherein, inter alia, a question in regard to non-payment of subsistence allowance was raised. The Tribunal in its order opined :

"Therefore, the applicant himself is responsible for delayed payment of the subsistence allowance, not the respondents."

7. Other contentions raised by him before the Tribunal were also not accepted. The Tribunal held that the conclusion of the enquiry officer being based on evidence produced in the departmental enquiry, no case has been made out for interference with the order of the Disciplinary Authority. The original application was, therefore, dismissed.

8. On a writ petition preferred by the appellant thereagainst before the High Court of judicature at Madhya Pradesh at Jabalpur which was marked as Writ Petition No.1497 of 2002, a Division Bench of the High Court, however, held that non-payment of subsistence allowance amounted to violation of principles of natural justice, stating :

"The Tribunal dismissed the application on the ground that the Tribunal or Court are not the appellate forum to review the punishment. However, this fact cannot be marginalized and blinked away because it goes to the root of the matter and it has nexus with the principles of natural justice, that unless and until subsistence allowance is paid to the delinquent employee in proper time, how he could take proper steps in defending his case in the departmental enquiry. In the present case, the period during which the subsistence allowance was not paid was quite long which is 4.9.1982 to 13.11.1984.

On the basis of the aforesaid premised reasons, we set aside the order passed by the Tribunal as well as the order terminating the services of the petitioner passed by the authority. The petitioner is hereby directed to be reinstated. However, looking to the entire facts and surrounding circumstances, we do not think it proper to award any back wages."

9. Ms. Vibha Datta Makhija, learned counsel appearing on behalf of the State, in support of this appeal would submit that the respondent having not shown any prejudice in regard to non-payment of the subsistence allowance, the High Court committed a serious error in passing the impugned judgment.

10. Respondent who appeared in person, on the other hand, contended that non-payment of subsistence allowance violates the right to life of a person as contained in Article 21 of the Constitution of India and in that view of the matter, it was obligatory on the part of the appellant herein to pay the said allowance.

11. Rule 53 of the Madhya Pradesh Fundamental Rules provides that subsistence allowance should be paid to an employee who has been placed under suspension. Payment of inadequate quantum of subsistence allowance has been adversely commented by this Court *[See O.P. Gupta v. Union of India & Ors.* [AIR 1987 SC 2257].

12. It is, thus, not in dispute that all facilities for receipt of payment of subsistence allowance must be given to the delinquent officer.

13. An almost identical question in regard to payment of subsistence allowance albeit in a different fact situation came up before this Court in *Jagdamba Prasad Shukla v. State of U.P. & Ors.* [(2000) 7 SCC 90] wherein it was opined :

> "6. It is evident from the record that the High Court is not right in observing that the ground sought to be urged was not taken in the claim petition or in the writ petition. In fact, the High Court in the latter part of the judgment observes that :
>
> "for the first time, the petitioner has taken the ground in this writ petition that he could not attend the departmental proceedings due to financial crunch as he was not paid his subsistence allowance".
>
> A perusal of the record shows that the contention urged before the High Court and again before us, was also raised before the U.P. Public Service Tribunal and even earlier before the authorities. The U.P. Public Service Tribunal considered it and on the facts of the case, the Tribunal held that :
>
> "Therefore, those rulings where person was unable to attend the enquiry for non-payment of subsistence allowance, resulting in inquiry being vitiated will not be applicable."
>
> Apart from it, in reply dated 22-1-1979 sent to the show-cause notice, the appellant specifically stated that he has not been paid his pay and suspension allowance which cannot be withheld and as such how could he be expected to reach Gorakhpur or elsewhere due to shortage of funds. He further stated that :
>
> "the applicant has requested a number of times for drawing his pay and suspension allowance, but the same could not be drawn and sent to the applicant which was a serious handicap to appear anywhere even if he so preferred during illness and even against the recommendations of his medical attendant".
>
> The request of the appellant for payment of subsistence allowance is also contained in his letter dated 31-3-1978 sent to the Superintendent of Police, Railways, Gorakhpur Section, Gorakhpur. The said letter also contains the address of the appellant. The address of the appellant is in fact contained on various communications sent by him to the respondents. It is curious that the respondents could serve all other communications including the show-cause notice to the appellant but insofar as the payment of subsistence allowance is concerned, the plea taken is that the appellant did not intimate his address and, therefore, the amount could not be sent. Thus, it is evident that despite repeated requests, the subsistence allowance was not paid to the

appellant from the date of suspension till removal. It is also evident that the appellant had expressed difficulty in reaching the place of inquiry due to shortage of funds.

8. The payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance. No justifiable ground has been made out for non-payment of the subsistence allowance all through the period of suspension i.e. from suspension till removal. One of the reasons for not appearing in inquiry as intimated to the authorities was the financial crunch on account of non-payment of subsistence allowance and the other was the illness of the appellant. The appellant in reply to the show-cause notice stated that even if he was to appear in an inquiry against medical advice, he was unable to appear for want of funds on account of non-payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the appellant to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service are quashed."

14. We may, however, notice that in *Indra Bhanu Gaur v. Committee, Management of M.M. Degree College & Ors.* [(2004) 1 SCC 281], a Bench of this Court opined that when an opportunity had been granted to the delinquent officer to take the subsistence allowance, it must be shown that because of non-payment thereof, he was not in a position to participate in the proceedings or that any other prejudice in effectively defending the proceedings was caused to him.

15. *Yet again, in U.P. State Textile Corpn. Ltd. v. P.C. Chaturvedi,*(2005) 8 SCC 211, it was held :

"Rule 41 provides that the subsistence allowance is payable only when the employee, if required, presents himself every day at the place of work. Obviously, for establishing that the employee had presented himself at the place of work, the authorities had clearly stipulated a condition that the attendance register was to be signed. No explanation was offered by Respondent 1 employee as to why he did not sign the register. It cannot be lightly brushed aside as technical and/or inconsequential. As admittedly, Respondent 1 employee had not signed the attendance register even though specifically required in the order of suspension, the High Court was not justified in coming to a conclusion that the non-signing was not consequential or a bona fide lapse. It is also to be noted that at various points of time the employer informed Respondent 1 employee about the consequences of his not signing the attendance register as stipulated in the order of suspension."

16. The High Court, in our opinion, committed a serious error in holding that the question of prejudice is irrelevant in so far as it misread and misinterpreted Jagdamba Prasad Shukla (supra). No law in absolute terms in this connection was laid down therein. The relief was granted to the appellant having regard to the fact situation obtaining therein. It was found as of fact that no subsistence allowance, had been given. It was not established that communication in relation to subsistence allowance was, in fact, served upon the appellant therein and despite repeated requests, subsistence allowance was not paid. The fact that the Court therein opined that no justifiable ground has been made for non-payment of the subsistence allowance all through the period of suspension till removal, may, itself be a ground for arriving at the conclusion that the delinquent officer was suffering from financial crunch on account thereof as also his illness.

17. The High Court, therefore, in our opinion, was required to arrive at a correct finding of fact so as to enable it to pose unto itself the right question for arriving at a right decision.

18. Respondent, indisputably, has been found guilty of commission of misconduct. He, however, rightly or wrongly carried an impression that the writ petition filed by him before this Court presumably by sending a letter to the Chief Justice has been entertained. But, evidently, neither no such letter was received nor the same had been entertained by this Court.

A finding of fact has been arrived at by the Tribunal that the respondent himself was to thank himself for non-receipt of subsistence allowance. It was held that the appellant had taken all possible steps for disbursement of subsistence allowance.

19. We, therefore, are of the opinion that in the peculiar facts and circumstances of the case, interest of justice shall be subserved if the impugned judgment is set aside and the matter is remitted to the High Court for consideration thereof afresh. The High Court may look into the records of the case so as to enable it to arrive at a decision whether non-payment of subsistence allowance caused any prejudice to the respondent in the event it intends to interfere with the finding of fact arrived at by the Tribunal that the respondent himself was responsible therefor.

20. However, we direct that in the peculiar facts and circumstances of this case, the State should pay a sum of Rs.50,000/- (Rupees fifty thousand only) to the respondent by way of litigation costs. The State shall also place before the High Court all relevant records. We would request the High Court to consider the desirability of disposing of the matter expeditiously.

21. The appeal is allowed to the aforesaid extent and with the aforesaid directions and observations.

Appeal allowed

I.L.R. [2008] M. P., 621

SUPREME COURT OF INDIA

Before Mr. Justice C.K. Thakker & Mr. Justice J.M. Panchal

13 December, 2007*

UNION OF INDIA & anr. ...Appellants

Vs.

NARENDRA SINGH ...Respondent

A. The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998 - Rules are framed by the President of India in consultation with the Comptroller & Auditor General of India in exercise of power under clause 5 of Article 148 of Constitution - Thus rules are statutory in nature. (Para 15)

B. The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998, Rule 5 - Power of Relaxation - Rule 5 conferred power on the Comptroller & Auditor General of India to relax rules - Such power should be exercised 'with respect to any class or category of persons' - Normally power should be invoked if eligible candidates are not available for promotion or for valid grounds/reasons - The power however should not be exercised to perpetuate a mistake - Respondent wrongly promoted though he was not eligible and qualified - His promotion order cancelled - Deputy Accountant General did not find any valid reason/ground to relax rules - Held - Reasons recorded by Dy. Accountant General were in conformity with the statutory rules. (Para 19)

C. The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998, Rule 5-A - Exercising the Power of Relaxation - Such power should be exercised to the extent as may be necessary to ensure satisfactory working or removing hardship in just and equitable manner but the government can not consciously and deliberately deviate from the rules exercising the power of Relaxation. (Para 23)

D. The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998, Rule 5 - Exercising the power of relaxation - Court or Tribunal can not exercise the power of relaxation - The question as to relaxation of rules was finally decided by Tribunal - Therefore it can not be said that the Tribunal's direction was limited to the 'consideration' of the case of respondent. (Para 27)

E. The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1998, Rules 3 & 12 - Fundamental Rules, 1922, Rule 31-A - If promotion is given wrongly the employee can not be prevented from applying the rules and in correcting the mistake - Mistakes are mistakes and can be corrected by following due process of law - Respondent wrongly promoted though he was not eligible and qualified for the post of Sr. Accountant - After giving show cause notice order of promotion cancelled - Proper. (Para 28)

*C.A. No. 5865/2007

F. Sympathetic consideration - Respondent wrongly promoted as Sr. Accountant - Holding the post since last 17 years and reaching the age of superannuation by the end of this month i.e. 31-12-2007 - Therefore it would not be appropriate now to revert the respondent to the post of Accountant for very short period - However he would be deemed to have retired from the post of Accountant and his pensionary and retiral benefits would be fixed by treating him as Accountant althroughout.

Cases referred. (Para 31)

1992 Suppl. (1) SCC 272, (1997) 6 SCC 766.

JUDGMENT

The Judgment of the Court was delivered by C.K. THAKKER, J.:–Leave granted.

2. The present appeal is directed against the order dated May 12, 2000 passed by the Central Administrative Tribunal, Jabalpur, Camp Indore ('Tribunal' for short) in Original Application No. 76 of 1997 and confirmed by the Division Bench of High Court of Madhya Pradesh, Jabalpur (Indore Bench) on August 26, 2004 in Writ Petition No. 1329 of 2000.

3. Brief facts of the case are that the respondent herein was working as Accountant in the Office of the Accountant General, Madhya Pradesh, Branch Office, Bhopal. By an order dated January 1, 1990, he was mistakenly promoted as Senior Accountant (Functional). After about four years, the Department realized that the promotion given to the respondent was erroneous and he was not eligible to be promoted. The mistake was, therefore, sought to be corrected. A notice under Rule 31-A of the Fundamental Rules, 1922 was issued to the respondent informing him that he could not have been promoted as Senior Accountant as he had not passed Departmental Examination of Accountants as required by law. He was, hence, asked to show cause why the promotion given to him erroneously should not be cancelled. By a reply dated February 16, 1994, the respondent contended that he was eligible and qualified for getting promotion and accordingly he was promoted. He also asserted that he was performing his functions and discharging his duties efficiently and there was no occasion to revert him. According to him, there was no need to clear Departmental Examination for Accountants and the notice was required to be discharged.

4. After considering the reply submitted by the respondent, the Principal Accountant General, vide his order dated March 29, 1994, cancelled the promotion. The respondent challenged the cancellation of promotion by filing Original Application No. 275 of 1994 in the Tribunal. The Tribunal, on March 12, 1996, allowed the petition and directed the Authorities to reconsider the case of the respondent.

5. In compliance with the order passed by the Tribunal, the appellant considered the case of the respondent and rejected his prayer. Accordingly, by an order dated June 24, 1996, the promotion was cancelled.

6. The respondent again challenged the order of reversion by approaching the Tribunal and the Tribunal allowed the petition. The order was confirmed by the High Court. The said decision is challenged in the present appeal by the Union of India and the Accountant General.

7. Notice was issued and keeping in view the fact that the respondent was due to retire shortly, the Registry was directed to place the matter for final hearing which was placed before us on December 5, 2007.

8. We have heard learned counsel for the parties.

9. Learned counsel for the appellants submitted that the action taken by the appellant could not be said to be illegal, unlawful or otherwise improper. He stated that the respondent was not qualified to be promoted as Senior Accountant as he had not passed the relevant examination required by law. It was due to mistake on the part of the Department that he was promoted in spite of his ineligibility. The said mistake was, therefore, corrected after issuing notice calling upon the respondent to show cause why the mistake should not be corrected. It was submitted that as per the direction issued by the Tribunal, the case of the respondent was considered and the Department rejected the prayer. The action of the appellant which was in consonance with law could not have been set aside by the Tribunal. By interfering with the said action, the Tribunal had committed an error of law. The High Court confirmed that order. Both the orders, therefore, are liable to be set aside.

10. Learned counsel for the respondent, on the other hand, supported the order passed by the Tribunal and affirmed by the High Court. According to him, the respondent was not required to pas any examination. He had sufficient experience. All those factors were considered by the Department when he was promoted as Senior Accountant. There is no allegation that the respondent had concealed facts or by playing fraud, got the promotion. Even if it is assumed that there was mistake on the part of the Department, the respondent should not suffer. It was further urged that in earlier litigation, directions were issued by the Tribunal, but they had not been complied with. The Comptroller and Auditor General of India ought to have relaxed the condition as to passing of examination. Moreover, the Tribunal has merely directed to consider the case of the respondent and there was no illegality in it. The High Court, therefore, rightly did not interfere with the said order. Finally, it was submitted that the respondent was promoted on January 1, 1990 and thus he has completed about seventeen years of service on the promoted post. He will be retiring within a few days i.e. after the office hours of December 31, 2007. Hence, even if this Court holds that his promotion was not strictly legal, the Court may not interfere with the said order and allow him to continue on that post for few days more.

11. Having heard learned counsel for the parties, in our opinion, the appeal deserves to be partly allowed. So far as the promotion of the respondent is concerned, it is not in dispute that he was promoted as Senior Accountant

(Functional) on January 1, 1990. It is not the allegation of the appellant that the respondent had obtained such promotion by concealing fact or by playing fraud.

12. At the same time, however, in our opinion, the learned counsel for the appellants is right in submitting that the respondent was not eligible and qualified to be promoted to the post of Senior Accountant. In this connection, he invited our attention to Article 148 of the Constitution. Clause (1) of the said Article declares that there shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal. Clause (5) deals with staff of Comptroller and Auditor-General of India and reads thus:

> (5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

13. In exercise of the power under Clause (5) of Article 148, the President, after consultation with the Comptroller and Auditor General of India, framed rules known as 'The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1988' (hereinafter referred to as 'the Rules'). Rule 3 provides for method of recruitment, age limit, qualifications, etc. of Senior Accountants and reads as under;

> 3. Method of recruitment, age limit, qualifications etc. The method of recruitment, age limit, qualifications and other matters relating to the said post shall be as specified in columns 5 to 14 of the said schedule.

14. The Schedule to the Rule expressly states that a person may be appointed as Senior Accountant 'by promotion, failing which by transfer on deputation' (Column 11). Column 12 is material and relevant part reads thus:

> **12. In case of recruitment by promotion / deputation / transfer, grades from which promotion/ deputation/transfer to be made :**
>
> **Promotion :** On seniority basis, subject to rejection or unfit from among Accountants in the grade of Rs.1200-2040, with three years regular service in the grade **having passed the departmental examination for Accountants.** (emphasis supplied)

15. Bare reading of Rule 3 with Schedule thereof makes certain things clear. Firstly, the Rules are framed by the President of India in consultation with the Comptroller and Auditor General of India in exercise of power under Clause (5) of Article 148 of the Constitution. The Rules are thus statutory in nature. Secondly, the Rules provide for mode of appointment to the post of Senior Accountant by promotion, failing which by transfer on deputation. Thirdly, promotion is based on

'seniority' subject to rejection or unfit from among Accountants, generally known as 'negative test'. Fourthly, an Accountant must have three years regular service. Finally, such Accountant must have passed Departmental Examination for Accountants.

16. It is not the case of the respondent that he had passed the Departmental Examination for Accountants. It is, thus clear that the respondent was not qualified for promotion to the post of Senior Accountant under the Rules.

17. The respondent, however, urged that even if it is held that passing of Departmental Examination was necessary, the Authorities ought to have relaxed the rule by exercising power under Rule 5. A grievance was also made that the direction of the Tribunal in earlier case had not been complied with and the prayer of the respondent was rejected mechanically.

18. We are unable to agree with the submission of the learned counsel. Rule 5 confers discretionary power on the Comptroller and Auditor General of India to relax the provisions of the Rules. It is relevant and may be reproduced:

> **5. Power to relax**-Where the Comptroller and Auditor General of India is of the opinion that it is expedient or necessary so to do, he may by order and for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons".

19. Reading of the order dated June 24, 1996, passed by the Deputy Accountant General (Administration), Gwalior, makes it clear that the Deputy Accountant General considered Rule 5 and observed that he did not find any valid reason/ ground to relax Recruitment Rules in view of the facts mentioned in the order. It was inter alia observed that Rule 5 conferred power on the Comptroller and Auditor General of India to relax the Rules, if he is of the opinion that it is expedient or necessary so to do by recording reasons in writing. But he proceeded to state that such power should be exercised 'with respect to any class or category of persons'. Normally, the power should be invoked if eligible candidates are not available for promotion or for similar valid grounds/reasons. The power, however, should not be exercised to perpetuate a mistake. Since the respondent did not fulfill the condition of Recruitment Rules and a large number of Accountants who had passed Departmental Examination were available and awaiting promotion, it would be against their interests to deprive them of promotion and to continue the respondent who had not passed the examination.

20. In our considered opinion, the reasons recorded by the Deputy Accountant-General were in conformity with the Statutory Rules. The Tribunal, therefore, should not have interfered with the well reasoned order passed by the Deputy Accountant-General. The Tribunal, while dealing with this aspect, observed;

> "The reasons given for not according relaxation to the applicant is that the power to relax is generally to be invoked only in respect

> of class or category of persons and is resorted to only in cases when eligible persons are not available for consideration for promotion or for any valid reasons/grounds, and the power in not conferred to perpetuates a mistake. We do not think that the grounds taken for rejection of the case of the applicant are valid. This Court has specifically directed with certain observation to consider the case of the applicant for relaxation under the powers vested under rule 5 and the respondent were duty bound to consider it in accordance with the order of this Tribunal".

21. We are unable to persuade ourselves as to how the Authorities did not carry out the order in letter and spirit as contended by the learned counsel for the respondent. We are also unable to agree with the Tribunal that the reasons recorded for rejection of the case of the respondent were not valid. On the contrary, in our judgment, the Deputy Accountant General was right in keeping in view relevant considerations, such as, the power should be exercised with respect to any class or category of persons, normally there should not be any relaxation in Recruitment Rules unless the eligible and qualified candidates are not available; relaxation should not be exercised to perpetuate mistake; a large number of Accountants who are eligible and qualified but they could not be appointed only because of non-availability of sufficient vacancies.

22. In this connection, it may be profitable to refer to a decision of this Court in *Keshav Chandra Joshi & Ors. v. Union of India & Ors.*, (1992) Supp (1) SCC 272 where this Court was called upon to consider the ambit and scope of relaxation-clause in Recruitment Rules. Rule 27 of the U.P. Forest Service Rules, 1952 invested in the Government power of relaxation which read thus:

> "Where the Governor is satisfied that the operation of any rule regarding 'the conditions of service' of the members of the service causes undue hardship in any particular case, he may, in consultation with the Commission, notwithstanding anything contained in the rules applicable to the case, by order dispense with or relax the requirements of that rule to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner".

23. The Court held that such power should be exercised to the extent as may be necessary to ensure satisfactory working or removing hardship in just and equitable manner but the Government cannot consciously and deliberately deviate from the Rules exercising the power of relaxation.

24. Interpreting the relaxation-clause and the power of the Governor, this Court observed;

> "Satisfaction of the Governor that the operation of the rules regarding the conditions of service would cause undue hardship in

a particular case or cases and the need to relieve hardship and to cause just and equitable results is a pre-condition. Even otherwise the court cannot substitute its satisfaction for the satisfaction of the Governor in exercise of the power of deemed relaxation."

25. The counsel for the respondent, no doubt, submitted that in the impugned order, the Tribunal merely directed the authorities to consider the case of the respondent for relaxation of Rules and no grievance could be made by the appellants.

26. We are unable to uphold the contention. Para 6 of the order issued by the Tribunal is explicitly clear. It reads thus:

"6. In view of aforesaid discussions, we feel that this is fit case for according relaxation under Rule 5. Accordingly, this O.A. is disposed of with a direction to the respondents to consider the case of the applicant for promotion to the post of Senior Accountant by relaxing the condition of qualifying in the examination and if found suitable, promote him to the post of Senior Accountant within a period of three months from the date of receipt of this order, subject to availability of vacancy. In case the said vacancy is not available, he shall be promoted immediately after the vacancy is made available. However, in case there are persons who are senior to the applicant and who have already qualified the examination of Senior Accountant, the case of the applicant shall be considered immediately after the promotion of such persons or such persons are promoted".

(emphasis supplied)

27. Plain reading of the above direction leaves no room for doubt that the Tribunal 'concluded' that it was a 'fit case for according relaxation under Rule 5'. Moreover, the Tribunal directed the appellants to promote the respondent, if found suitable, within the stipulated period. The Tribunal further stated that if there is no vacancy, the respondent should be promoted after the vacancy is available. There is, therefore, no doubt that the question as to relaxation of rule was 'finally decided' and the directions were to be carried out by the Authorities on the basis of such conclusion. It, therefore, cannot be said that direction was limited to 'consideration' of the case of the respondent and to take an appropriate decision in accordance with law.

28. It is true that the mistake was of the Department and the respondent was promoted though he was not eligible and qualified. But, we cannot countenance the submission of the respondent that the mistake cannot be corrected. Mistakes are mistakes and they can always be corrected by following due process of law. In *Indian Council of Agricultural Research & Anr. v. T.K. Suryanarayan & Ors.*, (1997) 6 SCC 766, it was held that if erroneous promotion is given by wrongly

interpreting the rules, the employer cannot be prevented from applying the rules rightly and in correcting the mistake. It may cause hardship to the employees but a court of law cannot ignore Statutory Rules.

29. As observed by us, Statutory Rules provide for passing of Departmental Examination and the Authorities were right in not relaxing the said condition and no fault can be found with the Authorities in insisting for the requirement of law. In the circumstances, the action of the Authorities of correcting the mistake cannot be faulted.

30. True it is that before such an action is taken and a person is actually reverted, he must be given an opportunity to show cause why the proposed action should not be taken. He may be able to satisfy the Authorities that there was no such mistake. But even otherwise, principles of natural justice and fair play require giving of such opportunity to him. But as observed earlier, in the instance case, in accordance with Rule 31-A of the Fundamental Rules, notice was issued to the respondent-employee, explanation was sought and thereafter the order was passed. The said order, in our considered view, was just, proper and in consonance with law and it ought not to have been set aside by the Tribunal or by the High Court. To that extent, therefore, the orders impugned in this appeal deserve to be set aside.

31. The last prayer on behalf of respondent, however, needs to be sympathetically considered. The respondent is holding the post of Senior Accountant (Functional) since last seventeen years. He is on the verge of retirement, so much so, that only few days have remained. He will be reaching at the age of superannuation by the end of this month i.e. December 31, 2007. In our view, therefore, it would not be appropriate now to revert the respondent to the post of Accountant for very short period. We, therefore, direct the appellants to continue the respondent as Senior Accountant (Functional) till he reaches the age of superannuation i.e. upto December 31, 2007. At the same time, we hold that since the action of the Authorities was in accordance with Statutory Rules, an order passed by the Deputy Accountant-General canceling promotion of the respondent and reverting him to his substantive post of Accountant was legal and valid and the respondent could not have been promoted as Senior Accountant, he would be deemed to have retired as Accountant and not as Senior Accountant (Functional) and his pensionary and retiral benefits would be fixed accordingly by treating him as Accountant all throughout.

32. For the foregoing reasons, the appeal is partly allowed. Though the respondent is allowed to continue on the post of Senior Accountant (Functional) till he reaches the age of retirement i.e. December 31, 2007 and salary paid to him in that capacity will not be recovered, his retiral benefits will be fixed not as Senior Accountant (Functional) but as Accountant. In the facts and circumstances of case, there shall be no order as to costs.

Appeal partly allowed.

I.L.R. [2008] M. P., 629

SUPREME COURT OF INDIA

Before Mr. Justice Altamas Kabir & Mr. Justice B.Sudershan Reddy

9 January, 2008*

KANHAIYALAL ...Appellant

Vs.

UNION OF INDIA ...Respondent

A. Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 53 - Officer-in-charge of a police station U/s 53 of Act is not a "Police Officer" within meaning of Section 25 of Evidence Act. (Para 38)

B. Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 67 - Criminal Procedure Code, 1973, Section 161 - A statement made U/s 67 of Act is not the same as a statement made U/s 161 of Code, unless made under threat or coercion - Statement made U/s 67 of Act to be used as confession against the person making it and excludes it from the operation of Sections 24 to 27 of Evidence Act. (Para 38)

C. Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 67 - Retracting the confession - Appellant made a confessional statement U/s 67 - Thereafter an application was made for retracting the confession - Neither any order passed on such application nor same proved during trial - Therefore, no evidence about retracting confession - Evidentiary value of confessional statement would not go down. (Para 40)

D. Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 67 r/w Section 42 - An officer for the purposes of Section 67 of Act r/w Section 42 thereof is not a police officer, the bar U/ss 24 & 27 of Evidence Act can not attracted and the statement made by the person directed to appear before officer concerned may be relied upon as a confessional statement against such person. (Para 40)

E. Narcotic Drugs & Psychotropic Substances Act (61 of 1985), Section 67 - A conviction can be maintained solely on the basis of a confession made U/s 67 of Act - Supreme Court maintained the conviction and sentence passed by High Court. (Para 40)

Cases referred :

AIR 1954 SC 4, AIR 1953 SC 459, (2004) 7 SCC 779, (2005) 11 SCC 600, (1971) 3 SCC 950, (1968) 2 SCR 641, (1963) Suppl. 1 SCR 689, (2001) 10 SCC 203, (1999) 6 SCC 1, (1964) 6 SCR 623, (2003) 8 SCC 449, (1962) 3 SCR 10, (1990) 2 SCC 409.

JUDGMENT

The Judgment of the Court was delivered by ALTAMAS KABIR, J.:–The appellant herein, along with one Phool Chand and Ram

*Cr. A. No. 788/2005

Prasad, was accused of offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and ultimately charges were framed against them by the Special Judge under Section 8/18 and in the alternative under Section 8/18/29 of the aforesaid Act. On denying the charges framed against them the accused persons were sent to trial.

2. The learned Special Judge framed several issues and ultimately held that the charges had been fully proved against the accused Phool Chand, from whose possession 19 kg 200 gms. of opium was seized. Phool Chand was found guilty and convicted under Section 8/18 of the NDPS Act and sentenced to suffer 10 years R.I. together with fine of Rs.1 lakh, in default, to undergo 2 years R.I.separately.

3. As far as the appellant herein and Ram Prasad are concerned, the learned Trial Judge found that the charges against them had not been proved and acquitted them of the charges under Section 8/18 read with Section 29 of the NDPS Act.

4. Aggrieved by his conviction and sentence, Phool Chand preferred Criminal Appeal No.47 of 2002 before the Indore Bench of the Madhya Pradesh High Court. On the other hand, the Union of India also preferred Criminal Appeal No.108 of 2003 against the acquittal of Ram Prasad and the appellant herein.

5. The High Court heard both the appeals together and ultimately dismissed the appeal preferred by Phool Chand and relying on the statement made by Ram Prasad and the appellant herein under Section 67 of the NDPS Act, found them also guilty of the charges framed against them and allowed the appeal filed by the Union of India. Ram Prasad and Kanhaiyalal (the appellant herein) were also sentenced to 10 years R.I. each and fine of Rs. 1 lakh each, and in default, to further undergo a jail sentence of 6 months R.I.

6. It is against the said judgment of the High Court that the instant appeal had been preferred by Kanhaiyalal.

7. Since the appellant, Kanhiyalal was convicted on the basis of the statement made by him under Section 67 of the NDPS Act, a question has been raised whether such statement made to an officer within the meaning of Section 42 of the said Act could be treated as a confessional statement and whether the accused could be convicted on the basis thereof in the absence of any other corroborative evidence.

8. As will appear from the records, the case of the prosecution was that on 22.2.1997 an information had been received by Shri Rajesh Nagpal, Assistant Narcotics Commissioner of the Central Bureau of Narcotics, Neemuch, that accused Phoolchand and Ram Prasad were involved in illegal dealing in opium and they had entered into an agreement to buy 25 kgs of opium from the appellant and the delivery of the said contraband was to be made at the site of the well of accused Ram Prasad situated in Haspur. On receipt of the said information, Shri Nagpal went to his office and reported the same. Subsequently, the same was

produced before the Deputy Commissioner, Shri Prem Raj. On the basis of the said information a preventive party was constituted which proceeded to the identified site. The raiding party purportedly reached village Hadipiplya Police Station, Manasa, by a Government vehicle at about 3.00 p.m. on the same day and after calling two independent witnesses, Madan Lal and Ram Rattan, who belonged to Hadipatiya, the raiding party proceeded towards the well in question belonging to Ram Prasads father Mangi Lal. The raiding party led by Lala Ram Dinkar, Inspector, along with the said two witnesses reached the said well at about 4.00 p.m. and found two persons sitting there with 3 bags. On seeing the raiding/preventive party, one of the two persons sitting there ran away and although he was chased by some members of the raiding party, they did not manage to catch him. Inspector Lal Ram Dinkar went up to the other person sitting near the well who disclosed his name as Phool Chand son of Sita Ram and resident of Bardiya. According to the prosecution case, on being asked as to who was the person who had fled, Phool Chand indicated the name of the appellant herein. On being further asked as to the ownership of the bags lying at the spot, accused Phool Chand admitted that the bags belonged to him and to the appellant herein.

9. Thereafter, Phool Chand was told about the confidential information that had been received and that the raiding party had reasons to believe that the bags in question contained intoxicating materials. He was also informed that for such reasons he would have to be searched along with the bags. In keeping with the provisions of Section 50 of the NDPS Act Phool Chand was given the option of the search being conducted by any nearby Magistrate or before any Gazetted Officer. According to the prosecution, Phool Chand was willing to have the bag searched before the Gazetted Officer. Accordingly, Shri R.K. Sinha, Superintendent of the Narcotics Department, who was present with the raiding/preventive party introduced himself as a competent Gazetted Officer to Phool Chand who gave his consent in writing about such search in the Panchnama which was drawn before Shri R.K. Sinha. Pursuant to the above, search of the bags was undertaken from which the contraband opium was found and on measurement the bags were found to contain the following amounts of opium:-

i) Bag 'A' 11 kgs. 500 gms.
ii) Bag 'B' 4 kgs. 700 gms, and
iii) Bag 'C' 300 gms

From each of the bags two samples of 25 grams each were taken out for chemical examination while the remaining opium was sealed under the Panchnama (Exh.P.2)

10. On the basis of the proceeding in terms of Section 57 of the NDPS Act and the First Information Report filed before the Narcotic Superintendent, one Suresh Badlani was appointed as Investigating Officer and the seized opium along with samples were deposited in the Malkhana. At this point of time the statement of accused Phool Chand was taken where he confessed to the offence complained of.

11. During investigation, accused Ram Prasad and Kanhaiyalal(appellant herein) were served with summons under Section 67 of the NDPS Act. While Ram Prasad was present in the Neemuch office on 24.2.1997 in pursuance of the summons, the appellant herein did not appear before the concerned officer. Accordingly, charge-sheet was filed before the Special Judge under the NDPS Act against Phool Chand and Ram Prasad on 20.5.1997. Subsequently, after fresh summons were issued to the appellant herein, he also appeared before the concerned officer and his statement was taken under Section 67 of the NDPS Act. In his statement the appellant confessed that he too was involved in the smuggling of opium with the co-accused. According to the prosecution, on the basis of his confessional statement, Kanhaiyalal was also arrested in connection with the offence and supplementary challan was filed against him before the Special Judge on 7.8.1997.

12. The defence of the accused was that they have been falsely implicated and accused Phool Chand took a specific plea that on 21.2.1997 he was playing Kabbadi at the sports ground.

13. The Trial Judge framed 4 questions for the purpose of deciding the case, namely, :-

i) Whether seized material in the case is opium?

ii) Whether aforesaid opium seized illegally kept in possession of accused Phool Chand in village Hadipipliya at about 4 oclock on 22.2.1997 i.e. the day of incident ?

iii) Whether aforesaid opium was collected for sale by all the three accused Ram Prasad and Kanhaiya Lal with co-accused Phool Chand in co-partnership ? and

iv) Whether in this case compliance of necessary legal provisions of NDPS Act is done ?

14. The first question was answered by the learned Trial Judge in the affirmative upon holding that the seized material was proved to be opium.

15. On the second question, the Trial Judge came to the definite finding that it had been fully proved that the opium had been seized from the possession of accused Phool Chand for which he did not have any valid licence.

16. The answer to the third question, which is relevant to this appeal, was answered in favour of the accused Ram Prasad and the appellant herein and the Special Judge concluded that except for the contradictory confession of these two accused there was no other corroborative evidence and the prosecution had failed to prove that they were included in the smuggling operation.

17. As far as the fourth question is concerned the Special Judge was satisfied that all the provisions of the NDPS Act had been duly complied with.

18. On the basis of his findings on the first, second and fourth questions, the

Special Judge under the NDPS Act convicted Phool Chand of the offences under Section 8/18 of the NDPS Act, but acquitted both Ram Prasad and the appellant herein of the said charge on his findings with regard to question no.3.

19. As mentioned hereinabove, the High Court while dismissing the appeal filed by Phool Chand allowed the appeal filed by the Union of India against the acquittal of Ram Prasad and Kanhaiyalal upon holding that the statement made by Ram Prasad and the appellant herein under Section 67 of the NDPS Act did not require any corroboration and were sufficient in themselves to convict the said two accused.

20. Mr. S.K. Gambhir, learned Senior Advocate, contended on behalf of the appellant, Kanhaiyalal, that the High Court had incorrectly stated the law regarding statements made under Section 67 of the NDPS Act before officers empowered under Section 42 thereunder. It was his specific case that once the appellant had been summoned in an inquiry under Section 67 of the aforesaid Act and was placed under arrest, any statement made by him thereafter would be hit by the provisions of Sections 24 to 27 of the Indian Evidence Act, 1872. Apart from the above, Mr. Gambhir also submitted that after making the statement in terms of Section 67 of the NDPS Act the appellant had retracted such statement and in the absence of corroborative evidence, the said retracted statement/confession could not be relied upon in order to convict the appellant. Furthermore, there was no independent evidence to corroborate the retracted confession, which fact had weighed with the trial court in acquitting the appellant.

21. Mr. Gambhir submitted that although from the arrest Memo it would be clear that Kanhaiyalal was arrested on 8.6.1997 at 5.30 p.m., he was produced before the Magistrate on 9th June, 1997, and on the same day he made an application in writing to the Court that his signature had been forcibly obtained on blank papers under threat that if he did not sign he would be involved in other serious cases and the same were subsequently used for preparing statements under Section 67 of the aforesaid Act as if the same had been voluntarily made by him. Mr. Gambhir submitted that the appellant had already been arrested and detained in custody when the statement under Section 67 of the NDPS Act was recorded and, accordingly the same came within the mischief of Sections 24 to 27 of the Evidence Act. Mr. Gambhir pointed out that since the Trial Court had taken cognizance of the said application and recorded a finding in the judgment itself that Kanhaiyalal had retracted his confession, it would be incorrect to say that the said application made by Kanhaiyalal had not been considered by the Court. It was also pointed out by Mr. Gambhir that although on behalf of the prosecution it had been submitted that Kanhaiyalal in his statement under Section 313 of the Criminal Procedure Code had stated that he had been compelled to sign on blank papers under threat, the truth was otherwise since in his statement under Section 313 Kanhaiyalal answered "galat hai" which had to be taken as a denial that he had given such statement. Mr. Gambhir submitted that the appellants positive

response had to be read along with his application dated 9.6.1997 retracting his confessional statement.

22. Mr. Gambhir submitted that the High Court had erred in relying upon the appellants statement made under Section 67 of the NDPS Act, although, not only had the same been retracted immediately thereafter before the learned Magistrate, but the same was not admissible under the above-mentioned provisions of the Evidence Act. It was submitted that since apart from the above statement there was no other evidence, which linked the appellant with the alleged offence, the High Court should have maintained the judgment of the acquittal passed by the learned trial court.

23. In support of his aforesaid submission that in the absence of other corroborating evidence the retracted confession had been wrongly relied upon by the High Court to convict the appellant, Mr. Gambhir referred to the three Judge Bench decision of this Court in *Muthuswami vs. State of Madras* (AIR 1954 SC 4) in which, it was indicated that no hard and fast rule could be laid down regarding the necessity of corroboration in the case of a retracted confession in order to base conviction thereupon. But apart from the general rule of prudence, if the circumstances of a particular case raised doubts as to the genuineness of a confession, it would be sufficient to require corroboration of a retracted confession.

24. In *Puran vs. State of Punjab* (AIR 1953 SC 459) the same view has been expressed as follows:-

> "It is a settled rule of evidence that unless a retracted confession is corroborated in material particulars, it is not prudent to base a conviction in a criminal case on its strength alone."

25. The same view was also expressed by this Court in *Parmananda Pegu vs. State of Assam* (2004 (7) SCC 779), which involved a conviction made on the basis of a confession made before a Judicial Magistrate in accordance with Section 164 of the Code of Criminal Procedure.

26. In the same context Mr. Cambhir strongly relied on the decision of this Court in *State (NCT of Delhi) vs. Navjot Sandhu* (2005 11 SCC 600) (commonly known as the Parliament Attack case)wherein while hearing several appeals, this Court had occasion to go into the question of confessions and retracted confessions in some detail. Referring to confessions in general, this Court made a distinction between "confession" and "admission". It observed that "an admission is a statement oral or documentary which enables the Court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession." This Court also cautioned that before acting upon a confession, the Court has to satisfy itself that it was freely and voluntarily made, having regard to the language of Section 24 of the Evidence Act. However, while examining the evidentiary value of a retracted confession against the confessor, the learned

Judges had occasion to consider three previous decisions of this Court in *Bharat vs. State of U.P.* (1971 3 SCC 950) and *Haroon Hazi Abdulla vs. State of Maharashtra* (1968 2 SCR 641) and *Pyare Lal Bhargava vs. State of Rajasthan* (1963 Suppl.1 SCR 689). The learned Judges extracted paragraph 7 of the judgment in *Bharat vs. State of U.P.* (supra) wherein a comparison has been made between "confession" and "retracted confession". While in the former case, it was observed that confessions could be acted upon, if the Court was satisfied that they were voluntarily made and they were true, retracted confessions, stood on a slightly different footing. In that context, it was observed that "a Court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two, to determine whether the retraction affects the voluntary nature of the confession or not." The learned Judges of the three Judge Bench went on to observe that upon being satisfied, it was for the court to decide whether to use the retracted confession or not, but all the same, the courts did not normally act upon a retracted confession without finding some other evidence as to the guilt of the accused. The learned Judges concluded that a true confession voluntarily made could be acted upon with slight evidence to corroborate the same, but a retracted confession requires the Court to be assured that the retraction was an after-thought and that the earlier statement was true.

27. Similar views were expressed in the other two cases referred to hereinabove, but it would be profitable to reproduce the views of the four Judge Bench in Pyare Lal Bharagavas case (supra) which has been reproduced in Navjot Sandhus case, in the following terms :-

> "A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a conviction without corroboration. It is not a rule of law, but is only rule of Prudence. If cannot even be laid down as an inflexible rule of practice of prudence that under no circumstances can such a conviction be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntary made and has been corroborated in material particulars."

28. While the above mentioned decisions dealt with other criminal enactments, the next case referred to by *Mr. Gambhir, namely, A.K. Mehaboob vs. Intelligence Officer, Narcotics Control Bureau,* (2001 10 SCC 203) is a decision under the NDPS Act with due regard to the provisions of Sections 42 and 67

thereof. The criminal appeal of Shri A.K. Mehaboob was heard alongwith the appeal filed by Shri P.K. Naushad, who were the second and third accused facing charges for having committed an offence under Sections 21 and 29 of the NDPS Act. While the first accused, Divakaran, was found guilty and convicted on the strength of recovery of brown sugar from him, the two appellants before this Court were acquitted by the trial court but were convicted by the High Court in appeal preferred by the Narcotics Control Bureau. From the facts of the said case, it appears that apart from the statement made by Naushad under Section 67 of the NDPS Act there was other evidence to indicate that business in Narcotic drugs was being transacted from his house. His appeal was therefore rejected. As far as Mehaboob was concerned, his statement did not contain any statement, which could involve him in the offence. The High Court, therefore, allowed the appeal filed by Mehaboob and set aside his conviction.

29. On this line of decisions, Mr. Gambhir lastly referred to a decision of this Court in *Pon Adhithan vs. Deputy Director, Narcotics Control Bureau, Madras* (1999 6 SCC 1) wherein, in fact, the confessional statement made by the accused-appellant while in custody of the Intelligence Officer, Narcotics Intelligence Bureau, was relied upon to convict the said accused, on it being held that the said statement had been voluntarily made as no complaint of threat or pressure had been made by the accused when he was produced before the Magistrate. Mr. Gambhir sought to distinguish the said decision on the ground that while in Pon Adhithans case, no complaint had been made by the accused of any threat or compulsion for making such statement, in the present case the confession made by the appellant herein was immediately retracted on the very next date when the appellant was produced before the Magistrate and that, too, in writing by way of an application. Mr. Gambhir reiterated that the said application was referred to by the learned trial court in its judgment. Mr. Gambhir also submitted that since the trial court had chosen not to rely on the statement made by the appellant under Section 67 of the NDPS Act, in the absence of any corroborating evidence, the evidentiary value of the retracted confession had not been gone into by the learned trial court.

30. Reliance was also placed by Mr. Gambhir on the Constitution Bench decision in *Haricharan Kurmi vs. State of Bihar* (1964 6 SCR 623) in support of his submission that apart from the statement of Phoolchand, the main accused, there was no other evidence to connect the appellant with the alleged offence under the NDPS Act. In the said case, the Constitution Bench, held that though a confession within the meaning of Section 30 of the Indian Evidence Act, cannot strictly speaking be treated as evidence as defined in Section 3, it is an element which may be taken into consideration by the criminal courts but the court cannot start with the confession of a co-accused person, but must begin with other evidence adduced by the prosecution before relying on the confession of the co-accused.

31. On behalf of the Union of India, Mr. B.B. Singh, learned Advocate, submitted that having regard to the decisions of this Court in *Pon Adithan vs. Dy. Director*

Narcotics Bureau, (supra); *A.K. Mehaboob vs. Intelligence Officer, Narcotics,* (supra) and *M.Prabhulal vs. The Assistant Director, Directorate of Revenue Intellegence* (2003) 8 SCC 449, the appellant had been rightly convicted on his confessional statement made under Section 67 of the NDPS Act alongwith the evidence of PW 9 Suresh Badlani, Inspector in the office of the Deputy Narcotics Commissioner, Lucknow, U.P., before whom such statement had been made. Mr. Singh also submitted that even if the person was in custody at the time when he made such confessional statement, the same would not attract the bar under Article 20(3) of the Constitution, if it was made voluntarily. Mr. Singh also emphasised that in all the three cases referred to hereinabove the accused were in custody when their confessional statements were recorded under Section 67 of the NDPS Act.

32. Mr. Singh further submitted that although PW 9 had deposed that the confessional statement had been made by the appellant on 8.6.97 before him in the office of the Deputy Commissioner, there was no cross-examination on this point on behalf of the appellant and consequently the confessional statement of the appellant had to be accepted.

33. On the issue involving retraction by the appellant of his statement made before the Inspector under Section 67 of the NDPS Act, Mr. Singh submitted that the application which the appellant is said to have filed before the Magistrate was never proved or exhibited in the Trial Court and did not form part of the evidence on record. He submitted that the same could not, therefore, be taken note of or be relied upon in support of the appellants case of retracted confession.

34. In support of his aforesaid submission Mr. Singh referred to the decision of the eleven Judge Bench of this Court in *State of Bombay vs. Kathi Kalu Oghad and others* (1962) 3 SCR 10) wherein it was, inter alia, concluded that the accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, just being in Police custody when the statement was made would not, by itself, give rise to an inference that the accused had been compelled to make such statement. It was also held that to bring the statement within the prescription of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused any time after the statement had been made.

35. From the facts of the case and the submissions made on behalf of the respective parties the point which emerges for determination is upto what extent can a statement under Section 67 of the NDPS Act be relied upon for convicting a person accused of having committed an offence under the provisions of the said Act. In order to arrive at a decision in regard to the above, it will also have to be considered whether such a statement would attract the bar both of Sections 24 to 27 of the Indian Evidence Act as also Article 20(3) of the Constitution of India. For the aforesaid purpose, the provisions of Section 67 of the N.D.P.S. Act are reproduced hereinbelow:-

"67. Power to call for information, etc. Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act,-

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case."

36. A parallel may be drawn between the provisions of Section 67 of the NDPS Act and Sections 107 and 108 of the Customs Act and to a large extent Section 32 of the Prevention of Terrorism Act, 2002 and Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. These are all special Acts meant to deal with special situations and circumstances. While the provisions of the Prevention of Terrorism Act, 2002, and TADA Act, 1987, are much more stringent and excludes from its purview the provisions of Sections 24 to 27 of the Evidence Act with regard to confession made before a police officer, the provisions relating to statements made during inquiry under the Customs Act and under the NDPS Act are less stringent and continues to attract the provisions of the Evidence Act. In the case of both the latter enactments, initially an inquiry is contemplated during which a person may be called upon to provide any information relevant to the inquiry as to whether there has been any contravention of the provisions of the Act or any Rule or Order made thereunder. At that stage the person concerned is not an accused although he may be said to be in custody. But on the basis of the statements made by him he could be made an accused subsequently. What is important is whether the statement made by the person concerned is made during inquiry prior to his arrest or after he had been formally charged with the offence and made an accused in respect thereof. As long as such statement was made by the accused at a time when he was not under arrest, the bar under Sections 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution be attracted. It is only after a person is placed in the position of an accused that the bar imposed under the aforesaid provision will come into play. Of course, this Court has also held in *Pon Adithans case* (supra) that even if a person is placed under arrest and thereafter makes a statement which seeks to incriminate him, the bar under Article 20(3) of the Constitution would not operate against him if such statement was given voluntarily and without any threat or compulsion and if supported by corroborating evidence.

37. The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in *Pyare Lal Bhargavas case* (supra). The consistent view which has been taken with regard to confessions made under provisions of

Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the Court should satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence. In addition to the above, in the case of *Raj Kumar Karwal v. Union of India and others* (1990) 2 SCC 409, this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an Officer-in-Charge of a police station under Section 53 of the NDPS Act, 1985, are not □police officers□ within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view.

38. Considering the provisions of Section 67 of the N.D.P.S. Act and the views expressed by this Court in *Raj Kumar Karwals case* (supra), with which we agree, that an officer vested with the powers of an Officer-in-Charge of a Police Station under Section 53 of the above Act is not a "Police Officer" within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the N.D.P.S. Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the N.D.P.S. Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act.

39. There is nothing on record to suggest that the appellant was compelled under threat to make the statement after he had been placed under arrest which renders such statement inadmissible and not capable of being relied upon in order to convict him. On the other hand, there is the evidence of PW9 upon which the High Court has relied in convicting the appellant. It may once again be mentioned that no question in cross-examination had been put to PW9 in this regard and the version of the said witness must be accepted as corroborative of the statement made by the accused.

40. It may also be recalled that though an application was made for retracting the confession made by the appellant, neither was any order passed on the said application nor was the same proved during the trial so as to water down the evidentiary value of the said statement. On the other hand, in the absence of such evidence on record, the High Court had no option but to proceed on the basis of the confession as made by the appellant under Section 67 of the NDPS Act. Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar

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under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant.

41. We, accordingly, dismiss the appeal and maintain the order of conviction and sentence passed against the appellant by the High Court.

Appeal dismissed.

I.L.R. [2008] M. P., 640

SUPREME COURT OF INDIA

Before Mr. Justice H.K. Sema & Mr. Justice Aftab Alam

9 January, 2008*

STATE OF M.P. & ors. ...Appellants

Vs.

MADHUKAR RAO ...Respondent

A. Wild Life (Protection) Act (53 of 1972) (as amended by Act 44 of 1991 w.e.f. Oct. 2, 1991), Sections 50(1)(c) & 39 (1)(d), Criminal Procedure Code, 1973, Section 451 - Provisions of Section 50 of Act and amendments made there under do not in any way affect the Magistrate's power to make an order of interim release of the vehicle U/s 451 of Code - Provision of Section 39(1)(d) would come into play after a court found the accusation and allegations true and recorded the finding that seized article was used in commission of offence. - Madhukar Rao's F.B. decision of High Court approved. (Paras 17,18)

B. Wild Life (Protection) Act (53 of 1972) (as amended by Act 44 of 1991 w.e.f. Oct. 2, 1991), Section 50 (4) - Expression used in sub-section is "according to law" and not "according to provisions of the Act". - According to law undoubtedly widens the scope and plainly indicates the application of the provisions of the Cr.P.C. (Para 13)

Cases referred :

(2002) 9 SCC 90, (2002) 4 SCC 713, (2004) 1 MPLJ 258 (FB).

J U D G M E N T

The Judgment of the Court was delivered by AFTAB ALAM, J.:–This judgment will dispose of the four appeals in all of which the same question arises for consideration. The question is whether a vehicle or vessel etc. seized under Section 50(1)(c) of the Wild Life (Protection) Act, 1972 (hereinafter referred to as 'the Act') is put beyond the power of the Magistrate to direct its release during the pendency of trial in exercise of powers under Section 451 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the

*C.A. No. 5196/2001

Code'). On behalf of the appellant, the State of Madhya Pradesh, it is strongly contended that the answer to the question would be only in the affirmative. The contention appears to us to be ex facie untenable but in order to examine the stand of the State Government it would be necessary to state the facts and circumstances in which the question arises and to take note of the relevant provisions of law in light of which it is to be answered.

2. The facts of the case are taken from Civil Appeal No.5199 of 2001, the *State of Madhya Pradesh vs. Madhukar Rao*, which was the leading case before the High Court. On March 12, 1997 at about 3.30 a.m., in course of checking a Sub-Inspector of Excise found a Tata Sumo vehicle, bearing Registration No.MH.31-H/6919, carrying 206 kgs. of antlers. The vehicle was owned by Madhukar Rao, the respondent, but he was not in it at the time of checking. The Excise Sub-Inspector informed the officers of the Forest Department who registered a case being Offence No.6527/97 under Sections 39, 42, 43, 44, 49(Kha) and 51(Kha) of the Act. The four persons occupying the vehicle were arrested and the vehicle and the antlers were seized under Section 50(1)(c) of the Act. The Judicial Magistrate, Raipur, was duly informed about the institution of the case on March 13, 1997.

3. The respondent, being the owner of the vehicle, moved the Judicial Magistrate, First Class, Raipur on May 12, 1997 for its release on Supurdnama. On behalf of the respondent it was stated that he was not an accused in the case and he had no concern with the commission of any offences. It was further stated that his neighbour Shri Lohiya, one of the accused in the case, had borrowed the vehicle on the pretext of going to see his ailing father. The Magistrate allowed the petition and directed for release of the vehicle on Supurdnama by order, dated May 12, 1997.

4. Against the order of the Magistrate, the State Government filed a revision before the Sessions Judge, Raipur. In the revision, it was stated that the Magistrate had erred in allowing the release of the vehicle in disregard of Section 39(d) of the Act in terms of which the seized vehicle became the property of the Government and hence, the court had no power to release it on Supurdnama. It was further contended that the power of release under Section 451 of the Code could be exercised only in respect of vehicles seized by a police officer. The Sessions Judge by order, dated June 5, 1997 allowed the revision, relying upon a Bench decision of the Gwalior Bench of Madhya Pradesh High Court in L.P.A.No.152 of 1996. (Here it is stated on behalf of the State that the S.L.P. filed against the order in the L.P.A. was dismissed by this Court in limine).

5. After the revision was allowed and the order of release passed by the Magistrate was set aside, the Wild Life Warden and Divisional Forest Officer, Raipur passed an order on June 16, 1997 declaring the seized vehicle as Government property in terms of Section 39(d) of the Act.

6. The respondent then went to the High Court at Jabalpur, in Writ Petition No.4421 of 1997, challenging the decision of the Sessions Judge and seeking a direction for release of the vehicle on Supurdnama as ordered by the Magistrate. The case of the present respondent along with three other cases (giving rise to the three other appeals in this batch) was finally heard by a full bench. Dharmadhikari,J. (as His Lordship then was) who authored the full bench judgment held and found that the Magistrates power to release a vehicle during the pendency of trial was not, in any way, affected by the legislative changes in the Act relied upon by the State and in appropriate cases it was fully open to the Magistrate to pass an order of interim release of a seized vehicle. The three other cases were also disposed of following the Full Bench decision in *Madhukars* case.

7. The State is in appeal against the order passed by the High Court.

8. On behalf of the State, it is contended that after the amendments made in Section 50 and Section 39(1)(d) of the Act w.e.f. October 2, 1991 by Act 44 of 1991 there was no way a vehicle seized for violation of the Act could be released. The amendments in Section 50 took away the power from the Assistant Director of Wild Life Preservation or Wild Life Warden (or an officer superior to them) and the Magistrate under the Code, in any event, had no such power. Moreover, the amendment of Section 39(1)(d) of the Act made any interim release of the vehicle further impossible.

9. In order to appreciate the submissions made on behalf of the State it would be necessary to examine the relevant provisions of law. Chapter VI of the Act contains provisions dealing with the prevention and detection of offences. The chapter begins with Section 50 that gives to the specificied officers the powers of entry, search, arrest and detention. It is a long section having as many as nine sub-sections. Sub-section (1) which is sub-divided into three clauses is as follows :

> **"50. Power of entry, search, arrest and detention -** (1) Notwithstanding anything contained in any other law for the time being in force, the Director or any other officer authorized by him in this behalf or the Chief Wild Warden or the authorised officer or any Forest Officer or any Police Officer not below the rank of a sub-inspector, may, if he has reasonable grounds for believing that any person has committed an offence against this Act
>
> (a) require any such person to produce for inspection any captive animal, wild animal, animal article, meat, [trophy, uncured trophy, specified plant or part or derivative thereof] in his control, custody or possession, or any licence, permit or other document granted to him or required to be kept by him under the provisions of this Act;
>
> (b) stop any vehicle or vessel in order to conduct search or inquiry or enter upon and search any premises, land, vehicle or

vessel, in the occupation of such person, and open and search any baggage or other things in the possession;

(c) seize any captive animal, wild animal, animal article, meat, trophy or uncured trophy, or any specified plant or part or derivative thereof, in respect of which an offence against this Act appears to have been committed, in the possession of any person together with any trap, tool, vehicle, vessel or weapon used for committing any such offence and, unless he is satisfied that such person will appear and answer any charge which may be preferred against him, arrest him without warrant, and detain him.

Provided that where a fisherman, residing within ten kilometers of a sanctuary or National Park, inadvertently enters on a boat, not used for commercial fishing, in the territorial waters in that sanctuary or National Park, a fishing tackle or net on such boat shall not be seized."

Before the Act was subjected to a large number of amendments with effect from October 2, 1991, Section 50 had sub-section (2) which was as follows :

"(2) Any officer of rank not inferior to that of an Assistant Director of Wild Life preservation or Wild Life Warden, who, or whose subordinate has seized any trap, tool, vehicle, vessel or weapon under clause (c) of sub-section (1), may release the same on the execution by the owner thereof of bond for the production of the property so released, if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made."

The Amendment Act 44 of 1991 deleted sub-section (2) and inserted in its place sub-section (3-A) which is as follows :

"(3-A). Any officer of a rank not inferior to that of an Assistant Director of Wild Life Preservation of [as Assistant Conservator of Forests], who, or whose subordinate, has seized any captive animal or wild animal under clause (c) of sub-section (1) may give the same for custody on the execution by any person of a bond for the production of such animal if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made."

At the same time, amendments were made in Section 39(1)(d) after which it reads as follows :

"**39. Wild animals, etc., to be Government property** (1) Every

(a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

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(c) xxx xxx xxx xxx

(d) vehicle, vessel, weapon, trap or tool that has been used for committing an offence and has been seized under the provisions of this Act, shall be the property of the State Government, and, where such animal is hunted in a sanctuary or National Park declared by the Central Government, such animal or any animal article, trophy, uncured trophy or meat [derived from such animal, or any vehicle, vessel, weapon, trap or tool used in such hunting] shall be the property of the Central Government."

10. Ms. Vibha Datta Makhija, learned counsel appearing for the State of Madhya Pradesh referred in detail to various sub-sections of Section 50. She also referred to Section 51 laying down the penalties for offences committed under the Act, Section 53-dealing with the punishment for wrongful seizure and Section 54 dealing with the power to compound offences. Learned counsel submitted that prior to October 2, 1991, while sub-section (2) of Section 50 was in existence, the specified officers were empowered to release any trap, tool, vehicle, vessel or weapon seized under clause (c) of sub-section (1) in connection with any offence under the Act. But the provision was deleted and was substituted by sub-section (3-A) that limited the power of release only in regard to any captive animal or wild animal. The legislative intent was thus clear that no release was permissible of any article other than a captive animal or wild animal that could be given in the custody of any person on execution of a bond.

11. Learned counsel submitted that Section 50 of the Act provided a complete and comprehensive scheme in matters of entry, search, arrest and detention for prevention and detection of offence under the Act and excluded the application of any other Act, including the Code, in the matter. She maintained that at no time it was open to the Magistrate to direct for interim release of a vehicle seized under Section 50(1)(c) of the Act. Previously officers of certain higher ranks had the power to release the seized vehicle but after deletion of sub-section (2) the power was taken away from the departmental officers as well and hence, a vehicle seized for commission of an offence under the Act could no longer be released on interim basis. In support of the submission that Section 50 provided a complete Code she also referred to Sections 51 and 53 of the Act. She submitted that the punishment for wrongful seizure too was provided under the Act itself and hence, the seizure would not attract the provisions of any other law, including the Code. In support of the submission she relied upon the decision of this Court in *State of Karnataka vs. K.A.Kunchindammed* [2002 (9) SCC 90]. She particularly relied upon paragraph 23 of the decision.

12. We are unable to accept the submissions. To contend that the use of a vehicle in the commission of an offence under the Act, without anything else would bar its interim release appears to us to be quite unreasonable. There may be a case where a vehicle was undeniably used for commission of an offence

under the Act but the vehicles owner is in a position to show that it was used for committing the offence only after it was stolen from his possession. In that situation, we are unable to see why the vehicle should not be released in the owners favour during the pendency of the trial.

13. We are also unable to accept the submission that Section 50 and the other provisions in Chapter VI of the Act exclude the application of any provisions of the Code. It is indeed true that Section 50 of the Act has several provisions especially aimed at prevention and detection of offences under the Act. For example, it confers powers of entry, search, arrest and detention on Wild Life and Forest Officers besides police officers who are normally entrusted with the responsibility of investigation and detection of offences; further sub-section (4) of Section 51 expressly excludes application of Section 360 of the Code and the provisions of Probation of Offenders Act to persons eighteen years or above in age. But it does not mean that Section 50 in itself or taken along with the other provisions under Chapter VI constitutes a self-contained mechanism so as to exclude every other provision of the Code. This position becomes further clear from sub-section (4) of Section 50 that requires that any person detained, or things seized should forthwith be taken before a Magistrate. Sub-section (4) of Section 50 reads as follows :

> "50(4). Any person detained, or things seized under the foregoing power, shall forthwith be taken before a Magistrate to be dealt with according to law [under intimation to the Chief Wild Life Warden or the officer authorized by him in this regard]."

It has to be noted here that the expression used in the sub-section is 'according to law and not 'according to the provisions of the Act. The expression 'according to law undoubtedly widens the scope and plainly indicates the application of the provisions of the Code.

14. We find that the full bench of the High Court has correctly taken the view that the deletion of sub-section (2) and its replacement by sub-section (3-A) in Section 50 of the Act had no effect on the powers of the Magistrate to release the seized vehicle during the pendency of trial under the provisions of the Code. The effect of deletion of sub-section (2) and its replacement by sub-section (3-A) may be summed up thus: as long as, sub-section (2) of Section 50 was on the Statute Book the Magistrate would not entertain a prayer for interim release of a seized vehicle etc. until an application for release was made before the departmental authorities as provided in that sub-section. Further, in case the prayer for interim release was rejected by the departmental authority the findings or observations made in his order would receive due consideration and would carry a lot of weight before the Magistrate while considering the prayer for interim release of the vehicle. But now that sub-section (2) of Section 50 stands deleted, an aggrieved person has no option but to approach the Magistrate directly for interim release of the seized vehicle.

15. We are also of the view that the decision in *Kunchindammed* is of no help to the State in the present appeals. Paragraph 23 of the decision apparently seems to support the appellants contention but we find it difficult to apply it in the facts of the present case. The decision in *Kunchindammed* was rendered on the provisions of the Karnataka Forest Act, 1963. In that case, an order of confiscation of the vehicle was passed by the competent authority and the confiscation order had attained finality. The present case arises under the Wild Life Protection Act and the facts are materially different.

16. The decision of this Court closer to the issue under consideration may be found in *Moti Lal vs. Central Bureau of Investigation & Anr.* [2002 (4) SCC 713]. In that case an offence committed under the Act was handed over for investigation to the Central Bureau of Investigation and the action was assailed exactly on the plea that the Wild Life Act was a special law and it contained comprehensive provisions for investigation, inquiry, search, seizure, trial and imposition of punishment and, therefore, the police force establishment under the Delhi Special Police Establishment Act was not empowered to investigate the case. This Court rejected the contention and after examining in detail the various provisions of the Act particularly the provisions of Section 50 came to find and hold as follows :

> "The scheme of Section 50 of the Wild Life Act makes it abundantly clear that a police officer is also empowered to investigate the offences and search and seize the offending articles. For trial of offences, the Code of Criminal Procedure is required to be followed and for that there is no other specific provision to the contrary. The special procedure prescribed is limited for taking cognizance of the offence as well as powers are given to other officers mentioned in Section 50 for inspection, arrest, search and seizure as well as of recording statement. The power to compound offences is also conferred under section 54. Section 51 provides for penalties which would indicate that certain offences are cognizable offences meaning thereby a police officer can arrest without warrant. Sub-section (5) of Section 51 provides that nothing contained in Section 360 of the Code of Criminal Procedure or in the Probation of Offenders Act, 1958 shall apply to a person convicted of an offence with respect to hunting in a sanctuary or a national park or of an offence against any provision of Chapter 5-A unless such person is under 18 years of age. The aforesaid specific provisions are contrary to the provisions contained in the Code of Criminal Procedure and that would prevail during the trial. However, from this, it cannot be said that operation of rest of the provisions of the Code of Criminal Procedure are excluded.
>
> In this view of the matter, there is no substance in the

contention raised by the learned counsel for the appellant that Section 50 of the Wild Life Act is a complete code and, therefore, CBI would have no jurisdiction to investigate the offences under the said Act. Hence, it cannot be said that the judgment and order passed by the High Court rejecting the petition filed by the appellant is in any way illegal or erroneous."

17. We have, therefore, no doubt that the provisions of Section 50 of the Act and the amendments made thereunder do not in any way affect the Magistrates power to make an order of interim release of the vehicle under Section 451 of the Code.

18. Learned counsel submitted that Section 39(1)(d) of the Act made the articles seized under Section 50(1)(c) of the Act as government property and, therefore, there was no question of their release. The submission was carefully considered by the Full Bench of the High Court and on an examination of the various provisions of the Act it was held that the provision of Section 39(1)(d) would come into play only after a court of competent jurisdiction found the accusation and the allegations made against the accused as true and recorded the finding that the seized article was, as a matter of fact, used in the commission of offence. Any attempt to operationalise Article 39(1)(d) of the Act merely on the basis of seizure and accusations/allegations leveled by the departmental authorities would bring it into conflict with the constitutional provisions and would render it unconstitutional and invalid. In our opinion, the High Court has taken a perfectly correct view and the provisions of Section 39(1)(d) cannot be used against exercise of the Magisterial power to release the vehicle during pendency of the trial.

19. We thus find no merit in any of the submission made on behalf of the appellants. The High Court has taken a correct view that warrants no interference by this Court. Accordingly, all the appeals and special leave petitions are dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 647

SUPREME COURT OF INDIA

Before Mr. Justice A.K. Mathur & Mr. Justice Tarun Chatterjee

19 February, 2008*

MOHD. HUSSAIN (DEAD) by LRs & ors. ....Appellants

Vs.

OCCHAVLAL & ors. ....Respondents

A. Civil Procedure Code (5 of 1908), Order 22 Rule 4 - Second Appeal pending before High Court - During pendency Mohd. Hussain one of respondents died - Appellants failed to make an application to bring LRs of Mohd. Hussain on record - Held - It would be too technical to set aside entire judgment of High

*C.A. No. 912/1999

Court on ground of not bringing entire body of LRs of Mohd. Hussain because some of his LRs were on record and left out of LRs were sufficiently represented by other LRs on record. (Para 3)

B. Civil Procedure Code (5 of 1908), Order 1 Rules 3 & 9 - Non impleadment of parties - Maintainability - Suit for redemption of mortgage - Two married daughters of one of mortgages (Nandram) not impleaded - Trial Court found that married daughters had no interest so in their absence suit decreed - First Appellate Court affirmed the judgment of Trial Court - But High Court allowed Second Appeal on ground of non-joinder of necessary parties i.e. two married daughters - Held - Estate of late Nandram, one of mortgages was sufficiently and in a bonafide manner represented by his two sons (defendants) - There was no fraud or collusion between them and plaintiffs - Accordingly decree that would be passed against both sons of Nandram, as heirs and LRs of Nandram also binds the estate even though two married daughters who may be interested in the estate were not brought on record. (Para 10)

C. Civil - Practice & Procedure - Trial Court decreed the suit for redemption - First Appellate Court affirmed decree - High Court had not considered the decree on merits but reversed decree on ground of non-joinder of parties - Held - Suit does not suffer from infirmity of non-joinder of parties - Findings of Courts below on merits not challenged before Supreme Court - Therefore it was not deemed necessary to remit the case back to High Court - Appeal allowed - Judgment and decree of High Court set aside and that of Courts below are restored. (Para 13)

Cases referred :

AIR 1941 Nagpur 5, AIR 1938 Nagpur 32, AIR 1919 PC 24, AIR 1915 Oudh 29, 1914 -24 IC 25, AIR 1965 SC 271, AIR 1966 SC 792, (1991) 3 SCC 114, AIR 1965 SC 271.

JUDGMENT

The Judgment of the Court was delivered by TARUN CHATTERJEE, J.:–This appeal is directed against the judgment dated 28th of February, 1992, which was delivered on 20th of March, 1992 by a learned judge of the High Court of Madhya Pradesh at Indore in Second Appeal No. 27/ 1978 whereby the concurrent judgments of the courts below decreeing the suit for redemption of mortgage filed by the appellants against the respondents were set aside practically on the ground that the suit for redemption could not be held to be maintainable in law in the absence of the two married daughters of one of the mortgagees.

2. Before we narrate the facts leading to the filing of this appeal, we may note the two questions which were posed by the learned counsel for the parties and need to be decided in this appeal, which are as follows: -

i) Whether the second appeal of the respondents herein, who

were the appellants in the High Court, had abated as they had failed to make an application to bring the legal heirs and representatives of Mohd. Hussian, one of the respondents in the High Court who had died during the pendency of that second appeal?

ii) Whether in the absence of the two married daughters of one of the mortgagees, it could be held that the suit for redemption of mortgage was not maintainable in law, that is to say the suit for redemption could be dismissed on account of their non-impleadment ?

3. Let us, therefore, take up the first question for our decision. The question is whether the second appeal, which was filed by the respondents had abated in its entirety on the death of Mohd. Hussain. Mr. Gambhir, the learned senior counsel appearing for the appellants contended that in view of the finding that one of the respondents in the second appeal viz., Mohd. Hussain had died, and no application for substitution of his heirs and legal representatives was made even till the signing of the judgment, the second appeal had abated in its entirety and therefore, until and unless the abatement caused on the death of Mohd. Hussain was set aside, the judgment in the second appeal is liable to be set aside without going into the merits of the same. From the record, it appears that Mohd. Hussain had died on 19th of November, 1991. It is true that the application for substitution after setting aside abatement was filed by the appellants in the second appeal to bring on record the heirs and legal representatives of the deceased Mohd. Hussain on 3rd of March, 1992 after the judgment was already signed by the learned judge. It is an admitted position that some of the heirs and legal representatives of Mohd. Hussain were already on record in the file of the second appeal. Such being the position, in our view, the question of abatement of the second appeal on the death of Mohd. Hussain could not arise at all as some of his heirs and legal representatives were admittedly on record. Only the question of noting the death of Mohd. Hussain could arise and his name could be deleted from the array of respondents in the second appeal. That being the position, even if the judgment was delivered after the death of Mohd. Hussain whose entire body of heirs and legal representatives were not brought on record, even then the only requirement under the law was to take note of the death of Mohd. Hussain and delete his name from the array of respondents in the second appeal and the rest of the heirs and legal representatives who were not brought on record could be added in the cause title of the memorandum of appeal. Therefore, in our view, it would be considered too technical to set aside the entire judgment of the High Court on the ground of not bringing the entire body of heirs and legal representatives of Mohd. Hussain because some of his heirs and legal representatives were on record and the left out heirs and legal representatives were sufficiently represented by the other heirs on record. Accordingly, the first question, as posed hereinabove, is decided in favour of the present respondents.

4. We may now narrate the relevant facts leading to the filing of this appeal. On 24th of April, 1932, late Hasan Ali entered into a mortgage with possession of the suit premises with late Nandram and his two sons, Manaklal and Motilal for Rs. 300/-. On or about 17th of July, 1967, a suit was brought by Hussainabai, Sugrabai and Mohd. Hussain, being heirs of Hasan Ali, (appellants herein) against Manaklal and Motilal (defendant Nos. 1 and 2) and their sons (proforma defendant Nos. 3 and 7) for redemption of mortgage of the suit premises, as fully described in the schedule of the plaint. At the time of filing of the suit for redemption of mortgage by the plaintiffs/appellants, Nandram was already dead leaving behind his two sons viz., Manaklal and Motilal and two married daughters viz., Annapurna and Pyaribai. It was the case of the plaintiffs/appellants that the respondents were avoiding to let the appellants have the suit premises redeemed and that the respondents had the intention to deprive them of the suit premises. Accordingly, on the allegations made in the plaint, the plaintiffs/appellants sought for a decree in the suit for redemption in respect of the suit premises. The suit was contested by the respondents in which it was, inter alia, alleged that the suit premises was in fact sold by Hasan Ali, since deceased, to them and accordingly, the appellants could not demand account from them. It was further alleged that the suit was bad on account of non-joinder of parties as all the legal heirs of Nandram, namely the two married daughters Annapurna and Pyaribai were not made parties although they were necessary parties. A case of adverse possession was also pleaded by the respondents in respect of the suit premises. Accordingly, the respondents pleaded that the suit must be dismissed not only on merits but also on the ground of non-joinder of parties.

5. The suit of the appellants was decreed in which the trial court found that the appellants were the legal heirs of Hasan Ali and had the right to redeem the mortgage and to recover the suit premises from the respondents. The plea of adverse possession raised by the respondents was rejected and the plea of respondents that the suit was not maintainable in law in the absence of the two married daughters of Nandram, one of the mortgagees, was also rejected.

6. Feeling aggrieved, an appeal was carried to the appellate court, which was also dismissed. The first appellate court held that since the two married daughters were not residing with Nandram at the time of his death, they were not necessary parties in the suit for redemption. It was also the finding of the first appellate court that out of the two married daughters of Nandram, Annapurna was not alive. So far as the other daughter was concerned, the appellate court held that at the time of the death of Nandram, she was not residing with him and, therefore, she was also not a necessary party in the suit. It was further found that the married daughters of Nandram were not in possession of the suit premises and that since the suit was not for partition of the suit premises in which the interest of the married daughters could be considered, they were not necessary parties. Finally, it was held that since Ochchalal-D.W.1 had clearly deposed that the partition of

the suit premises was already done and after partition, the suit premises had come to his share and therefore, the married daughters of Nandram had no interest in the same and accordingly, they were not necessary parties.

7. Aggrieved by the decision of the First Appellate court, which affirmed the judgment of the Trial Court, the respondents preferred a second appeal in the High Court. The High Court, as noted herein earlier, had set aside the concurrent judgments of the courts below and held that the suit was bad and liable to be dismissed because the two married daughters of Nandram, who were necessary parties to the suit for redemption, had not been made parties. However, the findings of the courts below to the extent that the two married daughters were not necessary parties on the death of Nandram, one of the mortgagees, for the reasons that at the time of his death, they were neither living with him nor were in occupation of the suit premises and that one of the daughters viz., Annapurna was already dead, were not considered by the High Court. Therefore, so far as the merits of the second appeal were concerned, the High Court had not considered the same and allowed the second appeal on the ground of non-joinder of necessary parties. On the question of theory of substantial representation of the two married daughters of Late Nandram by his two sons, it was held that the same would not salvage the case of the plaintiffs/appellants in the facts and circumstances of the case. It is this judgment of the High Court, which is impugned in this appeal.

8. As noted herein earlier, the second question, which needs to be looked into and decided in this appeal is whether the two married daughters of Nandram viz., Annapurna and Pyaribai were necessary parties to the suit for redemption of mortgage, that is to say whether in their absence, the suit was maintainable in law. The High Court in the impugned judgment had relied on Section 19 of the Hindu Succession Act, 1956 and held that since the two sons and the two married daughters of Late Nandram had succeeded to his estate as tenants-in-common and not as joint tenants, the suit was not maintainable in law in the absence of the two married daughters. In support of its conclusion that the suit was not maintainable in the absence of the two married daughters, reliance was placed by the High Court on the following cases: -

(a) *Girdhar Parashram Kirad Vs. Firm Motilal Champalal, Owners, Hiralal Champalal and others* [AIR 1941 Nagpur 5] (DB)

(b) *Ghanaram and others Vs. Balbhadra Sai and other* [AIR 1938 Nagpur 32]

(c) *Sunitibala Debi Vs. Dhara Sundari Debi and another* [AIR 1919 PC 24]

(d) *Rudra Singh Vs. Jangi Singh and other* [AIR 1915 Oudh 29]

(e) *Saeed-ud-din Khan Vs. Hiralal* [1914 24 IC 25]

Accordingly, the High Court had negatived the contention of the present appellants that the doctrine of substantial representation would come to their aid in the facts and circumstances of the case and held that the defendants/respondents did not represent the interest of the two married daughters and therefore, in their absence, the respondents could not have given a valid discharge to the appellants. Another ground on which the High Court had set aside the judgments of the courts below was that since the objection as to non-joinder was taken at the earliest opportunity by the respondents and the appellants without rectifying the said defect had proceeded with the hearing of the said suit, the question of making good the defect, which was fatal, could not be corrected at the second appellate stage. It was also held by the High Court that if the appellants were afforded an opportunity of rectifying the defect as to the non-joinder of parties at that belated stage, the suit must fail on the ground of limitation. Reliance in this regard was placed by the High Court in the case of *Kanakarathanammal Vs. Loganatha Mudaliar and another* [AIR 1965 SC 271].

9. Keeping the aforesaid findings of the High Court as well as the courts below in mind, let us now examine whether the High Court was justified in dismissing the suit of the plaintiffs/appellants at the second appellate stage on the ground of non-joinder of necessary parties when, admittedly, the two sons of the deceased mortgagee, who were also mortgagees in respect of the suit premises, were already representing the estate of the deceased mortgagee. The High Court, as noted herein earlier, held that the two married daughters of Nandram, one of the mortgagees, were necessary parties in the suit for redemption of mortgage and in their absence, the suit was not maintainable in law. We are unable to endorse the views expressed by the High Court. It is true that in a suit for redemption of mortgage, all the heirs and legal representatives of the deceased mortgagee are necessary parties but, in the facts and circumstances of the present case, we do not find any reason to agree that in the absence of the two married daughters, the suit could not be maintainable in law, for at least two reasons: -

i) It was the finding of the first appellate court that at the time of filing of the suit for redemption, one of the mortgagees viz., Nandram was already dead. A finding was also made that one of the married daughters viz., Annapurna was dead. If this finding is accepted, then Annapurna cannot be said to be a necessary party at the time of filing of the suit. So far as the other married daughter viz., Pyaribai is concerned, the finding of the appellate court was to the effect that she was not in occupation of the suit premises nor was she staying with the mortgagee viz., Nandram at the time of his death. Again, if this finding is also accepted, we are not in a position to hold that the suit could not be held to be not maintainable in law in the absence of the two married daughters.

ii) Even assuming that the two married daughters of Nandram

were necessary parties, then also, we must hold that the interest of the two married daughters in the estate of Nandram was sufficiently represented by their two brothers viz., Manaklal and Motilal. In the case of *N.K. Mohd. Sulaiman Sahib Vs. N.C. Mohd. Ismail Saheb and others* [AIR 1966 SC 792], this court in paragraph 14 observed as follows: -

"14. Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognized exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion. "(Emphasis supplied)

From a bare reading of the aforesaid observation of this court in the abovementioned decision, it is clear that ordinarily the court does not regard a decree binding upon a person who was not impleaded in the action. While making this observation, this court culled out some important exceptions: -

(i) Where by the personal law governing the absent heir, the heir impleaded represents his interest in the estate of the deceased, the decree would be binding on all the persons interested in the estate.

(ii) If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will

ordinarily be held binding upon all persons interested in the estate.

(iii) The court will also investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. Therefore, in the absence of fraud, collusion or other similar grounds, which taint the decree, a decree passed against the heirs impleaded binds the other heirs as well even though the other persons interested are not brought on record.

10. We find no difficulty in following the principle laid down by this court in the aforesaid decision. The two sons viz., Manaklal and Motilal, who were also the original mortgagees along with Nandram, being the sons of Nandram, duly represented the estate of the deceased. It was not the case of the defendants/ respondents either in the written statement or in evidence that the two married daughters were not made parties collusively or fraudulently. The suit filed by the appellants only against the two sons of Late Nandram and their sons was not out of fraud or collusion between them. It is also clear from the record that the two sons of Nandram seriously contested the suit and also the appeal filed against the judgment of the trial court before the first appellate court and finally the second appeal in the High Court. Therefore, by no stretch of imagination, it can be said that the suit was filed by the plaintiffs/appellants in collusion or fraud with the two sons of Nandram. Therefore, in the absence of such a defence, it must be held that the estate of Late Nandram, one of the mortgagees, was sufficiently and in a bona fide manner represented by Manaklal and Motilal and there was no fraud or collusion between them and the plaintiffs/appellants and accordingly, the decree that would be passed against Manaklal and Motilal as heirs and legal representatives of Late Nandram also binds the estate even though the two married daughters, who may be interested in the estate, were not brought on record. This view is also supported by the decision of this court in *Surayya Begum (Mst) Vs. Mohd. Usman and others* [(1991) 3 SCC 114]. In that case, this court in paragraph 9 has observed as follows: -

> "..This of course, is subject to the essential condition that the interest of a person concerned has really been represented by the others; in other words, his interest has been looked after in a bona fide manner. If there be any clash of interests between the person concerned and his assumed representative or if the latter due to collusion or for any other reason, mala fide neglects to defend the case, he cannot be considered to be a representative.."

11. In view of our discussions made hereinabove and following the principles laid down in the aforesaid two decisions of this court, we are, therefore, of the view that the two sons had sufficiently and in a bona fide manner represented the estate of the deceased Nandram and therefore, the suit could not be dismissed on that ground. It is true that the objection as to maintainability of the suit in the absence of the two married daughters was taken in the suit itself but we should

not forget that in view of the findings arrived at by the trial court as well as by the appellate court, the suit of the appellants was decreed which was affirmed at the first appellate stage. In view of the discussions made hereinabove that the two sons of Late Nandram had substantially represented the estate of the deceased which binds the married daughters of Late Nandram, it is not necessary for us to go into the question of limitation if the daughters are now allowed to be impleaded in the suit. Accordingly, it is not necessary for us to deal with the decision of this court in *Kanakarathanammal Vs. Loganatha Mudaliar and another* [AIR 1965 SC 271] in the facts and circumstances of the case and in view of the discussions made hereinabove.

12. For the reasons aforesaid, we are, therefore, of the view that the High Court had failed at the second appellate stage by dismissing the suit of the plaintiffs/ appellants on the ground of non-joinder of parties because, in our view, the two sons of Late Nandram duly, substantially and in a bona fide manner represented the interest in the estate, if there be any, of the two married daughters, in the absence of any case made out of fraud or collusion between the plaintiffs/appellants and the two sons of Late Nandram. The defendants/respondents all throughout denied the claim of the plaintiffs/appellants made in the suit and contended, inter alia, that the suit premises was sold to them and it was not a case of mortgage. In fact, a case of adverse possession was made out by them i.e. it was contended that the defendants/respondents had acquired title to the suit premises by virtue of adverse possession. That apart, from the findings arrived at by the appellate court, as noted herein earlier, which were not challenged before us by the learned counsel for the respondents, it is clear that i) one of the daughters viz., Annapurna was already dead; ii) the other daughter viz., Pyaribai had no interest in the suit premises as she was not residing with Late Nandram at the time of his death and iii) reliance was placed on the deposition of D.W.1-Ochanlal who deposed that there was a partition of the suit premises which fell in his share and therefore, it was concluded that the two married daughters were not necessary parties. That being the concurrent findings of fact arrived at by the courts below, it was not open to the High Court at the second appellate stage to hold that the suit was not maintainable in law as the two married daughters of Nandram were not made parties to the suit for redemption.

13. Before we conclude, we may note that while allowing the second appeal, the High Court had not considered the same on merits but in view of the stand taken by the learned counsel for the respondents before us, we do not find any reason to upset the findings of the courts below on merits viz., the suit premises was mortgaged with the respondents at a sum of Rs. 300/- and therefore, the appellants were entitled to a decree in the suit for redemption. Since, this finding was not challenged before us by the learned counsel for the respondents, it is not necessary for us to remit the case back to the High Court for a decision on merits. Accordingly, the appeal is bound to succeed and is, therefore, allowed. The

judgment and decree of the High Court is set aside and that of the courts below are restored. There will be no order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 656

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta

21 January, 2008*

R.K. KATHAL — Appellant

Vs.

REGISTRAR, TRADE UNION & ors. — Respondents

A. Constitution of India, Article 226 - *Locus Standi* - Member of Trade Union has *locus standi* to invoke jurisdiction of High Court under Article 226 when there is an interdiction in an election process.

In our considered opinion, the member of the Trade Union is a person aggrieved when there is an interdiction in an election process. Whether the election process is right or wrong is another matter. What is relevant is the intervention or interdiction. Thus, we have no hesitation in holding that the petitioner being a member of the union, has the *locus standi* to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. [Para 12]

B. Trade Unions Act (16 of 1926) - Section 23-J - Power of Registrar of Trade Unions - Registrar has no jurisdiction to entertain election dispute. (Para 20)

C. Trade Unions Act (16 of 1926), Section 23-J - Power of Registrar of Trade Unions to stay election - Registrar, Trade Unions does not have powers of Court - In absence of any express provision Election Tribunal does not have any power to grant temporary injunction - Registrar, Trade Unions could not have encroached upon an area and passed an order of stay relating to election. (Para 26)

Cases referred :

1991 LLN 506, 1995 I LLN 1079, AIR 1962 SC 527, 1997 JLJ 184, AIR 2004 SC 3992, AIR 1969 SC 430, AIR 2000 Gauhati 101, 1995 AIHC 2588 (P&H) (DB)

A.K. Mishra & D.K. Bohre, for the appellant

Samdarshi Tiwari, G.A. for the respondent No.1

S.K. Rao & Shailendra Pandey, for the respondent No.2

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–The substantiality and sustainability of the order dated 13.11.2007 passed by the learned single Judge in Writ Petition No.6124/2007 is in question in this intra-court appeal preferred under Section 2 of the M.P.Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

*W.A. No. 1895/2007 (Jabalpur)

2. The essential facts which are imperative to be adumbrated are that the petitioner-appellant invoked the extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India for issue of a writ of certiorari for quashment of the order dated 8.5.2007 passed by the Registrar, Trade Union, M.P., the first respondent herein. In the writ petition it was set forth that the workmen employed in the State Bank of India posted at various branches in the undivided State of Madhya Pradesh formed a trade union called SBI Workmen Union Bhopal Circle, Bhopal which is registered under the provisions of the Trade Unions Act, 1926 (for short 'the Act'). The Union is affiliated to the All India State Bank of India Staff Federation (for short 'the Federation') which is also a registered trade union and the apex union for the employees. The union has its constitution and bye-laws and as per the same, the main executive body has been vested with the powers to govern and control the functions of the union. As per the constitution of the union, the Federation has the right and authority to adjudicate all disputes of the members affiliated to the union. The petitioner is a member of the union and, as pleaded by him, the last election was held in May, 2002 and the term of the office bearer expired in May, 2005. There was some dispute as regards the election which led to filing of Writ Petition No.2665/02 and an interim order was passed directing not to hold the election. Later on by the order dated 18.10.05, a direction was issued in the aforesaid writ petition to the authority empowered under the law to take necessary steps and hold the election in accordance with law. Despite the aforesaid directions, the respondent No.2 did not hold the election for the post of General Secretary of the Union though he was obliged to do so. As the second respondent did not hold the election, out of 65 office bearers of the central committee, 52 office bearer convened a meeting to terminate the co-option of the said respondent as General Secretary under clause 13.2.7 as he was not directly elected General Secretary. The meeting was held on the date fixed and on that day, a unanimous resolution was passed to terminate the co-option of the second respondent, and one Ramendra Nath Hore was co-opted as General Secretary. The option in that regard was sent to the Federation as per Annexure P-3 to the writ petition dated 26.12.06. Coming to know about the aforesaid situation, the second respondent created documents purported to the effect that the meeting of the working and Central Committee was allegedly held on 20th and 25th January, 2006. The notices of the aforesaid meeting were neither issued or circulated amongst the members. There was no quorum to hold the meeting. However, the respondent No.2 declared the election, framed election rules and suspended four office bearers from primary membership and appointed the Registrar, Trade Unions as Chairman of the Central Election Committee. Various asseverations were put forth how illegalities were committed by the second respondent to aid and assist his associates to win the election. With the connivance and collusion with the Registrar, Trade Unions, the entire process of election was manipulated and all democratic norms were thrown to the wind. It was asserted that the respondent No.2 suspended one Pankaj Saxena from the post of State

Secretary (Chhattisgarh) on 20.12.06 and thereafter he was also suspended from primary membership on 25.12.06 though under clause 11.6 of the constitution, the Central Committee alone could suspend the primary membership of a member. As there was immense illegality in holding of election the Federation took cognizance of the dispute and called a meeting in Mumbai and it was resolved that they would abide by the decision of the Federation as regards the circle election. The said resolution dated 30.1.2007 has been brought on record as Annexure P-8 to the writ petition. Despite the aforesaid decision no action was taken by the respondent No.2 to implement the same.

3. The Federation was intimated about the inaction and eventually the Federation issued a letter dated 5.2.2007 to the second respondent requiring him to confirm the compliance of the resolution dated 30.1.2007. The respondent No.2 pretended to act as per the directions of the Federation on one hand and on the other hand managed the Registrar, Trade Unions that the decision could not be implemented inasmuch as the Bank had withdrawn all the infrastructure support and allowed the election to take place in the bank premises and hence, the election took place at a different place the information of which was not given to the majority of members which entailed in non-participation of the members in the election. In this manner, as set forth, the second respondent succeeded in continuing in the office despite the majority having not participated in the election. Because of this situation, the Federation advised majority of the members of Central Committee to take proper decision and accordingly, a decision was taken by the Central Committee on 4.3.2007 to hold fresh and fair election. A notification was issued on 21.3.2007 and the election was scheduled to be held on 12.5.07. At that juncture the second respondent submitted an application before the Registrar, Trade Unions contending that second election is impermissible. The Registrar, Trade Unions entertained the complaint put forth by the respondent No.2 and issued notices fixing the date of hearing on 8.5.07 and on that day, without giving any opportunity passed an order directing stay of holding of the election.

4. Questioning the legal propriety of the said order, it was contended before the learned single Judge that the Registrar, Trade Unions had no power to pass any order relating to election of trade union. A reference was made to Section 28-J (M.P. Amendment) to highlight that the dispute may be raised and the same could be referred to Industrial Court in such manner as may be prescribed but the Registrar has no jurisdiction to pass the order of present nature.

5. On behalf of the respondent No.2, it was contended in oppugnation that bye-laws and rules of the Union have been made applicable to the State of Madhya Pradesh w.e.f. 29.6.03. It was submitted that election was held in accordance with the said rules and 74 office bearers of the Central Committee of the Union were declared elected. The names of the elected office bearers were submitted to the Registrar for registering their names as lawful office bearers of the Union. The Registrar, Trade Union before registering their names issued notices to all

concerned and heard the objections of certain members including the petitioner and passed the order dated 11.5.06 as contained in Annexure R-6 to the writ petition. It was also set forth that the Registrar, Trade Unions also held that the election held on 24.3.07 and result declared on 6.4.07 to be valid and lawful. It was also highlighted that the petitioner had lost the election to the post of Deputy General Secretary of the Union and as he lost the election, in order to form a parallel body under the same registration he issued certain notification illegally by giving them ante-date and issued election programme on 21.3.07 in the name of unauthorised person, R.N. Bohidar, who is neither member of the union nor was he elected as member of the Central Committee. The petitioner also declared the election of the parallel body which compelled the respondent No.2 to file an application before the Registrar, Trade Unions who on consideration of the facts and circumstances of the case passed the interim order.

6. The learned Single Judge addressed himself with regard to the rival contentions raised at the Bar and came to hold that if the petitioner has any grievance with regard to the conduct of the election or the result thereof, he could have filed appropriate proceedings before the Election Tribunal constituted under Clause 2.10 of the State Bank of India Workmen Union, Bhopal Circle but he chose not to do so; that the Registrar of Trade Unions had accepted the newly elected Trade Union after deciding the objections raised by the petitioner and registered the same under the provisions of the Act and issued a certificate of registration; that as the petitioner's objections were rejected by the Registrar, Trade Unions the remedy available to the petitioner was to assail the election by way of filing a dispute under Section 28-J of the Act (M.P. Amendment) before the Industrial Court but the petitioner did not avail the said remedy; that the petitioner himself had contested the election and lost it and had filed objections before the Registrar when the question of issue of certificate under Sections 8 of the Act was taken up by the first respondent; that the aforesaid facts have not been mentioned in the writ petition and hence, there had been suppression of facts; that the non-applicants have not assailed the impugned order and the petitioner was not a party before the Registrar, Trade Unions and, therefore, he has no locus standi to assail the order in question; that the petitioner could have filed an application for intervention before the Registrar, Trade Unions and prayed for vacation of the order of stay; that the petitioner has not been able to demonstrate under what provisions of law the third respondent was authorised to issue notification of election which is the prerogative of the General Secretary of the Union; that the petitioner has not been able to demonstrate that the Secretary of the All India State Bank of India Staff Federation has any authority under the Constitution, bye-laws and election rules of the Union to issue the notification; that it is the choice of the Union to get itself affiliated with the Federation and it is not compulsory to be affiliated with the Federation inasmuch as the Union is an independent body; that the Federation has no authority to hold election of the Union as that is de hors the rules relating to the Union; and that even if the Registrar, Trade Unions has no jurisdiction to

pass the order impugned justice has been done and hence, it does not warrant any interference in exercise of extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India inasmuch as if justice becomes the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

7. We have heard Mr. A.K. Mishra, learned Senior Counsel with Mrs. D.K. Bohre for the petitioner, Mr. Samdarshi Tiwari, learned Govt. Advocate for the respondent No.1 and Mr. S.K. Rao, learned Senior Counsel with Mr. Shailendra Pandey for the respondent No.2.

8. Mr. Ajay Mishra,learned Senior Counsel appearing for the petitioner has raised the following contentions:

(a) The learned Single Judge has fallen into grave error by addressing himself to the merits of the case whereas the contention was advanced with regard to the jurisdiction of the first respondent to pass an order of stay.

(b) The learned Single Judge has not appreciated the averments made in the petition and has fallaciously expressed the opinion that there has been suppression of facts.

(c) The fundamental difference between registration of a Trade Union and the dispute relating to status of office bearers have not been appositely appreciated by the learned Single Judge and that has led to the erroneous conclusion which warrants interference in the present appeal.

(d) The learned Single Judge has fallen into error by expressing the opinion that the petitioner has no locus standi to file the writ petition whereas there have been clear-cut assertions in the petition that he is grieved by the order of stay being a member of the union and when the order is totally without jurisdiction the same could have been challenged by him before this Court invoking the extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

(e) The learned Single Judge though has referred to Section 28-J which is an amendment as far as the State of M.P. is concerned, yet has put the onus on the petitioner and not dealt with the issue of jurisdiction which is the centripodal issue to the controversy.

(f) The learned Single Judge has flawed by coming to hold that even assuming there is no jurisdiction in passing the order justice has been done by referring to certain citations which are inapplicable and further the matter related to the lack of inherent jurisdiction and there was interference in the matter of an election

dispute this Court should not have expressed an opinion that justice has been done.

(g) The learned Single Judge has exceeded the jurisdiction by expressing the opinion that the Federation has no role and the Union is under no obligation to affiliate itself with the Federation inasmuch as neither the Union nor the Federation has been arrayed as a party to the writ petition.

9. Mr. Samdarshi Tiwari, learned Govt. Advocate appearing for the respondent No.1 supported the order passed by the respondent No.1.

10. Mr. S.K. Rao, learned Senior Counsel appearing for the respondent No.2 resisting the submissions put forth by Mr. A.K. Mishra, learned Senior Counsel for the petitioner has proponed as under:

(i) The order of the learned Single Judge by no stretch of imagination can be faulted inasmuch as he has rightly held that the petitioner has no locus standi and further has not invoked the extraordinary jurisdiction of this Court in clean hands.

(ii) The analysis of facts made by the learned Single Judge with regard to status of the petitioner and that of the second respondent is based on facts which have been properly appreciated and hence, the order is invulnerable.

(iii) The stand and stance that the Registrar of Trade Unions has no jurisdiction to pass the interlocutory order of stay is contrary to the Scheme of the Act since the said authority is vested with the powers to deal with Unions and hence, has the authority to pass an order relating to stay of election.

(iv) The learned Single Judge has correctly held that justice has been done and, therefore, even if there had been some jurisdictional error the same did not warrant any interference in exercise of inherent jurisdiction of this Court.

(v) The Writ Court has flawlessly dealt with every facet of the case relating to genesis of the cavil; the suppression of facts by the petitioner and his locus standi; the manner in which the election was held; the role of Federation under the rules and regulations; the concept of affiliation; the impropriety shown by the petitioner in the matter of election; and when on appreciation of cumulative facts the order has been passed there is no justification for interference in the writ appeal.

11. To appreciate the rivalised submissions raised at the Bar, we have bestowed our anxious consideration and carefully scrutinised the order passed by the learned Single Judge and the order that was impugned before him. An English translation of the order passed by the Registrar, Trade Unions on 8.5.2007 reads as under:

"Applicant Shri Pramod Namdeo is present. Respondent No.2 Shri Arun Bhagolival is present. FAX dated 7.5.07 from Respondent No.1 Shri R.M. Bohidar, Chairman, Central Election Committee has been received.

Application from Shri Sanjeev Chhatwal is received and he appeared and submitted that the instant election conducted by the Chairman, Central Election Committee has created a situation of chaos. There is no responsible officer available at Bhopal to consider and solve the discrepancies which have arisen in the election so that the process of election could proceed. Therefore, the validity of the election to be held on 12.5.07 should be determined so that the members can be acquainted with the real position. It was further requested that the said position should be clear on 10.5.07.

Shri R.M. Bohidar has requested by FAX dated 7.5.07 that as he is busy in other works the date may be fixed after 18th May.

Reply of the respondents is necessary as Shri R.M. Bohidar, the Chairman, Central Committee and Shri Arun Bhagoli had issued the circular dated 5.5.07 by which the decisions taken on 4.3.2007 were circulated amongst the members. It is necessary to know their stand.

It was resolved in the meeting dated 4.3.07 that the election to be held on 12.5.07 is based on the election declared by the All India State Bank of India Staff Federation. The aforesaid meeting was convened under the direction of Deputy General Secretary, Shri Arun Bhagoliwal. There is no provision in the constitution of State Bank of India Workmen Union that the Federation can declare the election and also the meeting dated 4.3.07 in which the decision of election was taken was not called by the General Secretary as per the constitution. Hence, the election declared to be held on 12.5.07 which is being conducted by Shri R.M. Bohidar, the Chairman, Central Election Committee is being stayed (postponed).

The next date is fixed on 21.5.07 at 2:30 p.m. for reply of both the respondents."

12. The pivotal issue that emanates for consideration is whether such an order could have been passed by the Registrar, Trade Unions. The learned Single Judge, as has been indicted hereinbefore, has not dealt with the same. The learned Single Judge, as is perceptible, has gone by the factum of *locus standi*, suppression of facts and how the election had taken place. As far as locus standi is concerned, the petitioner, though was not a party before the Registrar, Trade Unions, there are averments in the petition which have not been disputed. He is a member of

the Trade Union. Whether the election had been conducted in a proper manner or not or whether there had been an effort or endeavour to have a parallel body is totally immaterial to the issue in question. In our considered opinion, the member of the Trade Union is a person aggrieved when there is an interdiction in an election process. Whether the election process is right or wrong is another matter. What is relevant is the intervention or interdiction. Thus, we have no hesitation in holding that the petitioner being a member of the union, has the locus standi to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

13. As far as suppression of facts are concerned, when properly viewed, it can never be treated to be suppression of facts inasmuch as the petitioner had raised a pure question of law while narrating the facts. What had happened in the interregnum period between the two contestants was not necessary to be stated in the writ petition and, therefore, it cannot be said that there has been suppression of facts. What was raised before this Court is that the Registrar, Trade Unions has interfered in the election process by granting stay, though the said authority does not have the jurisdiction to entertain a lis of this nature. In this factual backdrop how the election had been held, how the office bearers were elected, how there had been an intervention by the Federation and such other ancillary facts, we are disposed to think, have no relevance. Hence, we are of the considered opinion that no exception could have been to the same while adjudicating the writ petition.

14. Be it placed on record, the learned Single Judge has adverted to the merits how the election has been held and how office bearers have come into office. He has also expressed the opinion that the Union is under no obligation to get itself affiliated to the Federation and the Federation has no role to intervene. That was neither the case of the appellant nor the respondent and, in fact, such an adjudication was not necessary. What was required to be adjudicated was whether the Registrar, Trade Unions has the statutory authority to pass an order of stay.

15. To answer the aforesaid question, it is seemly to scan the anatomy of the Trade Unions Act, 1926 [for brevity 'the Act']. The aforesaid Act was brought into existence to provide for the registration of Trade Unions and in certain respects to define the law in that regard. Section 2 is the dictionary clause. Section 2(g) defines 'trade disputes'. Section 2(h) defines 'Trade Union". Chapter II of the Act deals with 'registration of Trade Union'. Section 4 of the Act envisages 'mode of registration'. Section 5 provides for application for registration. Section 6 stipulates that a union shall not be entitled to registration under this Act, unless the executive thereof is constituted in accordance with the provisions of this Act and the rules thereof. Section 8 empowers the Registrar of Trade Unions to register the Trade Union by entering it in a register. Section 9 empowers the Registrar to issue a certificate of registration in the prescribed form which shall be conclusive evidence that the Trade Union has been duly registered under the Act. Section 9(a) provides for minimum requirement about the membership of a

Trade Union. Section 10 authorises the Registrar to cancel the registration certificate on certain grounds.

16. Chapter III of the Act deals with rights and liabilities of a registered Trade Union. Section 21(a) engrafts the disqualification of office bearers of Trade Unions. Section 22 lays down the proportion of office-bearers to be connected with the industry. Section 23 deals with change of name of a registered Trade Union and Section 24 provides for amalgamation of Trade Unions. Section 25 deals with procedure for change of name or amalgamation and Section 26 stipulates the facts of change of name and amalgamation. Section 27 of the Act deals with dissolution of the registered Trade Unions. Section 28 of the Act provides that returns shall be sent annually to the Registrar on or before such date as may be prescribed. The said provision also requires the Trade Unions to do certain acts with regard to the returns.

17. Apart from the aforesaid it is imperative to refer to certain amendments that have been brought in by the State of M.P.. Section 28-I refers to other powers of the Registrar. The said provision reads as under:

> "28-I. Other powers of Registrar.- (1) For the purposes of discharging his duties generally under the Act and verifying the correctness of the annual returns submitted under Section 28, the Registrar shall have power to inspect the account books, the list of members and the minute book of a registered trade union:
>
> Provided that an inspection made under this sub-section shall, as far as practicable, be done at the office of the registered trade union or at a place within a reasonable distance therefrom and after giving reasonable notice.
>
> (2) For the purposes of discharging his duties under Chapter III-A, the Registrar shall, in addition to the powers mentioned in sub-section (1), have -
>
> (a) the following powers of a Court of civil jurisdiction under the Code of Civil Procedure, 1908 (V of 1908), namely :
>
> (i) power to require or accept the proof of facts by affidavits;
>
> (ii) power to summon and enforce the attendance of any person and to examine him on oath;
>
> (iii) power to compel the production of documents; and
>
> (iv) power to issue commission for the examination of witnesses;
>
> (b) power to enter and inspect any place used by the registered Trade Union as officer after giving reasonable notice; and
>
> (c) such other powers as may be prescribed."

18. Section 28-J deals with dispute as to officer of registered Trade Union. The said provision is reproduced hereunder:

> "28-J. Dispute as to officer of registered Trade Union .-
>
> (1) If there is any dispute as to who is the lawful officer of a registered trade union, any person claiming to be such an officer or the Registrar may refer the dispute to the Industrial Court in such manner as may be prescribed.
>
> (2) On a reference being made under sub-section (1), the Industrial Court shall, after hearing the parties to such dispute and recording such evidence as it may consider necessary, decide the dispute and declare who is the lawful officer. The decision of the Industrial Court shall be final and shall not be called in question in any Court of law.
>
> (3) No Civil Court shall entertain any suit or other proceedings in respect of any dispute which has been referred to the Industrial Court under sub-section (1) and is pending before such Court and if any such suit or proceeding is pending in a Civil Court on the date of the reference the Civil Court shall on receipt of a notice from the Industrial Court cease to exercise jurisdiction in respect thereof and shall forthwith transfer the record of such suit or proceeding to the Industrial Court." - Vide M.P. Act 28 of 1960, S.5."

19. It is worth-noting certain amendments have been incorporated in Section 28-J which basically relate to the procedural spectrum but there has been no essential change.

20. On a bare reading of the said provision it is clear as noon day, if there is any dispute as to the lawful officer of the registered Trade Union any person claiming to be such officer or the Registrar may refer the dispute to the Industrial Court in such a manner as may be prescribed. On a reference being made, the Industrial Court shall, after hearing the parties to such dispute and recording such evidence as it may consider necessary, decide the dispute and declare who is the lawful officer. The decision of the Industrial Court shall be final and shall not be called in question in any Court of law. Civil suit is barred in respect of any dispute which has been referred to the Industrial Court under sub-section (1) of Section 28-J. In the case at hand, the dispute is writ large with regard to the office bearers. The same, in our considered opinion, is within the ambit and sweep of Section 28-J of the Act. None of the provisions of the Act empowers the Registrar, Trade Unions to deal with an election dispute. The power conferred on him pertains to registration of Trade Unions, issue of certificate and cancellation of such a certificate. The moment a cavil is raised or controversy is put forth with regard to the status of office-bearers the Registrar may refer the dispute or the office-

bearers can raise a dispute before the Industrial Court, whose decision is final. Power of the Civil court has been ousted. Needless to state, the same would be subject to judicial review of this Court.

21. Regard being had to the scheme of the things we may refer with profit to a Division Bench decision rendered by the Gauhati High Court in *Ratan Kumar Dey and others vs. Union of India and others*, 1991 LLN 506 wherein it has been held as under:

> "12. Besides as said before in the dispute between the rival office-bearers of the Union, the Registrar of Trade Unions has no authority or power under S. 28 of the Trade Unions Act, 1926, to decide the dispute, even though he has power to make his enquiries and come to his own conclusion in the matter for the purposes of maintenance of record of office-bearers of the union."

22. We may also fruitfully refer to a Division Bench decision of the Patna High Court rendered in *Bokaro Steel Workers Union and another vs. State of Bihar and others*, 1995 I LLN 1079 wherein Aftab Alam, J. (as his Lordship then was) speaking for the Court has expressed the view as under:

> "27. On an examination and analysis of the Patna decision Mukund Ram Tanti case (vide supra), the Allahabad, Andhra and the Madras decisions, I come to the following conclusions:
>
> (i) In a dispute between two rival factions claiming to be the office-bearers of a trade union, it is open to the Registrar to hold an enquiry for the purpose of maintaining and updating the registers required to be maintained under S. 8 of the Act.
>
> (ii) His decision in this regard shall neither confer any right on any person or group of persons nor divest any person or group of persons of any lawful rights.
>
> (iii) Consequently the Registrar has no authority or power to issue any direction asking/advising the Labour Department of the Government or the employer to recognise and treat any particular person or group of persons as the duly elected office-bearers of the union in dealing with that union.
>
> (iv) The Registrar, Trade Unions, has no authority or power to direct the holding of election of the office-bearers of a union under his own supervision or under the supervision of his nominee.
>
> (v) In the absence of any provisions in the Trade Unions Act, 1926 any dispute of this kind can only be resolved by means of a suit filed before a civil Court.
>
> (vi) The adjudication in a suit at least in this State is normally a slow and time consuming process and does not constitute a wholly satisfactory remedy for resolving the dispute.

(vii) The Legislature will, therefore, be well advised to address itself to this lacuna in the Trade Unions Act and to take steps to remedy it which has been long over due."

23. At this juncture, it is worth-noting that the Division Bench of the Patna High Court had expressed its concern with regard to the lacuna in the statute. Section 28-J, the amendment brought by the State of M.P., if we permit ourselves to say so, in fact, fills up the lacuna. The Registrar, Trade Unions is a creature of the Statute. He has to function within the parameters of the statute and cannot travel beyond it. He cannot transgress the bounds and allow himself to roam in a fanciful world. It should be kept in mind that jurisdiction is the basic facet of law. As is patent the Registrar of Trade Unions has passed an order of stay, as per Annexure-P/10. An authority like the Registrar, Trade Unions does not have the powers of a Court. It is well settled in law that a Court can issue an order of injunction invoking inherent jurisdiction in cases not covered under Order 39 of the Code of Civil Procedure. It has been so held in *Manohar Lal Chopra vs. Rajbahadur Hiralal,* AIR 1962 SC 527 and *Ram Krishna Parashar vs. Chironji Lal Vaishya and others*, 1977 JLJ 184. In *Vareed Jacob vs. Sosamma Geevarghese and others,* AIR 2004 SC 3992, their Lordships have held that it is only in cases where circumstances do not fall under any of the rules prescribed then the Court can invoke its inherent powers. Order of injunction is mandated to meet the ends of justice. That apart, the inherent jurisdiction of a Court has to be exercised in exceptional and rare circumstances.

24. While dealing with the aforesaid facet, we think it apt to refer to a three-Judge Bench decision rendered in *Income-tax Officer, Cannanore vs. M.K. Mohammed Kunhi,* AIR 1969 SC 430 wherein the Apex Court has held as under:

"4.....It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Southland Statutory Construction, Third Edition, Articles 5401 and 5402). The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective....."

xxx xxx

Their Lordships again proceeded to state as under:

"6. It is well known that an Income tax Appellate Tribunal is not a court but it exercises judicial powers. The Tribunal's powers in dealing with appeals are of the widest amplitude and have in some cases been held similar to and identical with the powers of an appellate court under the Civil Procedure Code....."

xxx xxx

Thereafter their Lordships eventually referred many aspects and expressed the opinion as under:

> "8. Section 255 (5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section 220 (6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory."

25. We have referred to the said decision only to highlight that the Apex Court has expressed the opinion that the appellate authority when vested with the power of appeal can pass such orders which are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying the proceeding.

26. In the case at hand, the Registrar of Trade Unions, as has been indicated hereinbefore, has not been conferred with any power whatsoever to deal with the election disputes. The power conferred is absolutely limited and restricted and relates to a different field. He could not have assumed any jurisdiction to entertain the lis when the lis is not entertainable. The question of passing any ancillary order does not arise when final relief cannot be granted by the authority concerned. In the absence of jurisdiction authority to pass an order of stay or injunction is an anathema to law. It is an anathema to the basic tenet of justice to pass an order of stay or to issue an order of injunction. In this context, we may also note with profit that election tribunal has no inherent power of a Civil Court. In the absence of any express provision under the related Act and the rules, the Election Tribunal does not have any jurisdiction under Order 39 or Section 151 of the Code of Civil Procedure to grant any temporary injunction or pass an order of stay. This view of ours finds support from the decisions rendered in *Md. Siraj Ahamed vs. the State Election Commission*, AIR 2000 Gauhati 101; *Sukhdev Singh vs. Executive Magistrate, Samana, Dist. Patiala,* 1995 AIHC 2588 (P&H)(DB). Analysis made therein relates to election dispute. An election dispute is of a different nature. It rests on a different bedrock. It has a different contour and character and hence, Courts have laid down that power has to be specifically conferred. In the absence of such conferral of power, the Tribunal cannot pass an order of restraint. Judged from these spectrums, the Registrar, Trade Unions could not

have encroached upon an area and passed an order of stay relating to election. The order is a complete transgression of authority and jurisdiction.

27. In view of the aforesaid premises, the writ appeal is allowed and accordingly, the order of the learned Single Judge is set aside and as a sequitur, the order passed by the Registrar, Trade Unions on 8-5-2007 is quashed. There shall be no order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 669
WRIT APPEAL

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Prakash Shrivastava
7 February, 2008*

SHIV RAJ SINGH & anr. Appellants
Vs.
STATE OF M.P. & ors. Respondents

A. Constitution of India, Article 16 - sorption - Respondent No.3 working as Sub-Engineer in Special Area Development Authority, Singrouli - Transferred in same capacity to Town Improvement Trust, Rewa in year 1987 and on abolition of Town Improvement Trust, Rewa w.e.f. 1994 has continue to work with Municipal Corporation, Rewa - On consideration of relevant fact - Services of respondent No.3 absorbed in Municipal Corporation - Held - Decision of authorities to absorb respondent No. 3 can not be arbitrary and illegal. (Paras 5 & 7)

B. Constitution of India, Article 16 - Seniority - Absorbed Deputationist - Computation of seniority - Services rendered in parent department - Held - Two posts in both departments equivalent - Services rendered in parent department for fixation of seniority are to be counted. (Para 8)

C. Words and Phrases - Executive Instructions - Determination of Seniority - Employees whose services have been taken over by Municipal Corporation - Statutory rules silent - On the basis of executive instructions issued by State Government - As per executive instructions - Seniority shall be determined from initial dates of appointment - If post and pay scale are same in both departments - Seniority of appellants and respondent No.3 has to be determined in accordance with executive instructions. (Para 10)

Cases referred :

AIR 2001 SC 2761, (2003) 5 SCC 604, (2000) 1 SCC 644.

A.P. Singh, for the appellants
Vijay Kumar Shukla, Dy. A. G. for the respondents No.1 & 2,
Rajendra Tiwari, for the respondent No.3.

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*W.A. No. 92/2006 (Jabalpur)

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :--This appeal has been filed under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal), Adhiniyam, 2005, against the common judgment and order dated 28.2.2006 passed by the learned Single Judge in WP No.3422/1997 and WP No.3756/1998.

2. The facts briefly are stated that the appellants were appointed in April 1984 as Sub Engineers in the Town Improvement Trust, Rewa. The respondent No.3 was appointed by order dated 22.2.1984 as Sub Engineer in the Special Area Development Authority, Singrouli. Thereafter the respondent No.3 was transferred to the Town Improvement Trust, Rewa, in the year 1987. With effect from 1.8.1994, the Town Improvement Trust, Rewa, was abolished by a State Act known as Madhya Pradesh Nagar Sudar Nyas (Nirasan) Adhiniyam, 1994. The work of the erst-while Town Improvement Trust, Rewa, was taken over by the Municipal Corporation, Rewa and the appellants and the respondent No.3 continued to work as Sub-Engineers in the Municipal Corporation, Rewa. By order dated 28.6.1995 the services of the respondent No.3 were absorbed in the Municipal Corporation, Rewa, but when representations were filed by the appellants against the absorption of respondent No.3, the State Government cancelled the order dated 28.6.1995 by order dated 17.7.1995. However, the State Government cancelled its order dated 17.7.1995 by order dated 27.7.1998. By the order dated 27.7.1998 therefore the respondent No.3 was to continue as employee of the Municipal Corporation, Rewa. Aggrieved, the appellants filed WP No. 3756/1998 before this Court under Article 226 of the Constitution of India and prayed *inter alia* for quashing the order dated 27.7.1998.

3. Before the learned Single Judge who heard the Writ Petition No.3756/1998, the appellants contended that in case the respondent No.3 was treated as absorbed in the services of the Municipal Corporation, Rewa and his seniority is counted from the date of his initial appointment, the appellants will suffer grave prejudice. The learned Single Judge by the impugned judgment and order dated 28.2.2006 held that the absorption of the respondent No.3 in the services of the Municipal Corporation, Rewa, had attained finality and as such, there is no illegality in his absorption. The learned Single Judge further held in the impugned judgment and order relying on the decision of the Supreme Court in *Tamil Nadu Khadi and Village Industries Board Vs. M.S. Krishnaswamy and others* (AIR 2001 SC 2761) that the seniority of the appellants and the respondent No.3 should be reckoned from their initial dates of appointments and accordingly, he directed the respondents No.1 and 2 draw up a fresh seniority list in the post of Sub Engineers and consequently in the post of Assistant Engineers counting their seniority from the dates of their appointments. Aggrieved by the judgment and order dated 28.2.2006 of the learned Single Judge in WP No.3756/1998, the appellants have filed this appeal.

4. Mr. A.P. Singh, learned counsel appearing for the appellants, submitted that the appellants were appointed as Sub-Engineers in the Town Improvement Trust, Rewa, in April 1984 and the respondent No.3 came on transfer to the Town Improvement Trust, Rewa only in the year 1987 from the Special Area Development Authority, Singrouli, i.e. after about three years the appellants had worked as Sub Engineer in the Town Improvement Trust, Rewa. He further submitted that the absorption of the respondent No.3 in the Municipal Corporation, Rewa, was not legal and proper and was contrary to the established Rules and procedure and in any case, affected the seniority of the appellants and consequently, their promotional prospects. He further submitted that in the event the Court does not interfere with the order of absorption of the respondent No.3, the direction of the learned Single Judge in the impugned judgment and order directing that the seniority of the appellants and the respondent No.3 should be counted from the dates of their initial appointments, should be set aside and instead the seniority of the appellants should be counted from the dates of their appointments in April 1984 in the Town Improvement Trust, Rewa and the seniority of the respondent No.3 should be counted only from the date of his absorption in the Municipal Corporation, Rewa, on 28.6.1995.

5. Mr. Vijay Kumar Shukla, learned counsel appearing for the respondents No.1 & 2 and Mr. Rajendra Tiwari, learned senior counsel appearing for respondent No.3, on the other hand, submitted that the Government order dated 28.6.1995 absorbing the respondent No.3 in the services of the Municipal Corporation, Rewa, was fair and just considering the fact that the respondent No.3 had been working in the Town Improvement Trust, Rewa, since 1987 and on its abolition in the Municipal Corporation, Rewa. Regarding seniority, Mr. Shukla and Mr. Tiwari submitted that the Government after considering all the relevant aspects finally issued an order on 6.1.1999 directing that the seniority of the officers/employees of the Town Improvement Trust and the Special Area Development Authority in the Local Self Department shall be counted in cases where such officers/ employees have not been appointed by the Public Service Commission from their initial dates of appointments, if the post and pay scales are similar in both the Departments. They submitted that the pay scale and the post of Sub Engineers in the Special Area Development Authority, Singrouli, in which the respondent No.3 was initially appointed in February 1984 and Sub-Enigneers in the Town Improvement Trust, Rewa, in which the appellants were working since April 1984, were the same. They further submitted that the respondent No.3 was not transferred from the Special Area Development Authority, Singrouli, to the Town Improvement Trust, Rewa, in the year 1987 on his own request but pursuant to the order passed by the authorities.

6. Mr. Shukla has cited the decision of the Supreme Court in the case of *Bimlesh Tanwar Vs. State of Haryana and others* ({2003} 5 SCC 604) and in the case of *Sub Inspector Rooplal & another Vs. Lt. Governor* ({2000} 1 SCC 644) for the proposition that if the Government servant is holding a particular post is

transferred to the same or an equivalent post in another government department, the period of his service in the post before his transfer has to be taken into consideration in computing his seniority in the transferred post because the transfer cannot wipe out his length of service in the post from which he has been transferred. He submitted that the respondent No.3 was transferred from the Special Area Development Authority, Singrouli, to the Town Improvement Trust, Rewa, in the year 1987 and his services in the Special Area Development Authority, Singrouli from 22.2.1984 and till 1987 will, therefore, have to be counted for the purpose of seniority and cannot be wiped out.

7. It is not disputed that the respondent No.3 had worked in the Town Improvement Trust, Rewa, since 1987 and on abolition of the Town Improvement Trust, Rewa w.e.f. 1.8.1994, has continued to work with the Municipal Corporation, Rewa. If on consideration of these and other relevant facts, the respondents No.1 and 2 have taken a decision to absorb the respondent No.3 in the services of the Municipal Corporation, Rewa, the order for absorption of the respondent No.3 cannot be held to be arbitrary and illegal. We are, thus, of the opinion that the learned Single Judge was right in not interfering with the order of absorption of the respondent No.3 in the services of the Municipal Corporation, Rewa.

8. In *Sub Inspector Rooplal & another Vs. Lt. Governor* (supra), the Supreme Court has held that in law it is necessary that if the previous service of a transferred official is to be counted for seniority in the transferred post then two posts should be equivalent and any rule, regulation and statutory instructions which has the effect of taking the way the service rendered by the deputationist in the parent department while counting the seniority in the integrated cadre would be violative of Articles 14 and 16 of the Constitution of India. In the aforesaid decision, the Supreme Court took a note of its earlier observations in the case of *K. Madhavan V. Union of India* ({1987} 4 SCC 566) that it will be against all rules of service jurisprudence if the Government servant holding a particular post is transferred to the same or an equivalent post in another government department, if the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. It is in accordance with these principles of service jurisprudence with regard to the fixation of seniority that the Government finally took the decision on 6.1.1999 that seniority of the officers/employees of the Town Improvement Trust and Special Area Development Authority in the Local Self Department who have not been appointed by the Public Service Commission shall be counted from their initial dates of appointments if the post and pay scales are similar in both the departments.

9. The post and pay scale of respondent No.3 who was appointed as Sub Engineer in the Special Area Development Authority, Singrouli in February 1984 and the post and pay scale of the appellants who were appointed as Sub Engineer in the Town Improvement Trust, Rewa, were the same. The respondent No.3 was transferred from Special Area Development Authority, Singrouli, to the Town Improvement Trust, Rewa, in the year 1987 and not on his own volition but by

order passed by the competent authority. If the length of service of the respondent No.3 from February 1984 to 1987 in the Special Area Development Authority, Singrouli was to be ignored for the purpose of determining the seniority of respondent No.3 vis a vis the appellants, obviously the right to equality and equal opportunity in the matter of public employment guaranteed under Articles 14 and 16 of the Constitution of India of the respondent No.3 would be violated.

10. Moreover, it has been held in *Bimlesh Tanwar Vs. State of Haryana and others* ({2003} 5 SCC 604) that the seniority of employees working in the Government or other authorities has to be determined on the basis of the statutory rules and where the statutory rules are silent on the basis of the executive or administrative instructions. The statutory rules are silent with regard to determination of seniority of the employees whose services have been taken over by the Municipal Corporation, Rewa and in absence of such statutory rules, the Government has issued executive instruction on 6.1.1999 that the seniority of the officers/employees of the Town Improvement Trust and the Special Area Development Authority in the Local Self Department not appointed by the Public Service Commission will be counted from their initial dates of appointments if the posts and pay scale are the same in both the Departments. Hence, the seniority of the appellants and the respondent No.3 will have to be determined in accordance with the aforesaid executive instructions of the Government issued on 6.1.1999.

11. For the aforesaid reasons, we do not find any merit in the appeal and accordingly dismiss the same subject to the observations in this judgment.

Appeal dismissed.

I.L.R. [2008] M. P., 673
WRIT APPEAL
Before Mr. Justice R.S. Garg & Mr. Justice Prakash Shrivastava
12 February, 2008*

REGIONAL MANAGER & ors. Appellants
Vs.
RAM PRASAD MANDAL Respondent

A. Constitution of India, Articles 311, 226 - Departmental Enquiry - Non supply of documents - Enquiry Officer directed Presenting Officer to supply documents demanded from defence side - Documents not supplied - Held - Enquiry Officer did not reject the application of delinquent officer for production of documents on the ground that they are irrelevant - Direction of enquiry officer not challenged by Deptt. - Non supply of documents vitiated enquiry - Matter remanded back with direction to produce the copies of documents. (Paras 13,15,17)

B. Constitution of India, Articles 311, 226 - Departmental Enquiry - Adjournment - 10 days time sought by delinquent officer on 15-1-1991 on the

*W.A. No. 420/2006 (Jabalpur)

ground that his witnesses are busy in local fairs -- Enquiry Officer in earlier part of order had directed department to produce documents till 13-2-1991 - Enquiry Officer closed the proceedings on 15-1-1991 itself - Held - Once the enquiry officer himself had directed that documents be filed latest by 13-2-1991 heavens were not to fall if the case was adjourned for 10 days to produce witnesses - Learned Single Judge was justified in interfering with inquiry proceedings. (Para 18)

C. **Constitution of India, Articles 311, 226 - Departmental Enquiry** - Witness - Stand of Deptt. that witnesses sought to be examined by delinquent officer were irrelevant - Held - Prejudging the issue in enquiry not permissible. (Para 19)

D. **Constitution of India, Articles 311, 226 - Departmental Enquiry - Rule of Natural Justice** - Once disciplinary authority disagrees with findings recorded by Enquiry Officer it has to issue notice to delinquent officer - It is immaterial that the findings are recorded partly in favour of delinquent officer and partly in favour of department. (Para 20)

E. **Constitution of India, Articles 311, 226 - Regulations 1976, Clause 17 (2) - Departmental Enquiry - Order of Appellate Authority - Reasons** - Appeal dismissed by Appellate Authority without disclosing any reason - Held - Reasons are required to be recorded while passing administrative order except in cases where requirement is dispensed with expressly or by necessary implication. (Paras 24,25)

F. **Constitution of India, Articles 311, 226 - Departmental Enquiry - No Confidence of Deptt. on delinquent officer** - Such submission can be accepted if the enquiry was absolutely correct - The Departmental Authority including Enquiry Officer acted in highhanded or hasty manner - Action taken by department cannot be approved - Appeal dismissed with cost of Rs. 10,000/-. (Paras 31,32)

Cases referred :

(1998) 7 SCC 84, AIR 1990 SC 984, 1995(5) SLR 181 (SC), AIR 1988 SC 117, (2006) 3 SCC 150, (2002) 8 SCC 68, (2002) 3 SCC 443.

Arvind K. Pandey, for the appellants

Akash Choudhary, for the respondent

J U D G M E N T

The appellants, officers of Central Bank of India, being aggrieved by order dated 20th April, 2006 passed by the learned Single Judge of this Court in Writ Petition No. 4079/1994 have filed this appeal submitting interalia that the order passed by the learned Single Judge is illegal, deserves to be interfered with and set aside in the appellate jurisdiction of this Court.

2. It is to be noted that being aggrieved by the order dated 22.2.1993 (Annexure P/1) passed by the Disciplinary Authority dismissing the petitioner from service

and order dated 18.8.1994 (Annexure P/2) whereunder the appeal preferred by the respondent was dismissed, the respondent/employee filed Writ Petition No. 4079/1994. The learned Single Judge after going through the inquiry proceedings came to the conclusion that the conduct of the Inquiry Officer was unfair because on one side he was directing the department to produce and supply the documents demanded by the present respondent latest by 13.2.1991 and at the same time closed the proceedings. The learned Single Judge also found that the Inquiry Officer acted in a very hasty manner in closing the defence evidence less appreciating that the respondent/the original petitioner for the reasons stated by him could not produce his witnesses before the Inquiry Officer. It is also to be seen from the records that the documents were to be supplied latest by 13.2.1991 but the evidence was closed on 15.1.1991 and the Inquiry Officer closed the further proceedings.

3. The learned Single Judge after considering the pros and cons of the matter allowed the writ petition, quashed the orders (Annexures P/1 and P/2) and remitted the matter to the Inquiry Officer with direction to the present appellants to produce the documents as demanded by the petitioner and also required the Inquiry Officer to proceed with the Disciplinary Enquiry from the stage of recording the evidence of the present respondent's remaining witnesses.

4. Shri Pandey, learned counsel for the appellants/Establishment submitted that the charge-sheet was issued to the present petitioner on 4.5.1990 and he was provided appropriate opportunity to file his defence and examine the witnesses in support of his case. According to him, the documents which were demanded by the respondent were immaterial and irrelevant and were not needed to decide any issue between the parties.

5. According to Shri Pandey Advocate, if irrelevant documents are not supplied or the documents which are not the foundation of the case of the department are not supplied then such non-supply would not vitiate the proceedings. For this purpose, he has relied upon certain judgments of the Supreme Court which we shall refer to later on. He also submitted that the Inquiry Officer was absolutely justified in not adjourning the case from 15.1.1993 to any other date because 15.1.1993 was fixed at the request of the respondent/Delinquent Officer. According to him, even otherwise, the witnesses were also immaterial and their non-examination has not caused any prejudice to the present respondent. He also submitted that in the present case the learned Single Judge erred in observing that the order passed by the Disciplinary Authority is vitiated in view of the judgment of the Supreme Court in the matter of *Punjab National Bank and others Vs. Kunj Behari Mishra* (1998) 7 SCC 84 and other judgments less appreciating that present was not a case where the Disciplinary Authority was totally disagreeing with the findings recorded by the Inquiry Officer.

6. Shri Pandey, Advocate also submitted that the learned Single Judge was not justified in observing that the appellate order was not a speaking order. According to him, the order meets the requirement as laid down by the Supreme

Court in the matter of *S.N.Mukherjee Vs. Union of India* AIR 1990 SC 1984 and in the matter of *State Bank of India, Bhopal Vs. S.S.Koshal* 1995 (5) SLR 181 (SC).

7. It was lastly contended that the respondent not being an honest man cannot be continued in the services of the bank because if the bank cannot bank upon its own employee or cannot repose its confidence in one of its employee then an institution like a bank has to show the exit to its employee. It is submitted by him that even otherwise in accordance with Clause 17(2) of Central Bank of India Officer Employees' (Conduct) Regulations, 1976, the appellate order is in accordance with law.

8. Shri Akash Choudhary, learned counsel for the respondent, on the other hand, submitted that the judgment of the learned Single Judge is impeccable and one cannot find any fault in it. He submitted that if the present appellants/petitioners have prejudged the matter by saying that the present respondent is a dishonest man, then they should not be allowed to continue any inquiry. He submitted that the findings recorded by the learned Single Judge are in accordance with law.

9. Before we proceed to decide the matter, on the merits, it would be necessary to refer to Page 62 of the docket. It says that on 14.1.1991 the first adjournment was sought and the matter was adjourned from 14.1.1991 to 15.1.1991. On 15.1.1991, the delinquent representative made a request to the Inquiry Officer that as it was time of 'local melas' (local fairs) and every witness was a businessman, therefore, they were busy in their business and the present respondent was unable to produce them. The Inquiry Officer observed that as the matter was listed on 15.1.1991 at the request of the employee representative, the matter could not be adjourned to any other date. The Inquiry Officer directed the Presenting Officer that on 31.12.1990, 10.1.1991 and 12.1.1991, he was advised to produce the documents demanded from the defence side, therefore, needful be done. The Presenting Officer informed the Inquiry Officer that as the documents demanded by the defence were to be taken from/prepared at Regional Office, Shahdol, sometime be given to them, however, the Presenting Officer submitted that the documents were irrelevant.

10. The Inquiry Officer after hearing the parties observed that it was mutually agreed by all the participating parties that 25 days' time for production of documents be granted to the Presenting Officer, i.e.latest by 19.2.1991. The authority also directed that the documents demanded by the defence shall be marked as Defence Documents as Defence Exhibits 17 to 23 and copies of the said documents would be supplied to the defence representative at his present place of posting latest by 13.2.1991. On all this, the delinquent representative submitted to the Inquiry Officer that he was agreeable to supply all the documents latest by 13.2.1991 without which it would be difficult for him to proceed further.

11. We do not know as to how on the very same day, the Inquiry Officer could yet write another proceeding that the case stands closed. Even after record of

such proceeding, the bank did not produce the said documents before the Inquiry Officer nor supplied the same to the Delinquent Officer. Without taking into consideration the earlier order-sheets and without taking into consideration the non-supply/non-production of the documents, the Inquiry Officer proceeded to prepare his report. Out of as many as eleven charges, he observed that ten charges were fully proved or partly proved. For one of charge, he observed that it was partly proved. The report was examined by the Disciplinary Authority which observed that the charge No. 7 infact was proved in full. Without issuing any further notice to the delinquent, the Disciplinary Authority after supply of the inquiry report held every charge to be proved and had imposed the capital punishment of dismissal.

12. Being aggrieved by the said order, the respondent preferred an appeal to the Appellate Authority under Clause 17 and after the appeal was dismissed, he came to the Court challenging the enquiry, imposition of punishment and the order passed by the Appellate Authority.

13. At this juncture atleast it is not in dispute before us that a direction was issued by the Inquiry Officer to the Establishment to produce the documents and supply the copies to the Delinquent Officer. Present is not a case where the Inquiry Officer rejected the prayer of the respondent/employee on the ground that the documents were irrelevant. Present is a case where despite objections by the Department/Establishment, the Inquiry Officer directed that copies of the documents be produced in the enquiry and be supplied to the Delinquent Officer.

14. Reliance has been placed on the judgments of the Supreme Court in the matter of *Chandrama Tewari Vs. Union of India* AIR 1988 SC 117, *Syndicate Bank and others Vs. Venkatesh Gururao Kurati* (2006) 3 SCC 150, *Debotosh Pal Choudhury Vs. Punjab National Bank and others* (2002) 8 SCC 68 and *State of UP and others Vs. Ramesh Chandra Mangalik* (2002) 3 SCC 443.

15. We have gone through all the four judgments. In each of the judgments, the Apex Court has observed that if there is demand of irrelevant documents or documents which are not relevant for purpose of enquiry or the documents which have no connection with the charge then non-supply of such documents would not vitiate the enquiry.

16. It is not in dispute before us that after the Inquiry Officer directed the present appellants/Establishment to supply the copies, they conceded before the authority that they would supply and produce the copies and did not propose to challenge the said direction. The facts of the above referred four cases are different from the facts of this case. A judgment of any Court would be a judgment on the facts of the said case. Reading of the head note or pressing into service of the head note of a particular judgment would not be the requirement of the law. The law is deliberated in the judgment and not in the head notes which show the wisdom of the editor who prepares the head notes.

17. We are unable to hold that in view of the above referred four judgments of the Supreme Court, the Inquiry Officer was unjustified in directing the present appellants/Establishment to supply the copies. Even otherwise, in a petition filed by the present respondent/Delinquent Officer, the Establishment would not be allowed to say that the direction to supply the documents was illegal, therefore, the High Court in its writ jurisdiction should not interfere in the matter.

18. So far as adjournment of the case from 14.1.1991 to 15.1.1991 is concerned, there is no problem in the adjournment but the real problem arose when the respondent/Delinquent Officer prayed for ten days' time to produce the witnesses on the ground that because of the local fair, his witnesses are not available. At this stage, it would also be necessary to note that the Inquiry Officer was not concluding the enquiry on 15.1.1991 itself because in the first part of the order, he directed that the documents be supplied within twenty-five days latest by 13.2.1991 and if that was so then the heavens were not to fall if the case was adjourned for ten days enabling the Delinquent Officer to produce the witnesses.

19. Submission of Mr. Pandey, learned counsel for the appellants that the witnesses were immaterial, also cannot be accepted because nobody knows that what could be the statement of such witness. It would be height of an argument to say that if the witness was examined, his statement could be rejected as irrelevant. It would be prejudging the issue and that is not permissible in any enquiry. Even on that count, the learned Single Judge, in our considered opinion, was justified in interfering with the inquiry proceedings.

20. Referring to the judgment in the matter of *Punjab National Bank Vs. Kunj Behari Mishra* (supra), it was submitted that if the Disciplinary Authority disagrees with the findings in toto then only a further notice is required to be issued and not otherwise. In the opinion of this Court, a fair reading and understanding of the judgment in the matter of *Punjab National Bank Vs. Kunj Behari Mishra* (supra), it would clearly appear that if the Disciplinary Authority disagrees with the findings recorded by the Inquiry Officer then it has to issue a notice to the Delinquent Officer. It would be immaterial in a given case that the findings are recorded partly in favour of the Establishment or partly against the Delinquent Officer. Once the Disciplinary Authority proposes to review the findings recorded by the Inquiry Officer and on basis of such reviewed finding, proposes to impose punishment then a person who was feeling content and satisfied must be given an opportunity against the proposed review. The learned Single Judge certainly was justified in following the judgment of the Supreme Court delivered in the matter of *Punjab National Bank Vs. Kunj Behari Mishra* (supra).

21. It was then submitted that the order passed by the Appellate Authority was absolutely valid and legal. Placing reliance upon Clause 17 of the 1976 Regulations, it was submitted that the Appellate Authority is required to consider whether the findings are justified or whether the penalty is excessive or inadequate can pass appropriate orders.

22. Learned counsel for the appellants placed his strong reliance upon the judgment of the Supreme Court in the matter of *S.N.Mukherjee Vs. Union of India* AIR 1990 SC 1984 and the judgment in the matter of *State Bank of India, Bhopal Vs. S.S.Koshal* 1995 (5) SLR 181 (SC) to contend that if the order passed by the authority says that they have conceded every argument and have also taken into consideration the material available on the record then further discussion is not required.

23. In the matter of *S.N.Mukherjee* (supra), the Supreme Court observed that in view of the expanding horizon of the principles of natural justice, the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case. Therefore, except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision. The recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and assures a degree of fairness in the process of decision making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. Therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It is however not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.

24. From this judgment of the Supreme Court, it would clearly appear that reasons

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are required to be recorded while passing an administrative order except in cases where requirement is dispensed with expressly or by necessary implication. Clause 17 (2) of 1976 Regulations does not dispense with the requirement of recording the reasons. Even if we read Clause 17 in favour of the present appellants, we would still be unable to find that by express provision or by necessary implication, the Appellate Authority has been exempted from giving the reasons.

25. The order passed by the Appellate Authority is annexed with the writ petition as Annexure P/2. The order says "on thorough scrutiny of the above records, I find that the Disciplinary Authority has applied its mind and has properly analyzed all the facts brought in the enquiry and has arrived at the correct conclusion." "The appellant has not come out with any new or relevant fact that may merit my consideration. As such, I do not wish to interfere with the final orders..... by the Disciplinary Authority." I, therefore, hereby reject the appeal preferred by the appellant and order accordingly." This is the sum total of the consideration.

26. In the Constitution Bench Judgment of the Supreme Court in the matter of *S.N.Mukherjee* (supra), the Supreme Court has clearly observed that reasons must be recorded, except in cases where requirement is dispensed with expressly or by necessary implication. The judgment in the matter of *S.N.Mukherjee* (supra), would go contrary to the interest of the appellants.

27. In the matter of *State Bank of India, Bhopal* (supra), a two-judges Bench of the Supreme Court had observed that if the Appellate Authority records that they had considered at length the facts of the case etc then they would be entitled to dismiss the appeal. In the matter, it would be necessary to refer to paragraph 8 of the said judgment where the Supreme Court had observed that the High Court was right and justified in requiring the Appellate Authority to pass a speaking order even if it was an order of affirmance. The Supreme Court observed that they were satisfied that the appellate order was a speaking order.

28. In view of the judgment in the matter of *S.N.Mukherjee* (supra), we have no hesitation in holding that the appellate order sans reasons and amounts to abuse of the powers of the Appellate Authority.

29. We candidly asked Mr. Pandey that if we confirm the judgment passed by the learned Single Judge by employing the language as employed by their Appellate Authority, would the department be satisfied? Shri Pandey submitted that a Court is required to supply the reasons but an Appellate Authority in the departmental proceedings is not required to supply the reasons. We are unable to understand the distinction between a Departmental Appellate Authority and an Appellate Authority on the judicial side which gives a judgment of affirmance.

30. It was then submitted that the respondent is not an honest man and as present is a case of no confidence, this Court should interfere in the matter and allow the appeal.

31. Ordinarily, we could agree to the submissions if we were of the opinion that

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the enquiry was absolutely correct. The Departmental Authority including the Inquiry Officer acted in a highhanded or hasty manner. The old saying in cases like this is still goes true that unless a dog is declared mad,it cannot be killed.

32. In the present case while failing in all their efforts to get rid of the respondent, the appellants have come out with a new plea that because they have lost confidence in their employee, their appeal should be allowed. In our considered opinion, the learned Single Judge was not unjustified in granting the writ petition filed by the respondent. The present appeal appears to be an act of vengeance on the part of the Establishment. The action taken by the appellants cannot be approved. The order passed by the learned Single Judge deserves to and is accordingly confirmed.

33. The appeal filed by the appellants is dismissed with costs quantified at Rs.10,000/- (Rupees Ten Thousand). If the costs are not paid within thirty days from today, the appellants would not be entitled to proceed with the inquiry.

Appeal dismissed

I.L.R. [2008] M. P., 681
WRIT APPEAL
Before Mr. Justice R.S. Garg & Mr. Justice Prakash Shrivastava
14 February, 2008*

JAYPEE REWA CEMENT — Appellant
Vs.
STATE OF M.P. & ors. — Respondents

A. Electricity Duty Act, M.P. (10 of 1949) (as amended by the Act of 1985), Section 3, Table - Rates of Duty, Part-B, Clause 5 & Clause 8 - Levy of Duty - Whether residential Colony or Township attached to a factory is a part of industry - Duty is levied at a different rate for cement industry and at a different rate for non-industrial purposes - Held - Law does not provide that residential colony/township would become part of industry and would become such an integral part of industry without which it would not be possible to run industry. (Para 7)

B. Words & Phrases "includes" - Use of word includes enlarges meaning of expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. (Para 9)

Cases referred :

AIR 1972 SC 168, AIR 1995 SC 1395.

Alok Aradhe with *Shankalp Kochar,* for the appellant
Kumaresh Pathak, Dy. A.G. for the respondents No. 1 & 2
M.L. Jaiswal with *K.K. Gautam,* for the respondent No.3

*W.A. No. 302/2006 (Jabalpur)

JUDGMENT

The Judgment of the Court was delivered by **R. S. Garg, J** :-The appellant M/s. Jaypee Rewa Cement a Division of Jai Prakash Industries Limited, being aggrieved by the order dated 23.3.2006 passed in W.P. No.3734/1998 passed by learned single Judge of this Court dismissing the writ application have filed this appeal under Section 2 of the M.P. Uchha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005. The appellant M/s. Jaypee Rewa Cement is producer of cement and is in control of certain captive mines. The question raised before the learned single Judge was whether the consumption made in the colonies held, managed and possessed by the petitioner is to be clubbed into the consumption of the energy by the industry under the phrase "cement industry including its captive mines" or it is liable for duty under the head of other non-industrial purposes. The learned single Judge after referring to the table attached to Section 3 of the M.P. Electricity Duty Act, 1949 providing rates of duty came to the conclusion that separate provision for the colonies run by the industry in the earlier provision and non-inclusion of the colonies in the notification of 1985 would not make any difference because the Court is only concerned with the entry which provides "cement industry including its captive mines" and the consumption of the electrical energy 'for non-industrial purposes not included under any of the other categories'. After giving his thoughtful consideration the learned single Judge held that the respondents were justified in proposing the recovery against the present petitioner.

2. The Madhya Pradesh Electricity Duty Act, 1949 (Act No.10 of 1949) (hereinafter referred to as the 'Act' for convenience and brevity) is an Act to provide for levying of duty on sale or consumption of electrical energy. Section 2 is the definition clause while Section 3 relates to levying of duty on sale or consumption of electrical energy. Section 3 provides that subject to the exceptions specified in Section 3-A every distributor of electrical energy and every producer shall pay every month to the State Government at the prescribed time and in the prescribed manner a duty calculated at the rates specified in the table appended to Section 3 on the units of electrical energy sold or supplied to a consumer or consumed by himself for his own purpose or for purposes of his township or colony during the preceding month. It is not in dispute before us that the table appended to Section 3 has undergone various amendments from time to time. The Act was amended under 1972 Act, 1975 Act , 1978 Act , 1984 Act and 1985 Act and was also amended by subsequent Acts. The table provided different tariffs for domestic consumption and the industrial consumption. By the Act of 1972 it was provided that particular rate of duty would be chargeable on different types of consumption. In the year 1978 by M.P. Act No.21 of 1978 the Act was again amended and clause 2 provided as under :

> (2) Electrical energy sold or supplied for consumption in premises of a factory excluding energy supplied for consumption for

domestic or non-factory purposes where the connected load -

(a) does not exceed 100 HP	-	1.5. paise per unit per energy.
(b) exceeds 100 HP	-	3 paise per unit of energy.

(4) Electrical energy sold or supplied for consumption in

(a) township or colony attached to a factory, Mines or Institution.	-	10 paise per unit of energy.

The amendment of 1978 clearly provided that when the consumption is in the township or colony attached to a factory etc. then the electricity duty would be 10 paise per unit of energy. In the year 1984 the table was again amended though the clause 4 remained unamended but clause 5 and 6 were amended. By Act No.15 of 1985 the table appended to Section 3 was again amended and the material amendments were as under :

"(2) Electrical energy sold or supplied for consumption in premises of a factory including energy supplied for consumption for domestic or non-factory purposes where the connected load -

(a) does not exceed 100 HP	-	3 paise per unit of energy.
(b) exceeds 100 HP	-	4 paise per unit of energy.

(4) Electrical energy sold or supplied for consumption in :-

(a) Township or colony attached to a factory mine or Institution or	-	11 paise per unit of energy
(b) a premises getting supply of high voltage or extra high voltage but not covered under item (1) and (2) above		
(5) Electrical energy sold or supplied for consumption in a mine	-	26 paise per unit of energy

It is to be seen that under paragraph 4(a) it was provided that 11 paise per unit for energy would be charged as duty if the consumption is in the township or colony attached to a factory or institution etc. The table appended to Section 3 was again amended by Act No.21 of 1986. The amended table is as under :

TABLE
RATES OF DUTY
PART-A

Electrical Energy sold or of supplied in bulk by a Producer or distributor of electrical energy to another distributor of electrical energy excluding electrical energy supplied for his township or colony.	2 paise per unit energy.

PART-B

Electrical energy sold or supplied for consumption for purposes as shown below :-	
(1)For Domestic purposes receiving electricity at low tension tariff	8 paise per unit of energy up to 200 units of energy sold or supplied in a month; 15 paise per unit for each additional unit sold or supplied in a month in excess of 200 units of energy.
(2) For Non-Domestic and Commercial purposes including X-ray plants receiving electricity at low tension tariff.	12 paise per unit of energy up to 100 units of energy sold or supplied in a month: 15 paise per unit for additional unit sold or supplied in a month in excess of 100 units of energy.
(3) For water and sewage pumping installation of Municipalities, Corporation and other local bodies used for public utility water scheme.	3 paise per unit of energy.

(4) For Mines other than captive mines of a cement Industry.	50 paise per unit of energy.
(5) For Cement Industry including its captive Mines.	10 paise per unit of energy.
(6) For Mini Steel Plant, Calcium Carbide Plants, And for consumers receiving energy under electro chemical tariff.	4 paise per unit of energy.
(7) For other industries not covered under above Categories.	5 paise per unit of energy.
(8) For non-industrial purposes not included under any of the above categories.	15 paise per unit of energy;

Provided that if the electrical energy sold or supplied for consumption for any one purpose is used either wholly or partly, without the consent of the distributor of electrical energy or producer of electricity, as the case may be, for consumption for any other purpose for which a higher rate of duty is chargeable, the entire energy sold or supplied shall be charged at the highest rate applicable.

By Act no.4 of 1988 following entries were substituted.

"(i)In sub-section (1) under the Table of Rates of Duty, for items (1) to (8) of Part-B, the following items shall be substituted, namely:-

(1)For Domestic purposes receiving electricity at low tension tariff.	8 paise per unit of energy up to 200 units of energy sold or supplied in a month; 15 paise per unit for each additional unit sold "or supplied in a month in excess of 200 units of energy.
(2)For Non-Domestic and Commercial purposes Including X-ray plants receiving electricity at low tension tariff.	18 paise per unit of energy.

(3)For mines other than captive mines of a Cement Industry.	60 paise per unit of energy.
(4)For Cement Industry including its captive Mines.	12 paise per unit of energy.
(5)For other Industries not covered under above categories,-	
(a)Industries receiving electricity at low tension tariff;	3 paise per unit of energy
(b)Other Industries.	8 paise per unit of energy.
(6)For non-industrial purposes not included under any of the above catagories.	18 paise per unit of energy."

By the amendment of 1985, 10 paise per unit of energy was to be charged as duty if the consumption was by cement industry including its captive mines. Clause 8 provided that for non-industrial purposes not included under any of the above seven categories the duty would be charged at 15 paise per unit of energy.

3. After finding that the present appellant/petitioner was paying the duty at the rate of 10 paise per unit for all its consumption, the Electricity Board revised the bills and raised a demand. The petitioner/appellant being aggrieved by the said demand came to this Court in the writ petition and raised various arguments. As the learned single Judge did not agree with the contentions raised by the petitioner/appellant and rejected the writ petition the petitioner has filed this writ appeal.

4. Shri Aradhe, learned Senior counsel for the appellant/petitioner submits that the colony or township attached with the industry, factory etc. was all through taken to be a different entity and identity and consumption by it was charged separately and, therefore, unless such an entry continued by the amending Act, this Court must hold that the colony or the township attached with the industry would become a part of the industry and the industry would be justified in paying the duty at 10 paise per unit of the energy. It was also submitted that without a township or a colony the industry would be incomplete, therefore, also the township/ colony managed and operated by the industrial unit should be taken to be a part of the industry only. It was also submitted that clause 8 which provides for duty for non-industrial purposes would not take out the colony or the township from the sweep of clause 5 which relates to 'cement industry including its captive mines'.

Placing his strong reliance upon certain judgment which we may refer to and discuss at appropriate stage it was vehemently contended that the learned single Judge was not justified in not appreciating the distinction between a domestic use and consumption by an ordinary colony and a colony and mine managed by the industry.

5. On the other hand learned counsel for the State and the Electricity Board submitted that a fair understanding and reading of the different amending Acts it would clearly appear that the State Government always treated the colony or a township differently, as a different entity and different from the industry itself. It is submitted that for all these years different duty has been levied on the colonies and townships manned and managed by the industry, therefore, at this stage the petitioners cannot be allowed to say that the colony/township managed by the industry would become an integral part of the industry. They also submitted that if there is a colony which is not attached with a industrial unit then all the consumers would become domestic consumers and they would be extracting energy for domestic purposes and in such an event they would be required to pay 8 paise per unit of energy upto 200 units of energy sold or supplied in a month and 15 paise per unit for each additional unit sold or supplied in a month in excess of 200 units of the energy. It is also submitted by them that the domestic charges would be applicable where the supply is from the low tension line and the tariff is low tension tariff.

6. It is also submitted by the learned counsel for the respondents that duty leviable on consumption of energy by a cement industry including its captive mines is for industrial consumption while under clause 8 the duty is leviable for non-industrial consumption or purposes not included under any of the categories as provided in the table. It is not in dispute before us that the colonies/townships are getting the supply from the high tension line.

7. The word industry has not been defined in the M.P. Electricity Duty Act, 1949. Section 2(j) of the Industrial Disputes Act, 1947 defines industry as :

> "industry" means business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen"

If we accept the definition of industry as given in the Industrial Disputes Act, 1947 then the colony or the township manned and managed by the industry would not be a part of the industry. However, it would also be necessary to refer to definition of industry as given in different dictionary. Chambers 21st Century Dictionary defines industry as under :

> "industry" 1. the business of producing goods; all branches of manufacturing and trade. 2. a branch of manufactory and trade which produces a particular product - the coal industry 3. organized commercial exploitation or use of natural or national assets, such

> as historical buildings, famous people etc. - the tourist industry 4. hard work or effort, diligence - from Latin industrial diligence"

The Oxford Dictionary defines industry as under :

> "industry" - 1. the manufacture or production of goods 2. a particular branch of this; any business activity, the tourist industry, 3. the quality of being industrious."

Even from the dictionary meaning of the word "industry" it would not appear that any residential colony or the township attached with the industry would become an integral part of the industry. Even otherwise the law does not provide that the residential colony/township would become a part of the industry and would become such an integral part of the industry without which it would not be possible to run the industry. The township and/or the colony may provide some accommodation to the workers, employees and officers of the industry but that may be a facility provided by the industry either as a grace or as a service condition but provision of such accommodation etc. would not mean that the colony/township would become a part rather an integral part of the industry. The petitioners never came to the Court with a submission that in absence of a colony or township it would become impossible for them to run the industry.

8. Referring to the judgment in the matter of *The Commissioner of Income Tax Andhra Pradesh Vs. M/s. Taj Mahal Hotel, Secunderabad* AIR 1972 SC 168 it was submitted that if the books are included in the definition of the word "plant" in Section 10(5) of the Income Tax Act then the colony/township would become an integral part of the industry. In the matter of C.I.T A.P. (supra) the question before the Court was whether the sanitary fittings etc. in bath rooms is one of the essential amenities or conveniences which are provided in any good hotel would be a part of the plant or is to be separately assessed. The Supreme Court observed that where the definition of a word has not been given it must be construed in its popular sense if it is a word of every day use. That popular sense means "that sense which people conversant with the subject matter with which the statute is dealing, would attribute to it". In our considered opinion the judgment in the matter of C.I.T. A.P. (supra) is no authority to say that the colony/township would be an integral part of the industry and simply because clause 5 of the table uses the word "including" the definition would become inclusive definition and the colony/township would be included in the cement industry. When one has to interpret the statute especially a taxing statute or the statute which leads to civil law then the interpretation must be very strict. The entry in clause no.5 provides "for cement industry including its captive Mines". The word 'including' would not mean a cement industry which would include its township or the colony. The intent of the legislature is to include the mine in the industrial activity because without operation of the mines the cement industry cannot be run. In fact the word 'including' used in clause 5 of the table is simply to show that captive mines would be taken to be part of the cement industry and nothing beyond that.

9. . Shri Aradhe, learned counsel for the appellant, placed his strong reliance upon yet another judgment of the Supreme Court in the matter of *P.Kasilingam and others Vs. P.S. G. College of Technology and others* AIR 1995 SC 1395. In the said matter the question before the Supreme Court was that what would be meaning of the word 'College' and what would be the intent and explanation of the expression "means and includes". The Supreme Court observed that a particular expression is often defined by the legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means' and 'includes' are used. The use of the word 'means' indicates that "definition is a hard and fast definition and no other meaning can be assigned to the expression than is put down in definition". The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. Taking shelter under this judgment it is contended by Shri Aradhe, learned counsel, that Clause 5 is inclusive definition because it uses the word 'including' and the word 'including' would govern everything attached including a colony or township to the industry. We are unable to concede to this argument. The intention of the legislature is not only to be seen by use of the word 'including'. The intention is to be seen that whether the legislature was creating different types of consumer for purposes of levy of different duties. Clause 5 provided for levy of 10 paise per unit for cement industry including its captive mines. We have already observed that without mines a cement industry cannot be run and if some cement industry does not have its captive mines then such cement industry would be charged at the rate of 10 paise per unit of energy. In any case clause 5 would not include anything beyond what is intended by the legislature.

10. Clause 8 refers to non-industrial consumption which is not included in the other seven categories. We have already observed that category no.1 relates to domestic consumption and it relates to domestic consumption of electricity at low tension tariff. If the colony people or the township people were receiving the energy at low tension tariff then there would have been no problem but in the instant case in the undisputed facts it is clear that the colony people/township people are receiving the energy from the high tension tariff. Once it is proved that the colony people/township people are receiving the energy from the high tension tariff then they would fall under category 8 and without any hesitation it can be held that they are drawing electricity/energy for non-industrial purposes not included under any of the categories no.1 to 7.

11. Learned single Judge had given his thoughtful consideration to every aspect of the matter and has come to the conclusion that the cement industries were applied concessional rate of the duties as would be apparent from entry no.5. In our opinion if the industrial undertaking like a cement industry is using the electricity for industrial purposes only then they would be liable to pay at the rate as prescribed in clause 5 but they cannot be permitted and would not be permitted to say that any colony or the township attached with the cement factory/industry/captive

mines would also be liable to pay at the rate which is applicable to the cement industry. When the legislature provides different categories for levy of different charges, taxes or fees then unless there are very special reasons it would not be permissible for the Court to hold that a person falling under one clause or a category would be chargeable under any other category. After giving our thoughtful consideration to the totality of the circumstances we are unable to hold that the learned single Judge was unjustified in dismissing the petition.

12. The petition is dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 690
WRIT PETITION
Before Mr. Justice Rajendra Menon
5 December, 2007*

SANTOSH SINGH CHAUHAN & ors. Petitioners
Vs.
STATE OF M.P. & ors. Respondents

Constitution of India, Article 226 - Estoppel - Process of conducting written test and other particulars disclosed in circular - All 8 petitioners participated in written test - Out of them 6 petitioners were failed - Right to make complaint about manner of conducting written test after failing is not available - Failed petitioners estopped from challenging process of written test - Petition dismissed.

Case referred : (Para 9)

1997 SCC (L&S) 976

H.D. Mishra, for the petitioners
Sudha Shrivastava, Panel Lawyer for the respondent Nos 1 & 2,
S.K. Sharma, for the remaining private respondents.

ORDER

RAJENDRA MENON, J.:–This case has a chequered history, is the oldest service matter pending before this Court which was initially filed on 09th February, 1990 and is being taken up for final hearing today.

2. In the year 1990 petitioners eight in number filed this petition inter alia contending that a select list for promotion to the post of Head Constable in the Transport Department has been published by the respondents vide Annexure P/5 in which the private respondents are included. Inter alia contending that the process for promotion initiated and the select list prepared is not in accordance with provisions of rule 14 of the Madhya Pradesh Transport Department Subordinate Class-III Executive Service Recruitment Rules, 1969, petitioners filed this petition. According to the petitioners, the recruitment to the post in question as per rule 14 has to be conducted by conducting a written test and holding interview and

*W.P. No. 2598/2003 (Gwalior)

thereafter the selected candidates have to undergo a cadre course before preparation of the fit list. It is further stated that the select list has to be prepared on the basis of the result in the written test and candidates five times the number of vacancies have to be called for interview. When the petition was filed, the main grievance of the petitioners were that the syllabus in advance was not circulated and written test was also conducted deviating from the old practices in the matter of setting the paper for the written examination. Pointing out the following illegality in the matter of conducting selection process, this petition was filed:

> (i) Syllabus as was circulated in the previous years was not circulated, in the previous years examination is two papers were held but in the current year written test in only one paper is being held; and
>
> (ii) select list has been prepared without conducting interview and the marks obtained by various candidates have not been disclosed, no merit list has been supplied and therefore the entire selection process is vitiated and interference is sought for.

3. Initially when the petition was filed in the year 1990, there was a lot of confusion with regard to jurisdiction of this Court to dealt with the matter on account of formation of the State Administrative Tribunal and the matter went upto the Supreme Court and ultimately, the matter stood transferred to the State Administrative Tribunal which was created at the relevant time. In the process of adjudication of the matter with regard to jurisdiction to deal with the matter, a lot of time was consumed and after abolition of the Tribunal, the matter stood transferred to this Court. In the meanwhile, initially, interim order of stay was granted by this Court restraining the respondents from making any promotion on the basis of the fit list. Subsequently, stay order was vacated on 27th May, 1991 directing the respondents to keep eight posts vacant for the present petitioners while granting permission to promote the other candidates. In pursuance to the same, the private respondents who are promoted have been arrayed as respondents and during the pendency of this petition some of them have expired and the names of the respondents No.5, 9, 12, 13, 15, 19, 22 to 24 have been deleted as per the orders passed by this Court on various dates.

4. By filing return and by bringing on record the process initiated for conducting the examination, the State Government and the private respondents have pointed out that the notification for conducting the examination was issued on 02nd November, 1989 vide Annexure R/2. According to this notification, examination was to be held on 04th December, 1989. Admittedly, the notifications, Annexure R/2 and R/3 issued by the State Government and the procedure indicated for conducting the examination therein shows that the examinations was to be conducted on 04th December, 1989 at 8.00 A.M., the duration of examination was 2 ½ hours. It is stated that the examination and the papers will consist of three parts; the first part will be General Knowledge, the second part general

Hindi and the third part primary mathematics relating to the requirements of the department. The entire written examination would carry 60 marks and according to the respondents, the examination was conducted and the result were declared. It is the case of the respondents that in the written examination conducted, all the petitioners appeared and failed, 15 candidates in the general category, 03 in the scheduled caste category and 04 in the scheduled tribe category, total 22 candidates passed in the examination and therefore, they were sent for cadre course from 13th March, 1990 to 30th April, 1990 and in the cadre course, they were put to various examinations and thereafter they were subjected to some interview and thereafter appointed. The respondents have indicated the marks obtained by each of the petitioners and it is pointed out by them that as the petitioners have failed in the written test, they should have no grievance as the petitioners have only a right for consideration and as after considered, as they have failed in the written test, they are not entitled for any further relief. During pendency of the petition, I.A.No.10530/06 has been filed by the petitioners with a prayer for summoning of the records of the examinations conducted in the years 1985 and 1989. The Government has produced the records pertaining to the examination conducted from 1985 but the records of the examination conducted in the year 1989 are not available in the file produced by the learned Government Advocate. A perusal of the file produced indicates that in the previous years i.e. in the year 1985 & 1986, 40 marks was fixed as the minimum pass work for the general category candidates and 30% for the scheduled castes and scheduled tribe candidates and accordingly assessment has been made and the candidates who had passed the written test have been granted promotion. Kumari Sudha Shrivastava and Shri S.K.Sharma, learned counsel appearing for the respondents emphasised that as the petitioners appeared and participated in the written test without any objection on 04th December, 1989, after failing in the examination, they have no right to challenge the process and manner in which written examination was conducted. It is the case of the respondents that after participating in the written examination, petitioners cannot make a complaint with regard to the manner in which the question paper was set and non-circulation of the syllabus and other particulars pertaining to conduct of the written examination. It is the case of the respondents that as the petitioners have participated and failed in the written test, they are estopped and cannot challenge the result of the written examination. Accordingly, placing reliance on a judgment of the Supreme Court in the case of *University of Cochin vs. N.S.Kanjoonjamma and others,* 1997 SCC (L&S) 976, the respondents pray for dismissal of the petition.

5. Having heard learned counsel for the parties at length and on scanning the entire record available, it is seen that even though in the record produced by the respondents, the minimum pass marks and other particulars for the examination in the year 1989 is not available, but details of the examination conducted in the years 1985-86 are available. In the written test conducted in the year 1985-86 40% marks has fixed as minimum pass marks for the general category candidate

and 30% for reserved candidate and admittedly all the petitioners eight in number belonging to the general category and as per the records produced by the respondents, the marks obtained by each of the petitioners are as under:

Petitioner No.1, Santosh Singh Chauhan	25
Petitioner No.2, Saggir Ahmad Ansari	16
Petitioner No.3, Krishna Pal Singh Kushwaha	21.5
Petitioner No.4, Kishan Singh Kushwaha	22.5
Petitioner No.5, Umesh Shrivastava	10.5
Petitioner No.6, Rajmani Gurjar	marks not available
Petitioner No.7, Brijendra Singh Bhadroia	10.75
Petitioner No.8, Shyam Babu Dubey	22.5

In this case, respondents have not produced the complete record of examination. The record produced is incomplete, it only shows the marks obtained by the candidates and the petitioners are shown as failed in the report submitted by the State Government on 02nd January, 2001 [available at page 240/241]. However, the record shows that written test was held on 04th December, 1989 in which there was one paper of three parts and the maximum marks are 60, however, the minimum pass marks is not indicated, but in the previous examinations conducted by the department up to the year 1986, the minimum pass marks was 40% for general candidates and 30% marks for the reserved category candidates. That being so, it has to be held that in the examination held on 04th December 1989 also the minimum pass marks was 40%.

6. According to the notification, Annexure R/3 indicating the procedure and the manner of conducting the examination, the written test has to be in one paper consisting of three parts as indicated hereinabove and the total marks allotted for the written test was 60 marks. If 40% marks is the minimum pass marks prescribed as has been done on the previous occasions then the minimum pass marks required for being declared as passed would be 24 out of 60 marks. All the petitioners, except Petitioner No.1, Santosh Singh Chauhan have received less than 24%, therefore, they have been rightly declared as failed. The petitioner No.1, Santosh Singh Chauhan has received 25 marks out of 60 marks which is more than 40%. The marks obtained by petitioner No.6, Rajmani Gurjar are not available.

7. No doubt, from the records produced by the respondents, the entire process of selection as conducted cannot be said to be strictly in compliance with the requirement of rule 14 of the Madhya Pradesh Transport Department Subordinate (Class III Executive) Service Recruitment Rules, 1969 governing conduct of the examination. The conditions for eligibility for promotion and other particulars are contained in rule 14 and rule 14(3)(ii) contemplates holding of written test and interview for selection. In the present case, written test is conducted and the select list is prepared of all the candidates who have passed in the written test and they have been sent for cadre course. According to sub-rule 14(e), promotion is to be made by written test and interview and the selected candidate is required to

go through a cadre course which has to be conducted in the headquarter. Constables passing through the cadre course are eligible to come into the fit list. It is, therefore, clear from this rule that written test has to be conducted, interview held and thereafter the selected candidate has to be sent for cadre course and thereafter they will be brought in the fit list. In the present case, the record indicate that the selection is not done strictly in accordance with rules, on the contrary, written test is conducted, results declared and the selected candidates were sent for cadre course and after passing in the cadre course the interview is held and they were promoted to the post in question. This is not strictly in compliance to the statutory rules but at the same time it has to be taken note of by this Court that the selection process was initiated in the year 1990 and all the selected candidates have been granted promotion and most of them have retired on attaining the age of superannuation and some of them have expired, and therefore, it would not be proper now to cancel the entire select list after a period of 17 years. That apart, the records indicate that out of the petitioners eight in number, six have failed in the written test, they are petitioners Nos.2,3,4,5,7 and 8, that being so, they are not entitled for any relief. As these petitioners have failed to perform well in the written test, they have no right to participate in the further process of interview. All the petitioners having participated in the written test and having filed cannot challenge the process of examination now. So far as petitioner No.1, Santosh Singh Chauhan is concerned, the respondents have committed some irregularity. In such circumstances as petitioner No.1 has passed the written examination as he has obtained the minimum pass prescribed for the written test, he is entitled to participate in the further process of selection, i.e. for appearing in the cadre course and thereafter becoming eligible for promotion. So far as petitioner No.6,, Rajmani Gurjar is concerned, the records does not indicate as to how many marks he has received in the written test.

8. Accordingly, this Court has to take note of totality of the facts and circumstances of the case and has to decide the case in such a manner that substantial justice is done to all concerned and the things which have been settled for the last 17 years are not disturbed in such a manner that everything is re-opened and uncertainty created after a period of seventeen years. That being so, even though the records indicate that the respondents have committed some irregularity in deviating from the statutory rules in the matter of conducting the exercise of promotion for the post in question, I am not inclined to quash the entire selection and direct the respondents to re-do the entire process of selection as same is not in the interest of all concerned. More so, when six out of eight petitioners have failed in the written test, petition so far as it relates to these petitioners has to be dismissed.

9. The main grievance as has been put forth in the present case by the petitioners is that the written test has been conducted without circulation of the syllabus, no question is set in the subject of mathematics and the result of the written test has not been circulated to the candidates. Once the process of conducting written

test and other particulars were disclosed as per circular, Annexure R/3 and all the petitioners participated in the written test, it is seen that even their right to make a complaint about the manner of conducting the written test after failing in the written examination is not available, this Court has declined to interfere in the matter as these petitioners have participated in the written test and have failed in the examination, therefore, they are estopped from challenging the process of written test. That being so, petition so far as it relates petitioners Nos.2,3,4,5,7 and 8 are concerned being devoid of merit is dismissed.

10. So far as petitioner No.1, Santosh Singh Chauhan is concerned, he having received more than 40% marks in the written test is entitled for participating in the cadre course and interview as has been done in the case of other selected candidates, that being so, he is entitled to the following relief:

> Respondents are directed to take steps for considering the case of petitioner No.1, Santosh Singh Chauhan for promotion on the post of Head Constable from the stage of declaration of his result in the written test and thereafter evaluating his case as per recruitment rules, his case for promotion as was done in the case of other employees be done undertaken within a period of two months from the date of receipt of a certified copy of this order.

11. As far as petitioner No.6, Rajmani Gurjar is concerned, the respondents are directed to finding out the number of marks received in the written test by this petition and in case this petitioner has received 24 marks or above, then his case shall be also be considered and decided as directed in the case of the petitioner No.1, Santosh Singh Chauhan. In case the petitioner No.6 has received less than 24 marks then he is to be declared as failed and not entitled for participation in the cadre course, like the other six petitioners.

12. As this Court has already directed for keeping eight posts vacant, now the respondents are free to fill up the vacancies after considering the cases of petitioner No.1, Santosh Singh Chauhan and petitioner No.6, Rajmani Gurjar as directed hereinabove.

13. Before parting, it may be observed that this case is pending since 1990 i.e. for seventeen years, most of the respondents have worked on the promoted post and have retired or left this world, and therefore, now it would be against the interest of justice to remand the matter back to the department, that being so, this court has adopted the method followed in the previous years to hold that 40% is the minimum pass marks in the written examination and has decided the case on the said basis in order to do substantial justice to all concerned.

14. Accordingly, petition stands allowed to the extent indicated hereinabove and disposed of without any order so as to cost.

Petition allowed

I.L.R. [2008] M. P., 696

WRIT PETITION

Before Mr. Justice Abhay M. Naik

13 December, 2007*

RAJENDRA SINGH WADHWA — Petitioner

Vs.

STATE OF M.P. & ors — Respondents

Excise Act, M.P. (2 of 1915), Sections 25,28, General Licence Conditions, Liquor Policy 2006-2007 - Clause 8.4 of Liquor Policy provides that licencee shall not be entitled to lift liquor against belatedly deposited licence fee - No provision that such belatedly deposited licence fee shall be liable to be forfeited - Forfeiture of money deposited with State Govt. has stringent consequences and same cannot be permitted without any express and enabling provision - Neither in Excise Laws nor in liquor policy the word forfeiture has been used - Amount lying with respondents against which no liquor was supplied is liable to be refunded - Petition allowed.

Present case relates to the right/power of the State Government to forfeit the money deposited by or recovered from the petitioner against the defaulted instalment of annual licence fee. Its forfeiture can be permitted only if the State Government is empowered by virtue of any empowering provision.

However, it cannot be lost sight of that neither in the Excise Laws (Act and Rules) nor in the Liquor Policy of the year 2006-07 the word 'forfeiture' has been used. On the contrary, it has been specifically provided that if the licencee makes a default in making payment of instalment of annual licence fee, his licence may be revoked/cancelled. Thus, in the absence of specific provision for forfeiture, it cannot be held that forfeiture of the delayed payment of instalments of annual licence fee was even contemplated. Only power which vested in the Excise Department was to decline to issue liquor against such delayed payment and further to revoke/cancel the liquor licence. (Para 17 and 18)

Cases referred :

AIR 1953 SC 248, AIR 1977 SC 2279.

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

Alok Pathak, G.A. for the respondents/State.

O R D E R

Abhay M. Naik, J. :–Petitioner is a liquor contractor. A liquor auction was conducted in the month of March, 2005 which ended in favour of the petitioner on account of having quoted maximum bid. Accordingly, he was granted four licences for country liquor shops and one licence for foreign liquor shop for the year 2006-07. As per paragraph-5.3 of the writ petition, W.P. No.7670/06 containing challenge to the legality and validity of Clause 8(2) of the Liquor Policy of the

*W.P. No. 513/2007 (Jabalpur)

year 2006-07 is still pending. Petitioner deposited the basic licence fee and the annual licence fee for the complete year of 2006-07. His grievance is that despite the realization of money in the aforesaid manner, supply of country liquor as well as foreign liquor was not made by the respondents to the petitioner to enable the latter to sell it in exercise of his right under the licence. Since, the contractual period of 2006-07 is over, the petitioner has claimed refund of his unutilized money deposited as annual licence fee with interest.

2. In the matter of liquor contract three terminologies frequently come across. They are (i) annual auction amount (ii) basic licence fee (iii) annual licence fee. Annual auction amount means the bid received for a group of shops put to auction whereby open auction or tender system for any period is accepted and confirmed by the Collector or the Excise Commissioner as the case may be. The term annual auction amount is also known as annual price. This has been so defined in the general licence conditions. The basic licence fee is worked out at a particular percentage of annual price of the shop. Percentage is decided by the State Government for a particular year while deciding the policy for the year. For the relevant period 2006-07, percentage was fixed at 8%, meaning thereby that 8% of the annual price was the basic licence fee. Amount of basic licence fee deducted from the annual price would make out the annual licence fee against which supply of liquor is made. Equationally it may be said :-

> Annual price/annual auction amount – basic licence fee = annual licence fee.

Thus, a licencee of liquor (i.e. auction purchaser) is liable to pay annual price of a shop for which licence is granted to him in terms of basic licence fee as well as annual licence fee. No adjustment or supply is liable to be made against the basic licence fee whereas supply of liquor is liable to be made against the annual licence fee if the same is deposited in due manner within the prescribed period. Basic licence fee and annual licence fee are explained in clause 2.3.6 of the Liquor Policy of the year 2006-07 contained in Annexure/R-1.

3. Admittedly, the petitioner being the highest bidder in the liquor auction, was granted licence for four country liquor shops and one foreign liquor shop. Vide licence cumulatively marked as Annexure/P-4, he was required to make deposit in each quarter in the proportion mentioned in the licence. Clause-8 of the Liquor Policy (Annexure/R-1) provides for procedure of deposit of licence fee. Accordingly, the annual licence fee was liable to be realized in 24 fortnightly instalments. Under clause-8.4 of the Liquor Policy, if the licencee fails to deposit the instalment of licence fee or part thereof in the relevant fortnight and deposits the same in the next fortnight, he would not be entitled to issue of liquor to him against the delayed deposit of licence fee. If the licencee fails to deposit the balance licence fee even in the succeeding fortnight, the licence granted to him was liable to be revoked after expiry of such succeeding fortnight. Further, the

Excise Department was empowered to make an alternate arrangement for running such liquor shop.

4. Petitioner has admittedly failed to deposit the licence fee in respect of the shops within the period prescribed for him. On account of such failure, a notice dated 22.1.2007 (Annexure/R-4) was issued to the petitioner proposing thereby that the balance licence fee may be lastly deposited through challan by 22.1.2007. It was made clear that in case of failure to make deposit, his licence may be cancelled or may be revoked in exercise of powers under Section 31 of Madhya Pradesh Excise Act and the shops may be handed over for running them under an alternative arrangement. Petitioner vide his application dated 22.1.2007 (Annexure/R-5) submitted that the balance fees may be recovered by invoking the Bank Guarantee submitted by him. The present writ petition was submitted during the validity period of the liquor contract and on 7.3.2007 an interim order was made by this Court that if the petitioner is not in arrears of any instalment or dues except interest, the respondent No.1 shall permit the petitioner to lift the liquor as per the terms of contract. In the reply, it was stated that the Bank Guarantee was already invoked before passing of the order dated 7.3.2007 and the entire amount of annual price with respect to all the shops was recovered from the bank. It is further stated that pursuant to the order dated 7.3.2007 supply of liquor was made to the extent of fortnightly deposits which were received by the invocation of the Bank Guarantee in the relevant fortnights.

5. Shri S.R. Dhurve, Assistant Excise Commissioner, Damoh and Shri M.K. Jain, Deputy Excise Commissioner, Jabalpur Division were kept present by the learned Govt. Advocate with departmental record. They made a statement on the basis of their official record that the defaults were committed with respect to the following fortnights :-

Country liquor Shop No.	Period of default
1.	November,2006 to January,2007
2.	October II Fortnight to February I Fortnight.
3.	Regular deposit.
4.	July,06 to December,06 I Fortnight.
Foreign Liquor Shop	
5.	October,06 to January,07.

It is stated at Bar by Shri Dhurve, Assistant Excise Commissioner, Damoh that the supply of liquor was made against the money received from the bank through invocation of Bank Guarantee.

6. In view of the aforesaid and further on account of expiry of the relevant

period April, 2006 to March, 2007, the petitioner claimed for the refund of money deposited by him through Bank Guarantee against which no liquor was supplied and the writ petition survives merely to this extent.

7. Shri N.S. Kale, learned Sr. Advocate and Shri Alok Pathak, learned Govt. Advocate made their respective contentions which have been considered in the light of the material on record and the legal provisions governing the situation.

8. Shri N.S. Kale, learned Sr. Advocate contended that the amount of annual licence fee against which no liquor is supplied, is liable to be refunded in view of the terms and conditions of the contract as well as Excise Act, rules made thereunder and the Liquor Policy of the year 2006-07. Respondents are not empowered to forfeit such amount under any of the clauses. Reliance has been placed on the Division Bench decision of this Court dated 17.1.2006 in W.P. No.9310/2005 *(Lalit Jaggi Vs. State of M.P. and others).*

9. Per contra Shri Alok Pathak, learned Govt. Advocate, it has been contended that the decision in Lalit Jaggi's case is based on the Liquor Policy of the year 2005-06 whereas the present case arises out of the liquor contract of the year 2006-07 which is governed by different terms and conditions. Since, the petitioner has committed defaults in making fortnightly payment of the licence fee in a regular manner, the amount irrespective of non-supply of liquor stood forfeited and the claim of the petitioner for its refund is not liable to be accepted.

10. Matter is to be examined from the terms and conditions of the liquor contract including liquor licence, rules under the Madhya Pradesh Excise Act, 1915, General Licence Conditions and the Liquor Policy of the year 2006-07. Madhya Pradesh Excise Act, 1915 has been enacted to consolidate and amend the law in Madhya Pradesh relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and intoxicating drugs. Chapter-V of the Act provides for duty on excisable articles. Chapter-VI provides for issuance of licence, permit or pass. There is no dispute in the present case with regard to the power of the State Government to charge fees for issuance of liquor licence. Similarly, there is no dispute with regard to power of the Government to issue/cancel, suspend or withdraw the licence. In view of the nature of the controversy involved herein, it is unnecessary to embark upon the provisions of M.P. Excise Act, 1915 except observing that there is no express and specific provision in the Act empowering the State Government to forfeit the amount of annual licence fee.

11. Similarly, no rule under the M.P. Excise Act, 1915 has been pointed out in specific conferring a power on the State Government to forfeit the annual licence fee or part thereof in case of delayed deposits. Further, there is no clause in General Licence Conditions that the amount of annual licence fee or part thereof would stand automatically forfeited in case it is deposited after the expiry of the period prescribed therefor.

12. Liquor Policy of the year 2006-07 is on record as Annexure/R-1. Clause

2.3.6 provides that basic licence fee is fixed at 8% of the annual price and the annual licence fee would be worked out after deducting the basic licence fee from the annual price. Clause-8 of Annexure/R-1 provides for the procedure of deposit of licence fee which being relevant is reproduced below :-

> 8. लायसेंस फीस जमा करने की प्रकियाः
>
> 8.1 वर्ष 2006.07 में मदिरा दुकान के लिये निर्धारित वार्षिक लायसेंस फीस 24 पाक्षिक किश्तों में वसूली योग्य होगी, किन्तु ये किश्तें समान रूप से विभाजित नहीं होंगी, वर्ष के प्रथम त्रैमास में वार्षिक मांग का 30 प्रतिशत, द्वितीय त्रैमास में वार्षिक मांग का 20 प्रतिशत तथा वर्ष के तृतीय एवं चतुर्थ त्रैमासों में वार्षिक मांग का कमशः 25 एवं 25 प्रतिशत भाग वसूल किया जायेगा. किसी भी त्रैमास में वसूली योग्य इस राशि को छैः समान भागों में बांटा जायेगा. यदि यह राशि छैः समान भागों में विभाज्य नहीं है तो अविभाज्य शेष भाग संबंधित त्रैमास के प्रथम पाक्षिक किश्त में समायोजित किया जायेगा.
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> 8.2 देशी मदिरा अथवा विदेशी मदिरा की फुटकर बिक्री की दुकानों के अनुज्ञप्ति धारियों द्वारा देशी मदिरा, विदेशी मदिरा (स्पिरिट, वाईन, एवं बीयर) की जो मात्रा क्रय की जायेगी, उसके एवज में निर्धारित दरों पर जमा ड्यूटी की राशि उसकी संबंधित पक्ष की लायसेंस फीस के समतुल्य निर्धारित मांग के विरूद्व समायोजित की जायेगी.
>
> 8.3 यदि किसी पक्ष के लिये निर्धारित लायसेंस फीस के समतुल्य मदिरा क्रय करने के उपरान्त अनुज्ञप्तिधारी और मदिरा क्रय करता है तो जमा ड्यूटी की राशि का समायोजन संबंधित जिले के सहायक आबकारी आयुक्त/जिला आबकारी अधिकारी द्वारा आगामी अवधि की लायसेंस फीस के विरूद्व अनुमत किया जा सकेगा.
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> 8.4 यदि किसी देशी मदिरा अथवा विदेशी मदिरा की फुटकर ब्रिकी की दुकान के लायसेंसी द्वारा संबंधित पक्ष की लायसेंस फीस की निर्धारित पाक्षिक किश्त संपूर्ण अथवा आंशिक उस पक्ष में जमा न कराई जाकर आगामी पक्ष में जमा कराई जाती है तो ऐसी विलंब से जमा कराई गई लायसेंस फीस की राशि पर उसे मदिरा प्रदाय की पात्रता नहीं होगी . यह बकाया लायसेंस फीस यदि आगामी पक्ष की समाप्ति के पूर्व जमा नहीं कराई जाती है तो उस पाक्षिक अवधि की समाप्ति पर उसे स्वीकृत लायसेंस निरस्त किया जा सकेगा तथा/अथवा आवश्यकतानुसार दुकानों के संचालन की अन्य व्यवस्था की जा सकेगी .

13. Much emphasis has been put on Clause-8.4 which lays down if the licencee fails to deposit the prescribed fortnightly instalment fully or partly in the same fortnight and instead deposits it in the succeeding fortnight, he would not be entitled to the supply of liquor against such belatedly deposited licence fee. It has been further laid down that in case, if, the balance licence fee is not deposited before expiry of the succeeding fortnight, his licence may be revoked after expiry of the succeeding fortnight and the necessary alternate arrangement may be made. Clause-8.4 thus, disqualified a licencee from seeking supply of liquor against the licence fee which is not deposited in the relevant fortnight. This would merely mean that the licencee, though, deposits the balance licence fee in a belated manner cannot compel the Excise Department to issue liquor against such deposit and the Excise Department is under no obligation to make supply of the liquor against such deposit. It nowhere contemplates that the amount of deposit against which

liquor is not supplied would stand forfeited. It may be further seen from the remaining clause that in case of further default, the licence granted to the licencee is liable to be revoked. Thus, the power of the Excise Department is streamlined in as much as firstly the Excise Department did not carry any obligation to supply the liquor against the delayed deposit of balance licence fee. Secondly, in case of default of making deposit of balance licence fee in the relevant and succeeding fortnight, the licence could have been rightly and lawfully cancelled. Obviously, this power of cancellation has not been exercised at all. On the contrary, the amount of entire licence fee for the year 2006-07 has been recovered from the Department by invoking the Bank Guarantee.

14. It would be equally relevant to consider clause-3 of the Liquor Policy (Annexure/R-1) which provides for forfeiture of earnest money, basic licence fee and security amount. Basic licence fee has already been fixed at 8% of the annual price. Beyond it, it would be annual licence fee as per clause-2.3.6 of Annexure/R-1. Had there been intention of the Department to provide for forfeiture of annual licence fee, a proper provision could have been made in clause-3 which by no stretch of imagination deals in any manner with the forfeiture of annual licence fee. Forfeiture of money deposited with the State Government has stringent consequences and the same cannot be permitted without any express and enabling provision.

15. In the case of *Lalit Jaggi* (supra), the liquor contractor defaulted during April – July, 2005 in depositing the full amount of instalment in time and against the amount deposited lifted liquor and started selling the same in the shop in question. He was served with a show cause notice that why action should not be taken against him on account of failure to deposit the instalment due upto 30th June, 2005. Assistant Commissioner of Excise issued a direction to the Warehouse Incharge for not making supply of liquor to the petitioner. Considering clause-13 of the Liquor Policy of the year 2005-06, this Court observed :-

> "We have considered the aforesaid submissions of Mr. Tankha and Mr. Yadav and we find that sub-clause (3) of Clause 13 of the Liquor Policy for the year 2005-06 provides that in case the licencee fails to deposit any instalment of licence fee before the expiry of next instalment due, then his licence is liable to be cancelled and an alternative arrangement can be made to operate the concerned liquor shop. The said provision in sub-clause (3) of Clause 13 of the Liquor Policy for the year 2005-06 does not say that whenever the licencee fails to deposit the licence fee before the expiry of next instalment due, the licence of the licencee shall be cancelled or will stand automatically cancelled. It only confers a right on the Excise Department to cancel the licence of licencee if he fails to deposit the instalment of licence fee before the expiry of the next instalment due. Where, therefore, the default is made by the licencee in not making the deposit of instalment of licence

before the expiry of next instalment due, the Department may or may not exercise such right to cancel the licence and in the event, it does not exercise such right and accepts the deposit of instalment of licence fee beyond the stipulated time, liquor will have to be supplied to the licencee against the instalment of licence fee deposited and accepted beyond the stipulated time. Obviously, the Department cannot on the one hand accept and appropriate the licence fee paid by the licencee beyond the stipulated time and thereafter refuse to supply the liquor to the licencee against the instalment of licence fee deposited and appropriated after the due date. In *Bimal Chandra Banerjee's case* (AIR 1971 SC 517) and in *Pannalal's case* (AIR 1975 SC 2008), the Supreme Court has held that no excise duty is or can be collected on an undrawn liquor. The said decisions of the Supreme Court have been relied on in *State of M.P. vs. Firm Cappulal* (supra) cited by Mr. Tankha wherein the Supreme Court has, interpreting the provisions of the M.P. Excise Act, 1915 held that the State could not levy excise duty on undrawn liquor as the State does not possess such powers.

6. On a reading of the impugned circular dated 9.9.2005, we find that all that the Excise Commissioner has stated therein is that in some of the district, licence fee was being collected beyond the time as stipulated in Clause 13 of the Liquor Policy for the year 2005-06. In the said circular, the Excise Commissioner has nowhere stated that even if the Excise Department has accepted the instalment of licence fee beyond the stipulated time, the Excise Department will not make any supply of stocks of liquor against such deposits of instalment of licence fee beyond the stipulated time. To us, it appears that the Excise Commissioner has directed the district authorities to be strict in implementing the Clause 13 of the Liquor Policy of the year 2005-06 by ensuring that the licence fee is deposited within the stipulated time as provided in sub-clause (3) of Clause 13 of the Liquor Policy for the year 2005-06.

7. For the aforesaid reasons, we hold that sub-clauses (3) and (4) of Clause 13 of the Liquor Policy for the year 2005-06, or that the circular dated 9.8.2005 of the Excise Commissioner, are *ultra-vires* Section 25 of the Excise Act or Article 14 of the Constitution. But, as we have said above, if the Excise authorities accept the licence fee beyond the stipulated time as mentioned in sub-clause (3) of Clause 13 of the Liquor Policy for the year 2005-06, they will be obliged to supply stocks of liquor against such deposit of licence fee beyond the stipulated time. If they refuse to accept the instalment of licence fee beyond the stipulated time as

mentioned in sub-clause (3) of Clause 13 of the Liquor Policy for the year 2005-06, they will be entitled to cancel the licence of the licencee and make alternative arrangement in respect of the concerned liquor shop."

16. Shri Alok Pathak, learned Govt. Advocate contended that Lalit Jaggi's decision (supra) is based on the Liquor Policy of the year 2005-06. Copy of the same has been made available by the learned Govt. Advocate which has been kept on record. Relevant clause-13.3 is reproduced below for making a convenient comparison with clause 8.4 of Annexure/R-1.

Liquor Policy of the year 2005-06 :

13.3 यदि किसी देशी मदिरा अथवा विदेशी मदिरा की फुटकर बिक्री की दुकान के लायसेंसी द्वारा संबंधित पक्ष की निर्धारित पाक्षिक किश्त, आगामी पक्ष की समाप्ति के पूर्व जमा नहीं कराई जाती है तो उस पाक्षिक अवधि की समाप्ति पर उसे स्वीकृत लायसेंस निरस्त किया जा सकेगा तथा/अथवा आवश्यकतानुसार दुकानों के संचालन की अन्य व्यवस्था की जा सकेगी ।

Liquor Policy of the year 2006-07:

8.4 यदि किसी देशी मदिरा अथवा विदेशी मदिरा की फुटकर ब्रिकी की दुकान के लायसेंसी द्वारा संबंधित पक्ष की लायसेंस फीस की निर्धारित पाक्षिक किश्त संपूर्ण अथवा आंशिक उस पक्ष में जमा न कराई जाकर आगामी पक्ष में जमा कराई जाती है तो ऐसी विलंब से जमा कराई गई लायसेंस फीस की राशि पर उसे मदिरा प्रदाय की पात्रता नहीं होगी . यह बकाया लायसेंस फीस यदि आगामी पक्ष की समाप्ति के पूर्व जमा नहीं कराई जाती है तो उस पाक्षिक अवधि की समाप्ति पर उसे स्वीकृत लायसेंस निरस्त किया जा सकेगा तथा/अथवा आवश्यकतानुसार दुकानों के संचालन की अन्य व्यवस्था की जा सकेगी.

17. A perusal of both the clauses makes it clear that the earlier clause did not disqualify the licencee to lift the liquor even against the delayed deposit of annual licence fee whereas clause 8.4 of the relevant policy did disqualify the petitioner from demanding supply of liquor. On account of insertion of the clause of disqualification, the petitioner does not get substantial assistance from the Lalit Jaggi's decision. Present case relates to the right/power of the State Government to forfeit the money deposited by or recovered from the petitioner against the defaulted instalment of annual licence fee. Its forfeiture can be permitted only if the State Government is empowered by virtue of any empowering provision.

18. The word "forfeiture" was firstly dealt with by the Hon'ble Supreme Court of India long before in its decision in the case of *Bankura Municipality Vs. Lalji Raja & Sons* (AIR 1953 SC 248). It was held :-

"According to the dictionary meaning of the word 'forfeiture' the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty

or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture."

The word 'forfeiture' has been defined in the Black's Law Dictionary as :-

> "A deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition. Loss of some right or property as a penalty for some illegal act. Loss of property or money because of breach of a legal obligation (e.g. default in payment)."

There was again an occasion before the Apex Court to consider the word 'forfeiture' in the case of *R.S. Joshi Vs. Ajit Mills* (AIR 1977 SC 2279). It has been observed :-

> "Coming to 'forfeiture, what is the true character of a 'forfeiture' ? It is punitive in infliction, or merely another form of exaction of money by one from another ? If it is penal, it falls within implied powers. If it is an act of mere transference of money from the dealer to the State, then it falls outside the legislative entry. Such is the essence of the decisions which we will presently consider. There was a contention that the expression 'forfeiture' did not denote a penalty. This, perhaps, may have to be decided in the specific setting of a statute. But, speaking generally, and having in mind the object of Section 37 read with S. 46, we are inclined to the view that forfeiture has a punitive impact. Black's Legal Dictionary states that 'to forfeit' is 'to lose, or lose the right to, by some error, fault, offence or crime, 'to incur a penalty'. 'Forfeiture', as judicially annotated, is 'a punishment annexed by law to some illegal act or negligence .....', 'something imposed as a punishment for an offence or delinquency. The word, in this sense is frequently associated with the word 'penalty'."

However, it cannot be lost sight of that neither in the Excise Laws (Act and Rules) nor in the Liquor Policy of the year 2006-07 the word 'forfeiture' has been used. On the contrary, it has been specifically provided that if the licencee makes a default in making payment of instalment of annual licence fee, his licence may be revoked/cancelled. Thus, in the absence of specific provision for forfeiture, it cannot be held that forfeiture of the delayed payment of instalments of annual licence fee was even contemplated. Only power which vested in the Excise Department was to decline to issue liquor against such delayed payment and further to revoke/cancel the liquor licence. Nothing more may be read in the Policy.

19. Even under the provisions of Indian Contract Act, 1872, no-one is entitled to retain the benefit without performing a contract or without having stipulation to that effect.

20. Excise Officers present in the Court gave the following figures from their record :-

Country liquor Shop No.	annual price (in Rs.)	basic licence fee (in Rs.)	annual licence fee (in Rs.)	amount against which liquor was supplied (in Rs.)
1.	28644500/-	2291600/-	26352900/-	17570821/-
2.	4786600/-	383000/-	4403600/-	3241212/-
3.	2328500/-	186300/-	2142200/-	2242196/- *
4.	18213200/-	1457100/-	16756100/-	11663231/-
Foreign liquor Shop No.				
5.	13126100/-	1050100/-	12076000/-	4806834/-

* Note :- It has been informed by the learned Asstt. Excise Commissioner in the Court that the amount in excess of annual licence fee was deposited in cash by the petitioner.

21. In view of the aforesaid, tentatively it seems that an amount of Rs.22306502/- of the petitioner was with the Excise Department against which liquor is not stated to have been supplied. Such money could have been forfeited only in the light of any empowering legal or contractual provision. No such provision could have been pointed out by the learned Govt. Advocate. Therefore, the amount of the petitioner lying with the respondents against which liquor was not supplied is found hereby liable to be refunded and the petitioner is held entitled to it.

22. Shri Kale, learned senior counsel made a request that interest at the Bank Rate 14.25% per annum may be awarded on the amount of refund which has been vehemently opposed by Shri Alok Pathak, learned Govt. Advocate. It may be seen from the various terms and conditions of liquor laws or liquor contracts that the petitioner was not liable to pay interest on the defaulted amount. It is equally true that there is no statutory provision providing interest to the petitioner in case of refund. This being so, respondents cannot be straightway directed to pay interest on the amount of refund.

23. In the result, the writ petition succeeds in part. Petitioners are held entitled to the refund of the amount of annual licence fee against which liquor has not been supplied to the petitioner by the respondents. Respondents are therefore, commanded to refund the amount within two months from today. In case of failure, the petitioner would be entitled to interest at the rate charged from him while submitting Bank Guarantee to the respondents.

No order as to costs.

Petition succeeds in part.

I.L.R. [2008] M. P., 706

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta

14 December, 2007*

JAN SEVA SHIKSHA SAMITI — Petitioner

Vs.

STATE OF M.P. & ors. — Respondents

A. National Council for Teachers Education Act (73 of 1993), Sections 14, 15 & 32 - New B.Ed. College - Permission to start - N.C.T.E. is final authority to grant or refuse recognition - State Govt. cannot refuse No Objection Certificate. (Para 42)

B. National Council for Teachers Education Act (73 of 1993), Section14 (3) - Conditional Recognition - Conditional recognition issued by NCTE - Conditional recognition could be ripened only after satisfying statutory requirements provided in regulations 7 and 8 of the Regulations as they are conditions precedent. (Para 42)

C. National Council for Teachers Education Act (73 of 1993), Sections 14, 15 & 32 - New B. Ed. College - Institutions are bound to follow regulations and University are required to respect regulations as they have overriding effect on University Statutes - Petition disposed off. (Para 42)

Cases referred :

W.P. No. 12012/2007 = ILR (2007) MP 1757, AIR 2004 SC 2836, AIR 2004 SC 1107, 2006 AIR SCW 2048.

Manoj Chansoria, for the petitioner

Dharmendra Sharma, Assistant Solicitor General for the respondent/Union of India

Deepak Awasthy, G.A. for the respondent/State

Ashok Chakravarty, for the respondent/NCTE

Tapan Trivedi, P.K. Kourav & Vibhuvendra Mishra, for the respondent/ Universities.

O R D E R

The Order of the Court was delivered by DIPAK MISRA, J. :–The basic and fundamental issue that emanates for consideration in this batch of writ petitions being similar, despite the endeavour by the petitioners to pyramid a different structure, because of the language employed in the orders passed by the recognising authority, the NCTE under the NCTE Act, 1993 [for brevity 'the 1993 Act'], they were heard analogously and are disposed of by the singular order. Be it noted, counter affidavit filed in certain cases have been adopted in all the cases regard being had to the nature and character of the grievance. For the sake of convenience we shall exposit to the basic facts

*W.P No. 12133/2007 (Jabalpur)

enumerated in *Oxford Society of Education vs. State of M.P. & ors.* (W.P. No.8475/07) and thereafter refer to the different categories of orders passed by the recognising authority and dwell upon the legal effect of the same.

2. The petitioner, Oxford Society of Education, Social Welfare and Health Care, is a registered society under the M.P.Registrikaran Adhiniyam, 1973. The said society is running a Sadguru Shikshan Mahavidyalaya (B.Ed. College). The said society applied for 'No Objection Certificate' from the School Education Department and the same was issued on 31.12.2004. After obtaining 'No Objection Certificate' as per Annexure-P-2 the petitioner applied for recognition before the National Council for Teacher Education (NCTE) and the same, as setforth, was granted on 09.8.2005. The final recognition, as pleaded, was granted to the petitioner-society by the NCTE as per the order dated 26.12.2006 as contained in Annexure-P-4. Despite the issue of the aforesaid recognition, the Department of Higher Education refused to issue 'NOC' to the petitioner-society for the subsequent years. This compelled the petitioner to file a writ petition, W.P.8315/2005 which was disposed of on 12.8.2005 with certain directions. In compliance of the order of this Court the Higher Education Department issued the 'No Objection Certificate' for conducting B.Ed. Course for the academic session 2005-06 vide letter dated 10.11.2005. The said 'No Objection Certificate' was continued by letter dated 09.2.2007 with certain conditions. As setforth, the Higher Education Department had issued an earlier circular enumerating certain conditions for grant of 'No Objection Certificate'. It is contended that in pursuance of letter dated 09.2.2007 contained in Annexure-P-7 the petitioner fulfilled all the required formalities by submitting an application on 30.4.2007 to the Commissioner, Higher Education. It also submitted an application for continuation of 'NOC' for the academic session 2007-08 before the Commissioner. The same was cancelled as per communication dated 18.5.2007. Against the aforesaid communication an appeal was preferred before the Principal Secretary, Higher Education on 04.6.2007. The Secretary, Higher Education rejected the appeal of the petitioner by order dated 12.6.2007 without considering the law in force.

3. It is urged in the petition that once 'No Objection Certificate' has been granted there is no necessity for further orders regarding continuance of the same. It is putforth that the Executive Council of the concerned University has taken a decision on 30.12.2006 on the basis of the instructions of NCTE that the obtaining of 'NOC' from the State Government is not requisite formality. It is pleaded that the State Government ought to have decided that B.Ed. Courses is covered under the NCTE Act and, therefore, neither the State Government nor the Department of Higher Education could have interfered by taking recourse to the concept of grant of 'No Objection Certificate'. It is also highlighted that the final recognition has been granted in favour of the petitioner-institution by the NCTE for conducting B.Ed. Course and after grant of recognition by the said authority the State Government has no role to interfere and entrench in the matter and the grant of

affiliation by the University is automatic. In this factual backdrop a prayer has been made for issue of a writ of certiorari for quashing of order dated 20.5.2007 contained in Annexure-P-15 and to command the respondents to continue 'No Objection Certificate' for the academic session 2007-08 which had already been granted in favour of the petitioner-institution.

4. A counter affidavit has been filed in the Writ Petition No.11430/2007 by the respondents No.1 & 2, namely, State of Madhya Pradesh and the Commissioner, Higher Education Department which has been adopted in all the cases. It is contended that in similar cases the challenge is to the refusal of grant of 'No Objection Certificate' by the Department of Higher Education as the institutions are not fulfilling the requirement laid down by the Department of Higher Education and State of Madhya Pradesh on the ground that the State has no authority to refuse 'No Objection Certificate' for the purpose of running of B.Ed. Course. Reference has been made to Section 3 of the 1993 Act and Section 20 of the Act. Emphasis has been laid on Section 12 which provides for the functioning of the Council. It is emphasized that Section 12(f) lays down the guidelines for compliance by recognized institutions for starting new courses or training and for providing physical and institutional facilities, staffing pattern and staff qualification. According to Section 14 of the Act, every institution which is desirous of starting a course of training in Teacher Education is required to make an application to the Regional Committee in the prescribed format alongwith the requisite fee. On receipt of the application, the Regional Committee of the concerned area after processing, on being satisfied that such institution is having adequate financial resources, accommodation, library, qualified staff, laboratory and other conditions as prescribed for the purpose, can grant recognition. Sub-section (4) of Section 14 specifically provides that every order of granting or refusing recognition shall be published in the official gazette and information in this regard shall be sent to the Central Government, State Government and the Examining body and as per sub-section (6) every examining body on receipt of an order under Sub-section (4) of Section 14 granting or refusing recognition has to grant affiliation or cancel affiliation meaning thereby that if the Regional committee is satisfied about the law laid down requirement recognition has to be granted and there upon the examining body has to act in accordance with the intention of sub-section (6). It is putforth that a set of Regulations has been framed in exercise of the powers conferred under Section 32 of the Act. The said regulation, namely, National Council for Teacher Education (Recognition Norms & Procedure) Regulations, 2005 (hereinafter referred to as 'the 2005 Regulations') have come into force. Regulation 5 speaks about the manner of making application and Regulation 7 deals with processing of applications by the Regional Committee. According to Regulation 7(2)(iv) a written communication alongwith a copy of the application form submitted by the institution (s) of the concerned State/ U.T. is required to be sent to the State Government/U.T. Administration concerned. Regulation 7(3) stipulates that

on receipt of communication from NCTE or the Regional Committee, the State Government shall furnish its recommendations on the application to the concerned Regional Committee within 60 days from the receipt of the communication from the Regional committee and if no communication is received within the stipulated period of 60 days it shall be presumed that the State Government has no recommendation to make. Regulation 8 deals with conditions for grant of recognition and according to the same an institution must fulfill all the the norms fixed by the NCTE for the B.Ed. Course and being satisfied about the norms the NCTE shall issue unconditional letter of recognition in favour of the institution and thereafter the institution can proceed with the process of admission after obtaining affiliation from the examining body. It is contended that the 1993 Act and the 2005 Regulations prescribe complete procedure for granting recognition to an institution for starting B.Ed course and in the process of granting of recognition the State Government as well as the Examining Body, i.e., University has been given specific role. A reference has been made to Section 24(xii) and Section 26(i) of the M.P.Vishwavidyalaya Adhiniyam, 1973 to highlight that under the said enactment, the Commissioner, Higher Education has framed guidelines before issuance of the 'NOC' for opening/continuance of any new college and as the guidelines have been framed it is not apposite to contend on the part of the petitioner that the State Government has no role for grant of 'No Objection Certificate'. Emphasis has been laid on the aspect that NCTE while granting recognition has imposed certain conditions in the letter itself and the language employed therein categorically postulates 'subject to the conditions, recognition has been granted', one such condition is that 'subject to fulfillment of all other such requirement as may be prescribed by the other regulatory body like UGC and State". It is put forth that the NCTE has not acted in accordance with the Act and the Regulations inasmuch as Regulation 8(10) stipulates in a very specific manner that an institution can proceed with the process of admission only on obtaining the letter of recognition from the Regional Committee and affiliation from the Examining Body. In view of this the action of the State Government directing the institutions to adhere to the guidelines framed by the High Education Department is just and proper because it is the duty of the State Government to maintain minimum prescribed standard in the field of education. It is further urged that during the pendency of the present petitions by letter dated 20.8.2007 the Central Government has taken note of uneven and disproportionate growth in number of recognition granted by the Western Regional Committee of NCTE by ignoring the actual demand of teachers in a particular State and directed for review of the recognition granted by the NCTE, in exercise of power under Section 29 of the Act and has further directed that no recognition be granted till further orders. In compliance of the aforesaid order the NCTE has issued a letter on 22.8.2007 directing that no action be taken for grant of recognition and meeting of the Western Regional Committee. The said letters have been brought on record as Annexures-R-1 and R-2 respectively. It is further asseverated that the recognition in some cases have been granted for

the academic session 2005-06 and there is nothing on record to show that the recognition has been granted by the NCTE thereafter. As 'NOC' has not been obtained from the Department of Higher Education they are not entitled to the affiliation from the University and hence, the institution is not entitled for taking part in the counselling for B.Ed. Examination.

5. A return has been filed by the University stating that unless 'No Objection Certificate' is obtained from the State Government it is difficult on the part of the University to grant affiliation. It is also contended by the University that unless recognition is granted under Section 14(6) of the 1993 Act the institute despite being permitted for counselling cannot admit the students.

6. A return has been filed by the NCTE contending, inter alia, that the petitioner has been allotted a Code and is recognized by NCTE by letter dated 22.6.2006 passed under Section 14 of the 1993 Act. It is putforth that NCTE has been established in the year 1995 as an Apex body on the subject of "Teacher Education" under the NCTE Act, which was framed under Entry 66 of List I of the Seventh Schedule of the Constitution of India and the provisions of the said Act would prevail over the State Act which is inconsistent with the provisions of the said law. Reliance has been placed on Section 14(6) of the Act which provides that every examining body shall on receipt of the order under sub-section (4) grant affiliation to the institution where recognition has been granted. It is setforth that it is not open to the State Government or other State authorities including the University to refuse permission or affiliation to the recognized teacher education institutions relying on any of the provision of State laws or on policy consideration as the power to make the policy is co-extensive with the power to legislate. As the State Government cannot legislate on the subject of teacher education it cannot formulate any policy. It is urged that when NCTE has granted recognition after detailed examination and verification of physical and instructional infrastructure as per the statutory regulations and come to the conclusions that the institution fulfills the prescribed norms and standards the State Government cannot interfere to make it ineffective. The final authority to pass the order of recognition vests with the NCTE and the role of the State Government is only recommendatory in nature and the said recommendations are not binding on the NCTE. Neither the State Government nor the University has any authority to oppose the act of the NCTE as that is not permissible in law.

7. We have heard the learned counsel for the petitioners, Mr. Dharmendra Sharma, learned Assistant Solicitor General for Union of India, Mr. Deepak Awasthi, learned Govt. Advocate for the State, Mr. Ashok Chakrawarti, learned counsel for the NCTE, Mr. Tapan Trivedi, Mr. P.K. Kaurav and Mr. Vibhuvendra Mishra, learned counsel appearing for various universities.

8. To appreciate the controversy that has emerged in this bunch of cases, it is thought seemly to refer to Section 14 of the 1993 Act:-

"14. Recognition of institutions offering course or training in teacher education."

(1) Every institutions 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 institutions concerned such other particulars as it may consider necessary, it shall,-

(a) if it is satisfied that such institutions has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institutions for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institutions, subject to such conditions as may be determined by regulations; or

(b) if it is of the opinion that such institutions does not fulfil the requirements laid down in sub-clause (a), pass an order refusing recognition to such institutions 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 institutions for making a written representation.

(4) Every order granting or refusing recognition to an institutions 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."

9. On a scanning of the anatomy of the aforesaid provisions it is clear as day that an application has to be submitted in such a manner as may be determined by the Regulations and the application shall be considered by the Regional Committee which shall record its satisfaction that such an institution has adequate financial resources, accommodation, library, qualified staff, laboratory and it fulfills other such conditions required for proper functioning of the institution to offer a course or training in teacher education, as may be determined by the Regulations and thereafter pass an order granting recognition to such institution subject to such conditions as may be determined by the Regulations. Sub-section (4) postulates that grant or refusal of the order 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. Sub-section (6) stipulates that on receipt of the order under sub-Section (4) the examining body shall grant affiliation to the institution where recognition has been granted.

10. In this context we may profitably refer to Section 15 of the 1993 Act, which reads as under:

"15. Permission for a new course or training by recognised institution."

(1) Where any recognised institution intends to start any new course or training in teacher education, it may make an application to seek permission therefor to the Regional Committee concerned in such form and in such manner as may be determined by regulations.

(2) The fees to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application from an institution under sub-section (1), and after obtaining from the recognised institution such other particulars as may be considered necessary, the Regional Committee shall,-

(a) if it is satisfied that such recognised institution has adequate financial resources, accommodation, library, qualified staff,

laboratory and that it fulfils such other conditions required for proper conduct of the new course or training in teacher education, as may be determined by regulations, pass an order granting permission, subject to such conditions as may be determined by regulation; or

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

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

(4) Every order granting or refusing permission to a recognised institution for a new 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 recognised institution and to the concerned examining body, the local authority, the State Government and the Central Government."

11. In this regard it is also fruitful to refer to Section 16 of the 1993 Act. The said provision reads as under:-

"16. Affiliating body to grant affiliation after recognition or permission by the Council."

Notwithstanding anything contained in any other law for the time being in force, no examining body shall, on or after the appointed day,-

(a) grant affiliation, whether provisional or otherwise, to any institution; or

(b) hold examination, whether provisional or otherwise, for a course or training conducted by a recognised institution, unless the institution concerned has obtained recognition from the Regional Committee concerned, under section 14 or permission for a course or training under section 15."

12. Section 20 deals with the power of the Council to establish regional committees. Section 21 confers the power on the Council to terminate the Regional Committee. Section 29 provides for directions by the Central Government. The said provision being relevant for the present purpose is quoted below:-

"29. Directions by the Central Government.

(1) The Council shall, in the discharge of its functions and duties under this Act be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time."

(2) The decision of the Central Government as to whether a question is one of policy or not shall be final."

13. Section 32 deals with the power of the Council to make regulations. The said provision is reproduced hereunder:-

"32. Power to make regulations.

(1) The Council may, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder, generally to carry out the provisions of this Act."

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the time and the place of the meetings of the Council and the procedure for conducting business thereat under sub-section (1) of section 7;

(b) the manner in which and the purposes for which persons may be co-opted by the Council under sub-section (1) of section 9;

(c) the appointment and terms and conditions of service of officers and other employees of the Council under sub-sections (1) and (2) respectively of section 19;

(d) The norms, guidelines and standards in respect of-

(i) the minimum qualifications for a person to be employed as a teacher under clause (d) of section 12;

(ii) the specified category of courses or training in teacher education under clause (e) of section 12 ;

(iii) starting of new courses or training in recognised institutions under clause (f) of section 12;

(iv) standards in respect of examinations leading to teacher education qualifications referred to in clause (g) of section 12;

(v) the tuition fees and other fees chargeable by institutions under clause (h) of section 12;

(vi) the schemes for various levels of teacher education, and identification of institutions for offering teacher development programmes under clause (l) of section 12;

(e) the form and the manner in which an application for recognition is to be submitted under sub-section (l) of section 14;

(f) conditions required for the proper functioning of the institution and conditions for granting recognition under clause (a) of sub-section (3) of section 14;

(g) the form and the manner in which an application for permission is to be made under sub-section (1) of section 15;

(h) conditions required for the proper conduct of a new course or training and conditions for granting permission under clause (a) of sub-section (3) of section 15;

(i) the functions which may be assigned by the Council to the Executive Committee under sub-section (1) of section 19;

(j) the procedure and the quorum necessary for transaction of business at the meetings of the Executive Committee under sub-section (5) of section 19;

(k) the manner in which and the purposes for which the Executive Committee may co-opt persons under sub-section (6) of section 19;

(l) the number of persons under clause © of sub-section (3) of section 20;

(m) the term of office and allowances payable to members under sub-section (5) of section 20;

(n) additional functions to be performed by the Regional Committee under sub-section (6) of section 20;

(o) the functions of, the procedure to be followed by, the territorial jurisdiction of, and the manner of filling casual vacancies among members of, a Regional Committee under sub-section (7) of section 20;

(p) any other matter in respect of which provision is to be or may be, made by regulations."

14. We have reproduced the aforesaid provisions to understand and appreciate the scheme of the 1993 Act in proper perspective. As is evincible from the provisions contained in sections 15 and 16 that recognition or permission must precede affiliation by the examining body. Section, as is manifest, confers power on the Central Government to issue directives on question of policy to the Council and further whether a question is one for policy or not, is to be decided by the Central Government. Thus, the Central Government has been bestowed certain powers under the 1993 Act. Section 32(2) of the 1993 Act confers powers on the NCTE for making regulations. Initially certain regulations were framed. They have been superseded by a set of regulations called the National Council for Teacher Education (Recognition Norms & Procedure) Regulations, 2005 and the same has come into force from 27th December, 2005.

15. Regulation 3 which deals with applicability reads as under:-

"3. **Applicability** : These regulations shall be applicable to all matters relating to teacher education programmes covering norms and standards and procedures for recognition of institutions,

commencement of new programmes and addition to sanctioned intake in existing programmes and other matters incidental thereto."

16. Regulation 5 deals with manner of making application. Regulation 6 deals with processing fees. Regulation 7 deals with processing of application. Regulation 7 being relevant and significant for our purpose is reproduced hereunder:-

"**7. Processing of applications**-(1) applications which are complete in all respects shall be processed by the office of the Regional Committee concerned within 30 days of receipt of the such applications.

(2) The applications shall be processed as under:

(i) The particulars of the institutions shall be hosted on the official website of the Regional Committee concerned of the National Council for Teacher Education.

(ii) This will serve as an electronic communication to the applicant and also the State Government/UT Administration concerned for necessary follow up action on their part.

(iii) A written communication in addition shall also follow to the applicant.

(iv) A written communication along with a copy of the application form submitted by the instittuion(s) of the concerned State'UT shall be sent to the State Government/UT Administration concerned.

(3) On receipt of the communication, the State Government/UT Administration concerned shall furnish its recommendations on the applications to the office of the Regional Committee concerned of the National Council for Teacher Education within 60 days from receipt. If the recommendation is negative, the State Government/ UT Administration shall provide detailed reasons/grounds thereof, which could be taken into consideration by the Regional Committee concerned while deciding the application. If no communication is received from the State Government/UT Administration within the stipulated 60 days, it shall be presumed that the State Government/ UT Administration concerned has no recommendation to make.

(4) Though normally the applicant institutions will ensure submission of applications complete in all respects, in order to cover the inadvertent omission of deficiencies in documents, the office of the Regional Committee shall point out the deficiencies within 30 days of receipt of the applications, which the applicants shall remove within 90 days. The date of receipt of the application after completion of deficiencies shall be treated as the date of receipt of the application complete in all respects within the meaning of Regulation 7(1).

(5) Ordinarily, the inspection of infrastructure, equipment, instructional facilities etc. of an institution shall be conducted within 30 days of completion of processing of its application by the office of the Regional Committee with a view to assessing the level of preparedness of the institution to commence the course. Such inspection shall be in the chronological order of the date of receipt of the completed application in the office of the Regional Committee concerned. Among the applications received on the same day, alphabetical order shall be followed.

(6) All the applicant institutions are expected to launch their own website simultaneously with the submission of their applications covering, inter alia, the details of the institution, its location, name of the course applied for with intake, availability of physical infrastructure (land, building, office classrooms, and other facilities/ amenities), instructional facilities (laboratory, library etc.) and the particulars of their proposed teaching and non-teaching staff etc. with photographs for information of all concerned.

(7) At the time of visit of the team of experts to an institution, the institution concerned shall arrange for the inspection to be videographed in a manner that all important facilities are videographed along with interaction with the management and the staff (if available). The visiting team shall finalise and courier their reports along with the video tapes on the same day.

(8) The application and the report along with the video tapes of the visiting team shall be placed before the Regional Committee concerned for consideration of grant of recognition or permission to an institution in its next meeting.

(9) The Regional Committee shall decide grant of recognition or permission to an institution only after satisfying itself that fulfills all the conditions prescribed by the NCTE under the NCTE Act, Rules or Regulations, including, inter alia, the norms and standard laid down for the relevant teacher education programme/course.

(10) In the matter of grant of recognition, the Regional Committees shall strictly act within the ambit of the National Council for Teacher Education Act, 1993, the National Council for Teacher Education Rules, 1997 as amended from time to time and the regulations including the norms and standards for various teacher education programmes and shall not make any relaxation thereto. The Regional Director shall be responsible for ensuring that the decisions of the Regional Committees are not in contravention of the NCTE Act, NCTE Rules and regulations including the norms and standards.

(11) The institution concerned shall be informed of the decision for grant of recognition or permission subject to appointment of qualified faculty members before the commencement of the academic session.

(12) The institution concerned after appointing the requisite faculty/ staff, shall put the information on its official website and also formally inform the Regional Committee concerned. The Regional Committee concerned shall then issue a formal unconditional recognition order.

(13) In cases where the Regional Committee, after consideration of the report of the Visiting Team, is of the opinion that the institution does not fulfill the requirements for starting/conducting the course, such an institution will be allowed one more opportunity for inspection after removal of the deficiencies. For such inspection the institution concerned shall again deposit a fee of Rs.40,000 to the Regional Committee concerned through a demand draft from any Nationalised Bank drawn in the favour of the Member Secretary, NCTE payable at the city where the Regional Committee is located. However, no such fee is required if the deficiencies pointed out are minor in nature not involving civil construction or the like and the rectifications are verifiable without physical inspection.

(14) The reports of inspection of the institutions along with the names of the Visiting Team Experts shall be made available on the official website of the Regional Committee concerned after the same have been considered by the Regional Committee."

(Emphasis supplied)

17. Before we proceed to analyse the purpose, import and impact of the provisions of the 1993 Act and Regulations 2005 it is condign to refer to various types of orders passed by the NCTE at various junctures.

18. In respect of certain institutions the NCTE had passed the orders which read as under:-

"To,

The Commissioner/Director,
Madhya Pradesh State Council of Research and
Training,
Rajya Shiksha Kendra, Pustak Bhawan,
Arera Hills, Bhopal Madhya Pradesh.

Sub: Recognition of secondary level Teacher Training Institutions for the academic session 2004-2005.

Sir,

Please find the following institution recognised by Western Regional Committee (NCTE) with an annual intake of 100 for the B.Ed. Course for the academic session 2004-2005, 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. The formal order of recognition will be issued only after the receipt of this list in WRC, NCTE, Bhopal. You are requested to allow all the institutions to admit students only upto the approved intake for which recognition has been granted.

NCTE CODE	NAME AND ADDRESS OF THE INSTITUTION	COURSE	APPROVED INTAKE	ACADEMIC SESSION
223150	BUNDELKHAND SHIKSHA MAHAVIDYALAYA, RAJMAHAL, TA. PRANGADH CHHATTARPUR 471 001 MADHYA PRADESH	B.ED.	100	2004-2005

Also, instruct the institutions to adhere to the norms prescribed by the NCTE relating to eligibility criteria for admission, infrastructure, staff and curriculum transaction, etc. to the standards laid down by the NCTE and continuous maintenance of these norms and standards is mandatory and binding on the institution.

Yours faithfully,
(Sd/-)
Regional Director

Copy to:

1. The Principal, BUNDELKHAND SHIKSHA MAHAVIDYALAYA, RAJMAHAL, TA, PRANGADH CHHATTARPUR 471 001 MADHYA PRADESH. The institution is directed that the list of the faculty members are sent to this office duly signed by the Registrar of the affiliating University/ competent authority before commencement of the academic session. The formal order of recognition will be issued only after the receipt of this list in WRC, NCTE, Bhopal.

2. The Registrar, Dr. Harisingh Gour Vishwavidyalaya, SAGAR-470 003."

19. In respect of same institutions the NCTE has passed the following order:-

"TO BE PUBLISHED IN THE GAZETTE OF INDIA-
PART-III, SECTION IV

No.WRC/5-6/223150/63/2004/7878 Date: 16.11.07

ORDER

In terms of Section 14 (1) of the NCTE Act, 1993 BUNDELKHAND SHIKSHA MAHAVIDYALAYA, RAJMAHAL, TA. PRANGADH CHHATTARPUR had submitted an application to the Western Regional Committee of NCTE for grant of recognition for starting B.Ed. of one year from the academic session 2004-2005 with an annual intake of 100 students.

2. On scrutiny of the application submitted by the institution, the documents attached therewith and the input received from the visiting team, the Committee has noted the following:

(i) The institution has acquired the land for setting up the teacher education institution.

(ii) The institution has constructed the building for conducting the course on the above mentioned land.

Or

The institution has made arrangements for conducting the course in rented premises.

(iii) The institution has created an Endowment Fund of Rs.5.00 lakhs and a Reserve Fund of Rs.3.00 lakhs.

(iv) The institution has initiated the process for recruitment of Principal/head of Department and teachers for the said course.

3. Now, therefore, in exercise of the powers vested under Section 14(3)(a) of the NCTE Act, 1993 the Regional Committee hereby grants recognition to BUNDELKHAND SHIKSHA MAHAVIDYALAYA, RAJMAHAL, TA. PRANGADH CHHATTARPUR for B.Ed. Of one year from the academic session 2004-2005 with an annual intake of 100 students subject to fulfillment of the following:-

(a) The institution shall ensure that it gets duly affiliated for this course to the concerned University and all other formalities required by the University are also completed before the commencement of the course and admission of the students to the course and a report to this effect should be sent to the Committee.

(b) That the institution will ensure that 08 (one Principal and 07 lectures) faculty members are in position for an intake of 100 students before commencement of the course and a report to this effect duly verified by the Registrar of the concerned University

shall be sent to the Committee within one month of commencement of the course.

(c) The institution shall within one month of the receipt of recognition create an endowment fund account into a joint account to be operated along with an official of the Regional Committee.

(d) The institution shall shift to its own premises within three years from the date of recognition (In case the course is started in rented premises).

(e) The institution shall comply with the various other norms and standards as prescribed in the NCTE Regulations.

4. Recognition is subject to the condition that the affiliating University shall ensure that, amount other things, an institution has appointed required number of faculty members (including Principal/ Head of Department) as per the norms of the NCTE/ State Government.

5. Further, the recognition is subject to the fulfillment of all such other requirements as may be prescribed by other regulatory bodies like UGC and State Government, etc.

6. The institution shall submit to the Regional Committee a Self Appraisal Report at the end of each academic year along with a copy of the approval of the affiliating university/State Directorate of Education to the appointment of faculty members and the statement of annual accounts duly audited by a Chartered Accountant.

7. If the institution contravenes any of the above conditions or any of the provisions of the NCTE Act, Rules, Regulations and Orders made or issued thereunder, the Regional Committee may withdraw the recognition under the provisions of Section 17(1) of the NCTE Act.

By order
Regional Director

Code 1 1 3 1 5 0

The Manager,
Government of India,
Department of Publications, (Gazette Section)
Civil Lines,
Delhi-110054

Copy to-

1. Secretary, Department of Elementary Education and Literacy,

Ministry of Human Resource Development, Government of India, New Delhi.

2. The Principal Secretary (School Education), Government of Madhya Pradesh, Mantralaya, Bhopal.

3. The Member Secretary, National Council for Teacher Education, New Delhi - 110002.

4. The Registrar, Dr.Harisingh Gour Vishwavidyalaya, SAGAR-470003 (MP)- toensure compliance of the clause 4 of the recognition order. In case the institution is not found to have complied with the said requirements, the university shall withhold the affiliation and report the same to WRC, NCTE.

5. The Commissioner, Madhya Pradesh State Council of Educational Research & Training, Opposite Text Book Corporation, Jail – Pahari Road, Bhopal-462011

6. The Principal, BUNDELKHAND SHIKSHA MAHAVIDYALAYA, RAJMAHAL, TA. PRANGADH CHHATTARPUR 471001 MADHYA PRADESH

Regional Director"

20. In certain other cases the orders read as under:-

"TO BE PUBLISHED IN THE GAZETTE OF INDIA-PART-III, SECTION-IV.

No.WRC/5-6/932006/ 31st January, 2007

ORDER

The institutions mentioned in the table under para 3 below had submitted applications to the Western Regional Committee of National Council for Teacher Education for grant of recognition to D.Ed. in terms of Section 14(1) and 15(1) of NCTE Act, 1993 among others.

2. The WRC at its 93rd meeting held from 17th January, 2007, at Bhopal considered applications of the institutions included in the Agenda for the meeting and after careful examination of relevant documents, Visiting Team Reports, Video Recording etc. and the institutions compliance reports on deficiencies found the institutions mentioned in para 3 below fit for grant or recognition of the courses and intake mentioned against their names.

3. Now, therefore, in exercise of powers conferred under Section 14(3)(a) of the NCTE Act, 1993, the Regional Committee hereby grants recognition to these institutions for the course and intake mentioned against their names as under:

S.No.	MIS/NCTE CODE	NAME AND ADDRESS OF THE INSTITUTION	COURSE	APPROVED/ Additional/New INTAKE
1	APW02612/ 222148	GANDHI VOCATIONAL COLLEGE, A.B. ROAD. KUSHMODA, GUNA 473001 MADHYA PRADESH	D.ED	50
2	APW02674/ 222031 (ADDL)	INDORE MAHAVIDYALAYA, 164, MG ROAD, IV FLOOR MULEY TOWER INDORE 452 003 MADHYA PRADESH		

4. The institutions shall ensure the fulfillment of the following:

(a) The institutions shall maintain the teaching staff strength of 1+5 for the sanctioned D.Ed. course and all the appointments would be on regular basis on an approved scale of payment of the candidates having fulfilled eligibility condition prescribed by NCTE. The institute concerned shall send a report in this regard to WRC of NCTE within 30 days, in terms of clause 7(12) of the NCTE Regulations 2005.

(b) The institutions shall note that with regard to NET/SLET requirement, the relaxation is allowed only upto the year 2009-2010 as per NCTE Regulations dt. 21-7-2006.

(c) The institutions shall adhere to all the other regulations and guidelines as framed by NCTE from time to time.

(d) The institutions shall within one month of the receipt of the Recognition order, convert the Endowment Fund account into a Joint Account in the form of FDR for a period of not less than 60 months (Five Years) in a Nationalised Bank only to be operatd along with an authorised official of the Regional Committee.

(e) That the Reserve fund for an amount of Rs. Three Lakhs be maintained in the form of FDR in favour of the managements/ institutions.

(f) Further, the recognition is subject to fulfillment of all such other requirements as may be prescribed by other regulatory bodies like UGC and State Government etc.

(g) The institutions shall submit to the Regional Committee a Self Appraisal Report at the end of each academic year along with a copy of the approval of the affiliating University/State Directorate of Education about the appointment of faculty members and the Statement of Annual Accounts duly audited by a Chartered Accountant.

(h) The institutions shall regularly update their website.

(i) The institutions intending to run the teachers training programme approved above in a rented premises are required to submit report in compliance of the requirement of NCTE Regulations on the subject regarding their shift to permanent building.

5. If any of the institutions contravene any of the above conditions or any of the provisions of the NCTE Act, Rules, Regulations and/or order made or issued thereunder, the Regional Committee may withdraw the recognition under the provisions of Section 17(1) of the NCTE Act 1993. The NCTE Hqrs. May also cause inspections under Section 13 of the NCTE Act, 1993.

6.It is mandatory for the institutions to complete 200 teaching days as such the concerned university/board should ensure the recognition granted as per NCTE regulations and if the recognition date did not match with the academic calendar then the recognition granted shall be effective from the ensuring academic session.

By orders
(Sd)/
Regional Director

1. All Institutions cocnerned.

Copy to -

1. The Secretary, Department of Elementary Education and Literacy, Ministry of Human Resource Development, Government of India, New Delhi.

2. The Principal Secretary (School Education), Governent of Madhya Pradesh, Mantralaya, Bhopal.

3. The Member Secretary, National Council for Teacher Education, New Delhi – 110 002

4. The Commissioner/Director, Madhya Pradesh State Council and Research and Training, Rajya Shiksha Kendra, Pustak Bhawan, Arera Hills, Bhopal, Madhya Pradesh.

5. The Secretary, Board of Secondary Education, Board Office Ccampus, Shivaji Nagar, Bhopal, Madhya Pradesh.

6. The Under Secretary, Computer Section, National Council for Teacher Education, New Delhi – 110 002

7. P.S. to Chairperson, National Council for Teacher Education, New Delhi 110 002

8. The Manager, Government of India, Department of Publications (Gazette Section), Civil Lines, Delhi

9. All other officers and offices concerned.

Regional Director"

21. In some cases the order passed is as under:-

"NO. WRC/APW00632/223174/NCTE/2007/C-20011
Date: 23/07/2007
24

To,

The Principal,
ROSHANLAL DAIPURIA MAHAVIDYALAYA,
AT. POST SIRPURA TAH. ATER,
BHIND-477555, MADHYA PRADESH

Sub: Formal Order for B.Ed. Course-reg.

Sir/Madam,

With reference to your letter, it is to inform that your institution is a recognized one from 2007-08 for B.Ed. Course and formal order will be issued immediately on scrutiny of revised staff profile.

Yours faithfully,
Under Secretary

Copy to:

1. The Registrar, Jiwaji University, Gwalior.

22. In certain cases the NCTE after referring to Section 14(1) of the 1993 Act has stated that on a scrutiny of the applications submitted by the institutions documents attached therewith and the input received from the visiting team and staff list submitted thereafter the Western Regional Committee (WRC) in its 89th meeting has resolved to issue unconditional recognition order to certain institutions. After so mentioning the names of certain institutions do find place. Thereafter the order passed by the institution reads as under:

"3. Now, therefore, in exercise of the powers vested under Section 14(3)(a) of the NCTE Act, 1993, the Regional Committee hereby grants recognition for B.Ed. Of one year subject to fulfillment of the following:

(a) The institution shall ensure that it gets duly affiliated for this course to the concerned University and all other formalities required by the University are also completed before the commencementof the course and admission of the students to the course and a report to this effect should be sent to the Committee.

(b) That the institution will ensure that 08 (one Principal and 07 lecturers) faculty members are in position for an intake of 100 students before commencement of the course and a report to this effect duly verified by the Registrar of the concerned

University shall be sent to the Committee within one month of commencement of the course.

(c) The institution shall within one month of the receipt of recognition create an endowment fund account into a joint account to be operated along with an official of the Regional Committee.

(d) The institution shall shift to its own premises within three years from the date of recognition (In case the course is started in rented premises.)

(e) The institution shall comply with the various other norms and standards as prescribed in the NCTE Regulations.

4. Recognition is subject to the condition that the affiliating University shall ensure that, among other things, an institution has appointed required number of faculty members (including Principal/ Head of Department) as per the norms of the NCTE/State Government.

5. Further, the recognition is subject to the fulfillment of all such other requirements as may be prescribed by other regulatory bodies like UGC and State Government, etc.

6. The institution shall submit to the Regional Committee a Self-Appraisal Report at the end of each academic year along with a copy of the approval of the affiliating university/State Directorate of Education to the appointment of faculty members and the statement of annual accounts duly audited by a Chartered Accountant.

7. If the institution contravenes any of the above conditions or any of the provisions of the NCTE Act, Rules, Regulations and Orders made or issued thereunder, the Regional Committee may withdraw the recognition under the provisions of Section 17(1) of the NCTE Act..

By orders
(sd/-)
Regional Directorate

The Manager,
Government of India,
Department of Publication (Gazette Section)
Civil Lines, Delhi- 110 054
Copy to-

1. The Secretary, Department of Elementary Eduction and Literacy,Ministry of Human Resources Development,Government of India, New Delhi.

2. The Principal Secretary (School Education), Government of

Madhya Pradesh, Mantralaya, Bhopal.

3. The Member Secretary,National Council for Teacher Education, New Delhi – 110 002

4. The Registrar, Jiwaji University Gwalior/Barkatullah University, Bhopal/Vikram University, Ujjain/Devi Ahilya University, Indore/Rani Durgavati University Jabalpur/A.P.S. University, Rewa/H.S. Gaur University, Sagar – to ensure compliance of the clause 4 of the recognition order. In case the institution is not found to have complied with the said requirements, the university shall withhold the affiliation and report the same to WRC, NCTE.

5. The Commissioner, Madhya Pradesh State Council of Educational Research & Training,Opp. Text Book Corporation, Jail Pahari Road, Bhopal – 462 011.

6. The Secretary/Principal of concerned institutions."

23. We have referred to various types of orders to scan the nature, character, contour and import of the said orders. Submission of the learned counsel for the petitioners is that the Committee could have passed only a singular order and that is the final order. It is contended by them that when the Committee intimates its decision it is couched in different language and when the Committee uses the term 'order' it conveys finality. Learned counsel for the petitioners have further submitted that a notification in the official gazette as provided under Section 14(4) of the Act is not imperative and a communication subserves the purpose and meets the requirement. In support of the said submission the decision rendered in *Vedica College of Education, Bhopal vs. Barkatullah University* (W.P. No.12012/2007) has been commended to us. In the aforesaid case the Division Bench was dealing with a case of an institution wherein a formal order of recognition was not issued. The Division Bench has held that if an order of recognition has been issued by the Regional committee under sub-section (3) of Section 14 of the 1993 Act and the same has been communicated in writing to the institutions and concerned authority, 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. As advised at present, we are not disposed to address ourselves to the issue with regard to the facet of publication in the gazette. The Division Bench has stated that there is nothing like a formal order. The facts in the aforesaid case frescoes a different picture. As far as the present batch of cases is concerned we have referred to various types/categories of orders passed by the Committee. The question that emerges for consideration is whether the said orders can be regarded as final recognition from all spectrums. Quite apart from the above, the other question that emanates is whether the institution could have admitted students without affiliation from the university. Another aspect on which Mr. Deepak Awasthi,

learned Govt. Advocate for the State emphasised upon is whether no objection certificate from the State Government is the sine qua non for the purpose of grant of recognition.

24. Each of the aforesaid issues requires careful consideration. First we shall advert to the statutory requirement. The 1993 Act has its objects to achieve. If the anatomy of the entire scheme of the Act is scrutinised it would be quite clear that it is a complete code and it has a laudable purpose. The NCTE has been conferred a sacrosanct and paramount role in the Act. The NCTE has also been extended the power to frame regulations. It has also framed a set of regulations in the year 2005. Section 14(3) of the 1993 Act which has been reproduced hereinabove lays a postulate that the conditions are to be satisfied. The conditions which have been imposed can be compartmentalised into categories, one which the institutions are required to do after the institutions become functional to impart education and the other, as we perceive, before the functioning of the institutions. To elaborate: the conditions are pre-functional. The language used is `subject to'. The words 'subject to' have come for judicial interpretation in many a decisions. In the case of *Ashok Leyland Ltd. Vs. State of Tamil Nadu and another,* AIR 2004 SC 2836 their Lordships while discussing about the concept of 'subject to' expressed the view as under:-

> "90. Further more, the expression 'subject to' must be given effect to.
>
> 91. In Black's Law Dictionary, Fifth Edition at page 1278 the expression 'Subject to' has been defined as under:
>
> "Liable, subordinate, subservient, inferior, obedient to: governed or affected by; provided that; provided, answerable for. *Homan v. Employers Reinsurance Corpn.*. 345 Mo. 650, 196 SC 2d 289, 302"

25. We have referred to the aforesaid decision only to show that their Lordships have opined in categorical terms that the term 'subject to' must be given due effect. The said term has many a meaning and one such is 'provided'.

26. In *Union of India and another Vs. Azadi Bachao Andolan and another,* AIR 2004 SC 1107 a two-Judge Bench of the Apex Court while interpreting the term 'subject to the provisions of the Act' opined that the said term would mean that it is subject to the provisions of Section 90 of the Income Tax Act.

27. We have referred to the aforesaid decisions only to show that 'subject to' can mean that it is a conditional one and once the conditions are satisfied then the order becomes a ripened, crystallised and concretised one. On a proper appreciation of the Scheme of the 1993 Act and the Regulations framed thereunder, it cannot be brushed aside and the State Government is required to be consulted. The State Government has been ascribed a role to recommend though submission of Mr. Deepak Awasthi, learned Govt. Advocate for the State is that the State Government has not been duly consulted.

28. It is submitted by Mr.Ajay Mishra, learned senior counsel and other counsel appearing for the petitioners that as per Statutes 27 and 28 of the University without commencement of the course the faculty members cannot be appointed. Regulation 7(12) caste a mandate that the institution concerned after appointing the requisite faculty/staff, shall put the information on its official website and also formally inform the Regional Committee concerned. As it seems there is no material on record that the said conditions precedent have been fulfilled. The recognition granted is subject to many a condition and one such condition is appointment of faculty/staff. The University statute has to succumb to the Regulation framed under the NCTE Act. We are inclined to hold so in view of the law laid down in *State of Maharashtra vs. Sant Dnyanehswar Shikshan Shastra Mahavidyalaya,* 2006 AIR SCW 2048. Thus, the submissions putforth by the learned counsel for the petitioners that they can only appoint teachers after affiliation is given is sans substance. The affiliation can only be granted if recognition is granted by the NCTE and the NCTE recognition is only given if Regulation 7(12) is complied with. It is submitted by the learned counsel for the petitioners that 'No Objection Certificate' from the State demanded by the University to grant affiliation is contrary to the decision rendered in the case of *Sant Dnyaneshwar Shikshan ShastraMahavidyalaya* (supra). In the aforesaid case the Apex Court has observed as under:-

> "It is thus clear that the Central Government has considered the subject of Secondary Education and Higher Education at the national level. The Act of 1993 also requires Parliament to consider Teacher Education System 'throughout the country'. NCTE, therefore, in our opinion, is expected to deal with applications for establishing new B.Ed. colleges or allowing increase in intake capacity, keeping in view 1993 Act and planned and co-ordinated development of teacher-education system in the country.

29. Thereafter in paragraph 78 their Lordships proceeded to hold as under:-

> "78. In our opinion, the observations that the provisions of Section 82 and 83 of the Maharashtra University Act are "null and void" could not be said to be correct. To us, it appears that what the High Court wanted to convey was that the provisions of Sections 82 and 83 would not apply to an institution covered by 1993 Act. As per the Scheme of the Act, once recognition has been granted by NCTE under section 14(6) of the Act, every university ('examining body') is obliged to grant affiliation to such institution and sections 82 and 83 of the University Act do not apply7 to such cases."

30. One of the conditions imposed on the institutions is that they must have the staffing pattern. Submission of the learned counsel for the petitioners is that the Statutes 27 and 28 of the Vishwavidyalaya Adhiniyam only requires to appoint the Principal and other staff after the institutions become functional. It is also their

submission that affiliation has to be granted automatically. The State cannot refuse to issue a no objection certificate.

> 35. In view of the aforesaid decision there can be no scintilla of doubt the State Government cannot as a policy matter refuse no objection certificate. The university also cannot take recourse to the fact that the statue provides that NOC is a pre-requisite for grant of affiliation. That was exactly said in *Sant Dhyaneshwar Shikshan Shastra Mahavidyalaya* (supra). Their Lordships have not stated that affiliation is not necessary. In the guise of grant of affiliation the university cannot create any impediment in the functioning of the NCTE but, a pregnant and fertile one, if the university has been ascribed the role by the NCTE can look into the same. Section 14(3) of the 1993 Act categorically postulates that there has to be teaching staff. In the orders relating to grant of recognition it has been provided that they must satisfy the affiliating/examining body with regard to the staff/faculty members.

31. In view of the aforesaid the State Government cannot raise objection on its own policy for granting or non-granting of 'No Objection Certificate'. Regulation 7(2)(i) stipulates that the particulars of the institutions shall be hosted on the official website of the Regional Committee concerned of the NCTE and that would serve as an electronic communication to the applicant and also to the State Government/ UT Administration concerned for necessary follow up. Regulation 2(iv) provides that a written communication alongwith the copy of the application form submitted by the institution shall be sent to the State Government/UT Administration concerned. Regulation 7(3) lays a postulate that the State Government shall furnish its recommendation on the applications to the office of the Regional Committee concerned of the NCTE. A time limit of 60 days has been fixed. There is a factor of presumption that if no recommendation is given it will be presumed that the State Government has no recommendation to make. If the recommendation is negative the State Government is required to provide detailed reasons thereof.

32. Section 14(3) postulates that the Committee has to be satisfied apart from other things that the institution has fulfilled such other conditions apart from qualifying staff. Condition have been imposed in all the orders of recognition as the the terminology *'subject to fulfillment of education staff'* is used.

33. Regulation 7(11) clearly stipulates that the institution concerned shall be informed of the decision for grant of recognition or permission subject to appointment of qualified faculty members before the commencement of the academic session. Regulation 7(12) postulates that the institution concerned after appointing the requisite faculty/staff, shall put the information on its official website and also formally inform the Regional Committee concerned and thereafter the Committee shall issue a formal recognition order. Regulation 8(1) clearly lays down that the institution shall fulfill all the prescribed conditions related to norms

and standards as prescribed by the NCTE for conducting the course or training in teacher education. The norms cover conditions relating to financial resources, accommodation, library, laboratory, other physical infrastructure, qualified staff including teaching and non-teaching personnel, etc. Regulation 8(10) unequivocally postulates that an institution shall make admission only after it obtains unconditional letter of recognition from the Regional Committee concerned and affiliation from the examining body.

34. It is worth noting that in none of the cases there has been affiliation by the concerned University. If the regulations are properly understood, admissions could not have been given by the institutions. True it is, some of the condition imposed by the Committee are post functional and some are conditions precedent. True it is, the Committee has filed a return that the institutions have been duly granted recognition. At this juncture, it is worth noting that the whole thing was the subject-matter of review by the Central Government.

35. In the case of *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra) it has been held that the State Government cannot interfere in the matter of recognition. As far as recognition in the name of State policy is concerned the State Government has been assigned no role. Submission of learned counsel is that the committee has collected information on the website, but the same is not discernible from the factual matrix. That might have been put on the website. The State Government is required to send the recommendations. For these aspects and looking to the gravity of happenings the Union of India thought it proper to look into the matter by exercising the power under Section 29(1) of the Act. True it is, the same related to the pending applications. This Court cannot be oblivious as regards the nature of conditional recognition given. There is nothing to state with certitude that faculty members have been appointed whereas it should have been irrefragably done before conferral of the benefit of recognition. It is crystal clear that they have not been appointed. There is no affiliation. Thus, as per the relevant regulations, the students could not have been admitted.

36. At this juncture it is apt to refer to the letter issued by the Central Government to NCTE. The said letter reads as under:-

New Delhi
20th August, 2007

Government of India,
Ministry of Human Resources Development
Department of School Education & Literacy

To

The Chairperson,
National Council for Teacher Education,
1, Bahadur Shah Zafar Marg,
New Delhi – 110 002

Subject: Directions under Section 29 of the NCTE Act, 1993

to withhold the grant of recognition in institutions /Courses/ additional intake falling under jurisdiction of Western Regional Committee of National Council for Teacher Education (NCTE)

Sir,

It has come to notice of the Department of School Education & Literacy that there has been uneven and disproportionate growth in the number of recognitions granted to various courses and institutions in the states falling under the Western Regional Committee of NCTE and that while granting recognition, the actual demand of teachers in particular states has been totally ignored.

2. In these circumstances, it is felt appropriate to undertake a comprehensive review of the situation for taking necessary corrective measures. Therefore, as directed by the competent authority, NCTE is hereby directed under Section 29 of the NCTE Act, 1993 that recognition may henceforth not be granted to any teacher training institutions/courses/additional intake falling within the jurisdiction of the Western Regional Committee of NCTE, till a comprehensive review is made or till further orders, whichever is earlier.

3. Necessary instructions to this order may accordingly be conveyed to the Western Regional Committee of NCTE. A compliance report may be sent to this Department at the earliest.

Yours sincerely,
(Simmi Choudhary)
Deputy Secretary to Government
Govt. of India
Tel: 2307327"

37. It is also necessary to reproduce the communication made by the NCTE to the committee:-

"National Council of Teacher Education
A Statutory Body of the Government of India
Most immediate

File No.49-19/2007/N&S/NCTE August 22, 2007

To

Dr. OVS Sikarwar,
Regional Director
Western Regional Committees
Manas Bhawan (Near AIR)
Shyamla Hills,
Bhopal : 162 002

Sub: Directions under Section 29 of the NCTE Act 1993 to withheld

the grant of recognition to institutions / courses / additional intake, falling under the jurisdiction of Western Regional Committee of NCTE.

Sir,

I am directed to say that directions have been received from the competent authority under Section 29 of the NCTE Act, 1993 on August 21, 2007 that recognition may henceforth not be granted to any teacher training institutions/ courses/additional intake falling within the jurisdiction of the Western Regional Committee of NCTE till a comprehensive service service to be undertaken or till further orders, whichever is earlier.

2. In view of the above, you are directed to ensure that the above directions are complied with and immediate steps are taken to ensure that the above directions are complied with and immediate steps are taken to ensure that no action taken for grant of recognition and also no meeting of the Western Regional Committee is held. The Chairperson and members of the Western Regional Committee may immediately be suitably informed in this regard.

Yours faithfully,
Sd/-
(V.C. Tiwari)
Member Secretary"

38. In this regard it is also worth reproducing the letter dated 22-11-2007 issued by the Central Government. It reads as under:

"F.No.28-15/2007-EE-10
Government of India
Ministry of Human Resource Development
Department of School Education & Literacy
****

To

New Delhi, the 22nd November, 2007
The Chairperson,
National Council for Teacher Education,
Wing-II, Hans Bhawan,
1, Bahadur Shah Zafar Marg,
I.P.Estate, New Delhi-110002

Subject: Directions under Section 29 of the NCTE Act, 1993 to withhold the grant of recognition to Institutions/Courses/additional intake, falling under the jurisdiction of Western Regional Committee of National Council for Teacher Education (NCTE).

****

Sir,

I am directed to invite your attention to this Ministry's letter of even number dated 21.8.2007 under which Directions under Section 29 of the NCTE Act, 1993 were issued for not granting recognition to any teacher training institution/courses/additional intake, etc. falling within the jurisdiction of the Western Regional Committee of NCTE till a comprehensive review is undertaken. Ms.Anita Kaul, Joint Secretary, Deptt. Of School Education & Literacy was assigned to undertake comprehensive review of the situation in regard to WRC and suggest corrective measures vide office order No. 26-41/2007-EE-10 dt. 23.8.2007.

In compliance with the instructions and orders on the subject a comprehensive review of the working of Western Regional Committee was undertaken and a report on the subject was submitted on 1.11.2007. The Report has highlighted certain systemic problems, procedural lapses and irregularities which must be dealt with by NCTE on top priority.

A copy of Report (Vol. I to III) is enclosed. Chapter 8 of the Vol. I of the report contains the findings and recommendations of the comprehensive review. The report has been accepted by the Government. Accordingly, NCTE is advised to implement the recommendations contained in the report with following specific directions:

a) The WRC, Bhopal will process all pending applications ensuring, however, that it scrupulously takes into account the views of the State Government on the issue of sanction or rejection of applications for recognition. In case, WRC, Bhopal differs with the views of the State Government, it shall record specific reasons in writing in such case and submit a special report to NCTE headquarters;

b) NCTE shall expedite the study on the demand and supply of teachers/teaching capacity specially for the States of Maharashtra, Gujarat, Madhya Pradesh and Chhattisgarh; and

c) The recommendations in respect of amendments to NCTE Act and its Regulations shall be carefully examined in consultation with Ministry of Law.

Necessary instructions to this effect may accordingly be conveyed to the Western Regional Committee of NCTE. A compliance report may be sent to this Department at the earliest.

Yours faithfully
(Vikram Sahay)
Director"

39. We have referred to the aforesaid letters to highlight that at one point of time the Central Government had conducted review with regard to pending cases and thereafter has issued directions. True it is, they relate to pending cases but they have their own signification regard being had to what has been stated therein. Quite apart from the above, we cannot be oblivious of the factual scenario that has emerged before us.

40. We may note that the institutions have admitted students because of some interim orders passed by the learned Single Judge but the learned Single Judge had clearly mentioned that it should be done at the risk of the institutions.

41. Keeping in view the totality of facts and circumstances and the action taken by the Central Government with regard to the recognition granted by the WRC, Bhopal and the non-fulfillment of the conditions imposed in the so called orders of recognition, we are unable to accede to the relief sought for in the writ petitions.

42. Regard being had to the factual matrix in entirety, we proceed to state our conclusions and directions in seriatim:

(a) Though the letters of recognitions issued by the NCTE are couched in different phraseology in various cases, yet the same lead to one inescapable conclusion that they are conditional recognitions.

(b) The conditional recognitions could have been ripened after satisfying certain statutory requirements like appointment of teaching and non-teaching staff and other conditions enumerated/ provided in regulations 7 and 8 of the Regulations as they are conditions precedent and relate to fundamental realm of recognition.

(c) Certain conditions are relatable to the institutions after they become functional but on that foundation it cannot be construed that the orders of recognition are totally unconditional.

(d) The State Government cannot refuse 'No Objection Certificate' relying on the M.P. Vishwavidyalaya Adhiniyam, 1973 in view of the decision of the Apex Court rendered in the case of *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra).

(e) The institutions are bound to follow the regulations of the NCTE and the Universities are required to respect regulations as they have overriding effect on the University statutes.

(f) As the Union of India has interfered with the pending applications and the present cases do constitute a hybrid category, it is apposite that the Apex body of the NCTE shall look into the matter from all spectrums including calling for recommendation from the State Government within a specified span of time.

(g) If the Apex Body of NCTE grants unconditional recognition the University shall extend the benefit of affiliation and in case conditional recognition is granted by the NCTE the University shall grant affiliation on satisfaction of the conditions enumerated in the order itself and shall not entrench or encroach upon the field by taking recourse to its Act or its statutes.

(h) The University shall be totally bound by the conditions imposed in the order and shall not travel beyond them.

(i) The institutions who have admitted students de hors the Act and the regulations and admitted students without proper recognition and affiliation cannot be extended the benefit of equity and the students who have been admitted can be imparted education afresh after recognition and affiliation are granted.

(j) If the institutions are eventually granted recognition and affiliation fees collected from the students shall be adjusted for fresh course which would commence after recognition and affiliation.

(k) If the students do not intend to prosecute studies in the institution they would be entitled to claim refund of their fees and the institution shall be bound to refund the fees to the said students on receipt of proper application, as the institutions have admitted the students at their own risk.

43. The writ petitions are disposed of accordingly. There shall be no order as to costs.

Petitions disposed of

I.L.R. [2008] M. P., 736

WRIT PETITION

Before Mr. Justice Rajendra Menon

3 January, 2008*

ASHOK KUMAR VAJPAYEE — Petitioner

Vs.

STATE OF M.P. & anr. — Respondents

A. State Administrative Service Rules, M.P. 1975, Rule 21 - Senior Pay Scale - *'Seniority-cum-merit'* - Petitioner not granted senior pay scale on ground that he had not obtained four *Very Good* and one *Good* entry in his five preceding Annual Confidential Reports - Held - Admittedly promotion is to be granted on *'Seniority-cum-merit'* basis - DPC evaluating case on principle of *'merit-cum-seniority'* - Not permissible. (Para 11)

B. State Administrative Service Rules, M.P. 1975, Rule 21 - Senior Pay Scale - *'Seniority-cum-merit'* - An employee who is senior and otherwise

*W.P. No. 5523/2003 (Gwalior)

eligible for promotion has to be promoted if there is no adverse material against him - Comparison of *inter se merit* and rejecting senior employee after evaluating *inter se merit* - Not permissible. (Para 11)

C. State Administrative Service Rules, M.P. 1975, Rule 21 - Senior Pay Scale - *'Seniority-cum-merit'* - Normally when proceedings of DPC are held to be improper - Matter is required to be remanded back for fresh consideration - However, petitioner has received *Good, Very Good* and *Outstanding* grading - No useful purpose will be served by remanding matter back - Petitioner is entitled to be promoted on basis of principle of *'seniority-cum-merit'* - Petitioner granted senior pay scale with all other consequential benefit. (Para 11)

Cases referred :

W.P. No. 3880/03 decided on 3-3-06, 2005(2) MPLJ 33, (1998) 6 SCC 720, ILR 2006 MP 931

Arvind Dudawat, for the petitioner,

Praveen Newaskar, Dy. G.A. for the respondents/State

O R D E R

RAJENDRA MENON, J. :- Challenging the action of the respondents in not granting senior pay scale to the petitioner and rejecting his claim for grant of the aforesaid benefit vide order dated 28.07.99, this petition was filed before the State Administrative Tribunal in the year 2000 and after winding up of the Tribunal, matter stands transferred to this Court.

2. Petitioner was initially appointed as Deputy Collector and joined the service on 13.06.1988. He was declared permanent with effect from 17.7.1990 vide order Annexure A/1 dated 24.08.91. After completing 8 years of regular service in the post petitioner became eligible for grant of senior pay scale as per rules 21 of the Madhya Pradesh State Administrative Service Rules, 1975 (hereinafter referred to as 'the Rule of 1975). Grievance of the petitioner is that he fulfilled all the necessary criteria for selection and grant of senior pay scale which is to be made on the basis of principle of *'seniority-cum-merit'*, but his claim has been rejected after considering it from various periods i.e. ending 1st January, 1995, 1st January, 1996 and 1st January, 1997 respectively. Inter alia contending that procedure adopted by the Departmental Selection Committee is not based on the principle of *'seniority-cum-merit'* but it is based on the principle of 'merit-cum-seniority', which is impermissible and is contrary to rule 21 of the Rules 1975, petitioner seeks interference into the matter.

3. Shri Arvind Dudawat, learned counsel for the petitioner invites may attention to the provision of Rule 21 of the Rules, 1975 points out that under sub-rule 3, the procedure for selection on the basis of 'seniority-cum-merit' is clearly stipulated, thereafter inviting my attention to a un-reported judgment passed by a bench of this Court in W.P. No. 3880/03 *(Bhagwan Das Sargaiyan vs. State of Madhya Pradesh and others)* decided on 3.3.06, a division bench's judgment of this Court

in the case of *Narmada Prasad Saxena vs. State of M.P. and others* (2005(2) MPJR 495) and another judgment of this Court in the case of *Badrilal vs. State of M.P. and others* (2005(2) M.P.L.J 33), a judgment of the Supreme Court in the case of *B.V. Sivaiah and others vs. K. Addanki Babu and others* (1998{6} SCC 720) so also on another judgment of the Supreme Court in the case of *Harigovind Yadav vs. Rewa Sidhi Gramin Bank and others* (2006 ILR 931) argued that procedure followed in the present case is not based on the principle of *'seniority-cum-merit'* but claim of the petitioner is rejected after evaluating the comparative merit of the candidates whose cases were taken up by the DPC. Taking me through the DPC held on 1.8.95 and 28.8.97, Shri Arvind Dudawat points out that in the said DPC criteria fixed was for evaluating the confidential records of five years and then to promote only those persons who had obtained minimum four 'Kha' entries i.e. 'very good' entries and one 'gha' entry i.e. 'good' entry, it is stated by Shri Arvind Dudawat that in the said process petitioner whose earned three 'very good' entries for the year 1998, 1999 and 2000, whose records were also 'good' prior to 1993 having earned two 'good' entries for the year 1993 and 1994 and two 'very good' entries for the year 1991 and 1992 has been ignored and promotion denied after evaluating the *inter se merit* of the candidates. It is pointed out by Shri Arvind Dudawat that for the year 1999 petitioner had obtain one outstanding entry which is 'ka'. However, in the year 1995 and 1996 as petitioner was facing a departmental enquiry, the recommendation was kept in a sealed cover and after exoneration of the petitioner in the proceedings, the recommendations have been opened but promotion still denied on the ground that petitioner did not earn four 'very good' entires during the previous five years. Accordingly, Shri Arvind Dudawat submits that in evaluating the case of the petitioner contrary to the rules, respondents have committed error and therefore, he seeks interference in the matter.

4. Shri Praveen Newaskar, learned Deputy Government Advocate for the respondents/State by producing the relevant DPC record points out that in the present case, a Departmental Promotion Committee has considered the claim of the petitioner with regard to his promotion on 1.1.95, 1.1.96 and 1.1.97 respectively and as his case was not recommended by the DPC it is stated that petitioner is not eligible for promotion. Accordingly, he prays for dismissal of this petition.

5. I have heard learned counsel for the parties and perused the record.

6. Grant of senior pay scale is governed by the provision of Rule 21 of the M.P. State Administrative Service Rules, 1975. According to the aforesaid rules eligible persons working in the junior scale of the State Civil Services are entitled for promotion or appointment on the senior pay scale who have completed eight years of service on First January of the year, who have passed the prescribed departmental examination and whose cases are considered by a committee consisting of members as per the Schedule IV, in sub-rule 3 it is stipulated that promotion shall be granted on basis of 'seniority-cum-merit'. In the present case,

it is not in dispute that petitioner fulfills all the conditions stipulated in the rules and was eligible for consideration as per the aforesaid rules. Claim of the petitioner was considered for the years as on 1.1.95, 1.1.96 and 1.1.97, DPC's were held on 1.8.95, 28.8.97 respectively for considering the case along with record. In the DPC, as petitioner was under suspension facing a departmental enquiry, the recommendations was kept in a sealed cover. However, after his exoneration, the sealed cover was opened and finding the petitioner's case is not recommended by the Departmental Promotion Committee, the communication in question was made to the petitioner on 28.7.98 intimating him the position.

7. A perusal of the proceedings of the DPC indicates that the CR grading of the petitioner from 1991 up to 2000 are as under:-

1991	-	outstanding 'ka'
1992	-	very good 'kha'
1993-94	-	good 'gha'
1995	-	good 'gha'
1996-97	-	suspended facing departmental enquiry.
1998-99-00	-	very good 'kha'.

The Departmental Promotion Committee has fixed the criteria for recommending the cases of only such persons who had received four 'kha' entries i.e. 'very good' entries during the preceding five years and one 'gha' entry during the preceding five years. On the ground that petitioner had not received four "Kha" during the preceding five years, his case has been rejected.

8. The question now which requires consideration, as to whether this procedure followed in the DPC for evaluating case of the employee on the basis of receiving four 'very good' entries and one 'good' entry for the preceding five years is in accordance to the principle of *'seniority-cum-merit'* or amounts to consideration on the principle of *'merit-cum-seniority'*. Admittedly, when promotion is to be made on the basis of *'seniority-cum-merit'*, seniority has to be given due weightage and a employee who is senior and otherwise eligible for promotion has to be promoted if there is no adverse material in his service record. Comparison of the inter se merit of various persons and rejecting a senior person after evaluating the inter se merit is not permissible when promotion is based on the principle of *'seniority-cum-merit'*.

9. In the case of *Bhagwan Das Sargaiyan* (supra), a bench of this Court has considered similar criteria followed by a Departmental Promotion Committee wherein the DPC had evaluated the case of a employee by fixing the criteria of evaluating last five years A.C.R. and the criteria fixed was that in last five years, three years C.R. should be good and last two years C.R. should be invariably good. After taking note of the principle laid down by the Division Bench in the case *Narmada Prasad Saxena* (supra) and after considering the principle of *'seniority-cum-merit'*, the learned judge has evaluated the principle in the following manner:-

> "The principles of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity. With regard to promotion the normal principles are either merit-cum-seniority or *seniority-cum-merit. Seniority-cum-merit* means that gives the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Article 14, 16(1) and 16(2) of the constitution of India. See *State of Kerala and another vs. N.M. Thomas and others* (1976 2 SCC 310).
>
> Where the criteria for promotion is seniority-cum-merit, the seniority is determinative factor and not the merit. The Rule required promotion to be made by selection on the basis of 'seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion'."

After so holding the procedure followed is held to be not in conformity to the principle of 'seniority-cum-merit' and matter has been remanded back for fresh consideration. In the case of *B.V. Sivaiah* (supra) decided by the Supreme Court, the question has been considered and the criteria followed for consideration on the basis of *'seniority-cum-merit'* is so dealt with in para 18 of the aforesaid judgment:

> "18. We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary met, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of *seniority-cum-merit.*"

10. From the perusal of the aforesaid criteria, it is clear that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority in the matter of granting promotion. Recently, the matter was again considered by the Supreme Court in the case of *Harigovind Yadav* (supra) and the criteria laid down in the case of *B.V. Sivaiah* (supra) has been approved and it is held by the Supreme Court that in the said case also that while considering cases for promotion on the basis of *'seniority-cum-merit'* by comparing the inter se merit of various candidates, a senior candidate cannot be rejected. A complete reading of the judgment rendered by the Supreme Court in

the cases of *Harigovind Yadav* (supra) and *B.V. Sivaiah* (supra) indicates that what is permissible is only fixing a minimum standard or criteria and comparison of the inter se merit or the comparative the merit of various candidates is not permissible.

11. In the present case, DPC has prepared a merit list of candidate, persons, who have got four or more "Ka" or "Kha" i.e. outstanding or very good entry are placed at the top, after evaluating the number of very good entries for various years list is prepared in the decentry order and consequently petitioner is held ineligible on the ground that he has not received four very good entries in the preceding five years. The list is prepared after evaluating the inter se merit of various candidate. Even though petitioner has earned two very good entries and one outstanding entry for the preceding five years his claim is rejected. This procedure followed by the respondents is clearly unsustainable, it does not fix any minimum criteria for grant of promotion, but is after evaluating inter se merit of a candidate and is clearly contrary to the principle of *'seniority-cum-merit'*. Petitioner up to 1995 having received two good, two very good and one outstanding grading cannot be ignored for promotion if the principle of 'seniority-cum-merit' is to be followed. That being so, this Court is of the considered view that in evaluating the claim of the petitioner the Departmental Promotion Committee has deviated from the rules fixed for promotion, the criteria followed is not of *'seniority-cum-merit'* but it is of *'merit-cum-seniority'*. Normally when the proceedings of the DPC are held to be improper, matter is required to be remanded back for fresh consideration, however, in the present case, petitioner's claim has to be considered for promotion on 1.1.95 and if five years grading prior to 1.1.95 are taken note of, it would be seen petitioner has received "good" grading for the year 1993-94, "very good" entries for the year 1991-92 and "outstanding" grading for the year 1990. Once these grading are taken into consideration as evident from the record of DPC produced by the State Government, there is no reason why the petitioner cannot be granted benefit of promotion, this Court is of the considered view that in the facts and circumstances of the present case, no useful purpose will be served by remanding the matter back as petitioner had got 'good' CR grading and is entitled to be promoted on the basis of principle of 'seniority-cum-merit'. Recently a Division Bench of this Court in a Writ Appeal No. 613/07 decided on 22.11.07 considered this question and directed for promotion without remanding the matter back for reconsideration to the promotion committee. The question is so considered and decided by the learned Division Bench:-

> "8. On this root question, whether writ Court should directly order for promotion of an employee or should only give direction to consider his case for promotion, as per the decision of the constitutional Bench, it is true that generally in such cases the Court should not order for directing promotion to the employee and direction should be given to consider the case. As per Regulation 70-A, if the appellant is found suitable for promotion

he can be granted out of turn promotion. It is also true that in the return, State has not stated anything that the respondent was not found otherwise unsuitable for promotion on any other ground. Therefore, if the respondent was found suitable then he was entitled for out of turn promotion. While rejecting the case of the respondent, Screening Committee has not recorded such a finding that he is not fit for promotion. Under Article 226 of the Constitution of India while issuing the mandamus the High Court is fully competent in appropriate cases to issue such directions. If the circumstances permits and case is made out legally and if it is found that the person was not otherwise found unsuitable for promotion and a case of discrimination is made out, then certainly there can be any embargo on the powers of the High Court to issue such a directions....."

12. Considering the same, it is directed that as petitioner has received good and very good entries for the five years between 1991 to 1995 is eligible for promotion on the post in question. Accordingly, this petition is allowed and it is directed that petitioner be granted senior pay scale as per Rule 21 of the Service Rule of 1975 with all other consequential benefit w.e.f. 1.1.95.

13. Accordingly, petition stands allowed and disposed of with the aforesaid without any order so as to costs.

Petition allowed

I.L.R. [2008] M. P., 742
WRIT PETITION
Before Mr. Justice Abhay M. Naik
8 January, 2008*

HASSAN KHAN — Petitioner
Vs.
STATE OF M.P. & ors. — Respondents

A. Police Regulations - Regulation 70-A - Out of turn promotion - Prior Approval by DGP is *sine-qua-non* - No office order regarding promotion issued - Petitioner cannot be treated to have been promoted in accordance with law - DGP within his power to refuse grant of approval for out of turn promotion. (Para 8)

B. Police Regulations - Regulation 70-A - Refusal to accord approval-Opportunity of Hearing - Petitioner given out of turn promotion on the strength of a wireless message sent by I.G. to D.G.P. for grant of approval - Refusal to grant approval by DGP - Does not amount to Reversion - No opportunity required-However, purpose of petitioner is served if post decisional opportunity of hearing

*W.P. No. 5244/2003 (Gwalior)

is granted to him - Petition disposed of accordingly. (Paras 10 and 11)

Cases Distinguished :

(1999) 8 SCC 378, (1999) 1 SCC 685, 1997 MPLSR 109, 2002 MPWN (2) 46

D.K. Katare, for the petitioner,

Sudha Shrivastava, Panel Lawyer for the respondents/State

ORDER

ABHAY M. NAIK, J. :–Case of the petitioner is that he in the capacity of Constable with the police team participated in face to face encounter with Dacoits on 09-05-1998. Dacoit Vimles Jatav was killed in encounter by the police party. S.P., Gwalior recommended the case of petitioner and other constable for out of turn promotion vide annexure A/6. Inspector General of Police, Gwalior gave out of turn promotion to the petitioner to the post of Head Constable vide order dated 09-05-1998 contained in annexure A/7. It is stated that petitioner has joined on the said post on 09-05-1998 and had been working on the promotional post since then. After lapse of more than two years, petitioner was served with the impugned order contained in annexure A/8, declining thereby approval for out of turn promotion to the petitioner. This has been challenged in the Original Application before State Administrative Tribunal which came up for hearing today on account of abolition of State Administrative Tribunal.

2. Shri Katare, learned Advocate contended that petitioner was duly promoted on the post of Head Constable in out of turn manner and can not be reverted to the post of Constable in the impugned manner. It is further contended that no opportunity of hearing was provided to the petitioner who was working on the promotional post.

3. In the return it has been stated that annexure A/7 is merely a wireless communication. Moreover, on the recommendation by Inspector General of Police but in absence of approval from Director General of Police no out of turn promotion could have been granted by the I.G.P. Even in annexure A/7 it was clearly mentioned that the case for obtaining the formal sanction for out of turn promotion was forwarded to PHQ, Bhopal. Thus, it is amply clear that there was no approval for out of turn promotion to the petitioner and such approval having been declined no infirmity is found in annexure A/8.

4. Ms. Sudha Shrivastava, learned Panel Lawyer made her submissions in support of return and documents annexed thereto.

5. Out of turn promotion is provided in Regulation 70-A of M.P. Police Regulations which reads as under:

> 70-A. Notwithstanding anything contained in Regulation 70, a Constable may be promoted to the rank of Head Constable by the Superintendent of Police with the prior approval of the Directors General of Police and a Head Constable to the rank of Assistant

Sub Inspector by the Deputy Inspector General of Police with the prior approval of the Director General of Police if he has distinguished himself in anti dacoity operations, law and order situations of shooting competitions or in some other field of duty or who has been awarded the President's Police Medal for Gallantry or for meritorious/distinguished services, if he considers him suitable for promotion. Similarly the Inspector General of Police may promote an Assistant Sub Inspector to the rank of Sub Inspector and a Sub Inspector to the rank of an Inspector on similar grounds if found suitable for promotion and subject to the prior approval of the Directors General of Police. The number of Officers promoted under this Regulation shall not exceed 10 percent."

6. Aforesaid provision empowers the Superintendent of Police with prior approval of DGP to promote a constable to the rank of Head Constable, if he has distinguished himself in anti dacoity operations. Thus, prior approval is sign-quo-non for exercising power for out of turn promotion. Surprisingly, there is no office order regarding promotion of the petitioner, from the post of Constable to the rank of Head Constable. On perusal of annexure A/7 it seems to be a wireless communication from Inspector General of Police Gwalior to Director General of Police (M.P.) with the following language:

"i- In compliance of your consent and orders Constable No.1480 Hasan Khan (petitioner) and Constable No.4 Udaibhan Singh have been promoted to the rank of Head Constables. A case for obtaining formal sanction for their out of turn promotion has been forwarded to PHQ, Bhopal.

ii. Consent and orders of DGP were mentioned in annexure A/7.It has been emphatically denied by the respondents that an approval was accorded for out of turn promotion to the petitioner as required under Regulation No. 70-A. Moreover, it is clearly mentioned in annexure A/7 itself that the case for out of turn promotion was forwarded to PHQ, Bhopal for obtaining sanction".

7. Shri Katare, learned counsel contended that it has never been the case of the respondents that no approval was earlier granted for out of turn promotion to the petitioner for the rank of Head Constable. This contention does not seem to be correct because petitioner had earlier submitted Writ Petition No. 1285/2000 which was dismissed by the learned Division Bench of this Court on 15-09-2000. Learned Division Bench observed:

"It is claim of respondents that in fact there was no prior approval which had been obtained and on the contrary the formal sanction referred to in the wireless massage, was refused by the Directors General of Police. It is also contended on behalf of the respondents that in face of the report of the magisterial enquiry there could not

arises any question of granting prior approval and that too on the very date on 09-05-1998 itself as claimed by the petitioner".

8. It may be seen that wireless massage is of the date of occurrence itself i.e. 09-05-1998. It does not appeal to reason that approval would have been accorded by the DGP on the date of occurrence itself when even entire report of the occurrence would not have been received by him. Moreover, case was forwarded to PHQ for sanction which clearly goes to show that the I.G.P. was not in receipt of necessary approval under Regulation 70-A while issuing wireless communication contained in annexure A/7. In absence of office order regarding promotion of petitioner to the rank of Head Constable, petitioner can not be treated to have been promoted in accordance with law. DGP (M.P.) was within his power to refuse to accord approval for out of turn promotion. Thus, petitioner has failed to establish that he was promoted to the rank of Head Constable in accordance with the Regulations.

9. It is contended by Shri Katare, learned counsel that no reason has been assigned in annexure A/8 for reversion. Annexure A/8 is not an order of reversion but is a document whereby DGP (M.P.) has refused to accord the approval for out of turn promotion. Thus this contention of Shri Katare has no force.

10. Shri Katare placed reliance on (1999) 8 SCC 378 *(Gajanan L. Pernekar Vs. State of Goa and another)*, (1999) 1 SCC 685 *(Ram Ujarey Vs. Union of India)*, 1997 M.P.L.S.R. 109 *(Ku. Rita Bhaduri & others Vs. Municipal Corpn. Durg & others)* and 2002 M.P.W.N. (2) 46 *(Surendra Kumar Namdeo Vs. State of M.P.)* and contended that no opportunity of hearing was provided to the petitioner before making his reversion to the post of Constable from the post of Head Constable. On perusal of the impugned document (annexure A/8) it is observed that the same does not amount to reversion. DGP has merely refused to accord approval for out of turn promotion. In none of the cases, relied by Shri Katare, the petitioner therein was holding the post which required prior approval. However, the purpose of the petitioner would be served if post decisional opportunity of hearing is granted to him for establishing prior approval, if any.

11. It may be seen that State Administrative Tribunal has refused to grant interim relief to the petitioner vide its order dated 16th of May, 2000 which was challenged by the petitioner before this Court in Writ Petition No. 1285/ 2000. Writ Petition was dismissed on 15-09-2000. This being so, a post decisional opportunity of hearing is sufficient for the petitioner and he is not entitled to any other relief, so far as this petition is concerned.

12. In the result, petition is disposed of with a direction that respondent No.2 shall grant a post decisional opportunity of hearing to the petitioner in the matter within a period of three months from the date of receipt of certified copy of this order.

No order as to costs.

Petition disposed of

I.L.R. [2008] M. P., 746
WRIT PETITION

Before Mr. Justice Abhay M. Naik

9 January, 2008*

AJAY KUMAR SINGH — Petitioner

Vs.

STATE OF M. P. — Respondent

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966 - Rule 10 (i) to (iv) - Minor Penalty - Natural Justice - Show cause notice issued to petitioner who submitted his reply - Departmental Enquiry ordered - However, no enquiry was conducted on ground that since neglect and dereliction in duties is made out from reply - Minor penalty of censure imposed - Held - Fresh opportunity of hearing ought to have been given before inflicting minor penalty - Petition allowed. (Para 5)

Cases referred :

(2001) 9 SCC 180, AIR 1997 SC 1125

Gaurav Samadhiya, for the petitioner

V.S. Chaturvedi, G.A. for the respondent

ORDER

ABHAY M. NAIK, J. :–Petitioner was Asstt. Director, Fisheries at the relevant time at Ratlam. He was asked to attend training on Govt. expenses at Central Fisheries Education Institution, Mumbai for the training session 1997-99. Pursuant thereto, petitioner was relieved on 16/7/97 from the office of the Asstt. Director Fisheries Ratlam for joining at Mumbai for the purposes of training. He reported at the training institution Mumbai on 17/7/97. At the training institution, petitioner was required to deposit Rs. 3065/- in addition to Rs.1450/- as hostel fees. These expenses were liable to be deposited by the Govt. which were not duly deposited. Since the petitioner was not possessed of sufficient money, he could not deposit the amount. Consequently, he was not allowed to attend the training. He came back to Ratlam and reported the matter to respondent No.2 immediately on 18/7/97. Petitioner was, thereafter, suspended and was served with a show-cause notice marked as Annexure-A/10. He submitted his reply as revealed in Annexure-A/11, refuting the allegations and further explained the reasons for not attending the training. After receipt of the reply of the petitioner, the Director of Fisheries appointed an Enquiry Officer as well as Presenting Officer for the purposes of enquiry against the petitioner in the matter of Annexures A/10 and A/11. However, no enquiry was conducted pursuant to Annexures A/10 to A/12 and instead, an order contained in Annexure-A/2 dated 22/7/98 was issued cancelling thereby Annexure-A/12 for the reason that there would be no propriety in holding departmental enquiry against the petitioner because neglect and dereliction in duties are made out from the reply. Thereafter, the impugned order dated 22/7/98 was

*W.P. No. 5370/2003 (Gwalior)

issued imposing thereby the penalty of censure. Further, the travelling expenses and allowance for journey from Ratlam to Mumbai and back have also been denied. By way of modification vide Annexure-A/3 dated 16/2/2000, the period of suspension has been treated as on duty for all the purposes. Aggrieved by Annexure-A/2, petitioner submitted a representation before the State Govt. which, too, has been rejected on 21/3/2000 vide Annexure-A/1. Aggrieved by Annexures A/1 and A/2, petitioner submitted an original application before the M.P.State Administrative Tribunal,Gwalior.

2. In the return, it has been contended that the petitioner was given advance of travelling allowance. He was validly relieved to report at the training centre at Mumbai on 16/7/97. Petitioner has produced his joining at the training centre on 17/7/97. He returned back to Ratlam on 18/7/97 on the ground that the requisite amount was not sent to the training centre. It is further stated in the return that the petitioner assumed charge of office of Astt. Director Fisheries at Ratlam in a forcible manner on 21/7/97. Thus, case of the respondents is that enquiry in pursuance of Annexure-A/10 to A/12 was withdrawn and a minor penalty of censure was imposed which did not require further notice of show cause and enquiry at all.

3. Shri Gaurav Samadhiya, learned Advocate for the petitioner and Shri V.S.Chaturvedi, learned Govt. Advocate for the State have made their respective submissions which have been considered in the light of the material on record.

4. Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 empowers the Competent Authority to impose penalty. Rule-10 provides for imposing minor as well as major penalties. Procedure for imposing penalty specified in clauses (v) to (ix) of Rule 10 is provided in Rule 14 which makes it obligatory for holding of enquiry. It is thus clear that before imposing minor penalty specified in clauses (v) to (ix) no enquiry in the prescribed manner is to be held necessarily. As a corollary, it may well be said that enquiry in the same manner is not required while imposing minor penalty. However, that will not empower the authority to impose minor penalty without following the principles of natural justice. Hon'ble Supreme Court of India in the case of *O.K.Bharadwaj Vs. Unior of India and others* (2001)9SCC 180 has held :-

> "While we agree with the first proposition of the High Court having regard to the rule position which expressly says that "withholding increments of pay with or without cumulative effect" is a minor penalty, we find it not possible to agree with the second proposition. Even in the case of a minor penalty an opportunity has to be given to the delinquent employee to have his say or to file his explanation with respect to the charges against him. Moreover, if the charges are factual and if they are denied by the delinquent employee, an enquiry should also be called for. This is the minimum requirement of the principle of natural justice and the said requirement cannot be dispensed with.

Learned counsel for the respondent, however, says that though the second proposition of the High Court may not be correct, yet so far as this case is concerned, it does not make any difference for the reason that in this case, as a fact an opportunity was given to the appellant and that there has been adequate compliance with the principles of natural justice. But, since the High Court has not considered the matter from the above angle that is on merits the proper course in our opinion is to remit the matter to the High Court to consider whether an opportunity was given to the appellant to put forward his case and whether in the light of the facts and circumstances of the case, an enquiry was called for and if called for, was it held according to law and the principles of natural justice, and to dispose of the matter according to law. The appeal is allowed with the above directions. No costs."

5. Shri V.S.Chaturvedi, learned Govt. Advocate relying upon the Supreme Court's decision in the case of *L.Chandra Kumar Vs. Union of India* (AIR 1997 SC 1125) has contended that no interference is warranted in the present writ-petition where the petitioner was given merely minor penalty requiring no enquiry under the Statutory Rules. It is no doubt, correct that the enquiry as per prescribed procedure under the rules is not required to be held before imposing minor penalty. However, rules of natural justice cannot be bypassed even while imposing minor penalty. In the case in hand, a show-cause notice was served upon the petitioner vide Annexure-A/10 and a detailed reply was submitted by the petitioner refuting the factual as well as legal allegations. Earlier, the Director of Fisheries deemed it proper to hold an enquiry and an Enquiry Officer as well as Presenting Officer were appointed vide Annexure-A/12 dated 26/6/98. Petitioner in the light of Annexures A/10 to A/12 must have been anticipating a due enquiry as per procedure prescribed under Rule 14. If the authorities were of the opinion that there was no propriety for holding an enquiry in the light of the reply of the petitioner, the enquiry could have been well dropped. However, a fresh opportunity of hearing ought to have been given to the petitioner before inflicting minor penalty in the nature of censure. Thus, the rules of natural justice have been violated by the respondents. Even minor penalty of censure could not have been imposed without giving an opportunity to the petitioner to show cause against the same in the light of Supreme Court decision (supra).

6. In the result, the impugned orders contained in Annexures-A/1 and A/2 are not sustainable in law and they are hereby quashed. However, it is observed that the respondents would be at liberty to take appropriate action against the petitioner and to pass necessary orders after giving him an opportunity of hearing in respect of the alleged occurrences.

7. Petition accordingly, stands disposed of in the manner indicated above. No order as to costs.

C.c as per rules. *Petition disposed of.*

I.L.R. [2008] M. P., 749

WRIT PETITION

Before Mr. Justice Rajendra Menon

14 January, 2008*

ASHOK SINGH PAL — Petitioner

Vs.

MANJULATA — Respondent

A. Hindu Marriage Act (25 of 1955), Section 24, Criminal Procedure Code, 1974 - Section 125 - Maintenance U/s 125 of Code and alimony *pendente lite* U/s 24 of Act can be claimed by resorting to both these provisions - The Court is competent under these provisions to grant relief to person concerned. (Para 10)

B. Hindu Marriage Act (25 of 1955), Section 24, Criminal Procedure Code, 1974 - Section 125 - Question of adjustment - When competent Court granted relief in both the provisions i.e. maintenance U/s 125 of Code and alimony U/s 24 of Act - There is no thumb-rule that adjustment to amount is to be granted in each & every case - Question of adjustment to be decided after taking into consideration totality of circumstances, amount granted and capacity of person directed for making payment - Family Court rejected application after evaluating totality of circumstances - Held - High Court not found any error of law or jurisdiction - Petition dismissed. (Para 10)

Cases referred :

2003(II) MPWN 151, 2000 (I) MPWN 119, 1988 (I) HLR 373, 1996 (II) DMC 362 (AP), 1977 Puj. 383 HLR, 1988 (1) HLR 407, 1982 HLR 455 (Guj), 1988 (2) HLR 452 (P&H), 2000 (2) HLR 324 (AP), 1999 (2) HLR 631, 1992 Cr.L.J. 3688, 2003 (2) MPLJ 137.

R.K. Sharma, for the petitioner,

Sarvesh Chouhan, for the respondent

O R D E R

RAJENDRA MENON, J. :–Challenging the order dated 10.10.07 Annexure P/1 passed by the Principal Judge, Family Court, Gwalior in case no. 531-A/06 (Hindu Marriage Act) rejecting a application for adjustment of interim alimony granted in the proceedings held in the case in question i.e. case no. 531-A/06 pending under the Hindu Marriage Act, petitioner has filed this petition.

2. Facts in brief necessary for disposal of this petition filed under Article 227 of the Constitution are that petitioner/husband has filed a application under Section 13 of Hindu Marriage Act for dissolution of the marriage solemnized between the petitioner/husband and respondent/wife. The proceedings have been registered as case no. 531-A/06 (HMA) and is pending before the Presiding Judge, Family Court, Gwalior. In the said proceedings, respondent/wife filed an application

*W.P. No. 5221/2007 (Gwalior)

under Section 24 of the Hindu Marriage Act seeking maintenance pendente lite and expenses for the proceedings. In the application filed under Section 24 of the Hindu Marriage Act respondent/wife claimed a sum of Rs. 2000/- per month as maintenance, a sum of Rs. 500/- as litigation expenses. It was her case that petitioner/husband is earning more than Rs. 15000/- per month. Apart from filing this application under Section 24 of the Hindu Marriage Act in the proceedings pending under the Hindu Marriage Act, respondent-wife also filed an application claiming maintenance under Section 125 of Cr.P.C. before the same Family Court which was registered as Misc. Cr. Case No. 647/2006. In this application also respondent-wife claimed a sum of Rs. 2,000/- as maintenance and Rs. 500/- as litigation expenses. Both these applications were decided by the same Presiding Officer of the Family Court on the same day i.e. 13.04.07 vide Annexure P/2 and Annexure P/3 respectively. In both these cases, learned Family Court has directed for payment of Rs. 1,000/- as maintenance and a sum of Rs. 500/- as litigation expenses. Inter alia contending that adjustment of the amounts granted by way of maintenance under Section 125 of Cr.P.C. is not granted while passing order on the application filed under Section 24 of the Hindu Marriage Act, an application was filed before the Family Court, the aforesaid application for adjustment having being dismissed vide order dated 10.10.07, Annexure P/1, petitioner is before this Court in this petition under Article 227 of the Constitution, challenging the rejection of the application for adjustment of the maintenance granted in both the proceedings.

3. Shri R.K. Sharma, learned counsel for the petitioner argued that respondent-wife was only entitled for one maintenance and when orders were passed by the Family Court on both the applications i.e. under Section 125 of Cr. P.C. so also under Section 24 of the Hindu Marriage Act, adjustment of the amount paid under Section 125 of Cr.P.C. should have been granted. In support thereof, he places reliance in the case of *Narayani Rathore (Smt.) V. Ramesh Chandra Rathore* 2003(II) M.P.W.N. [151] and also places reliance on a judgment of Supreme Court in the case of *Sudeep Chaudhary V. Radha Chaudhary* 2000(I)M. P.W. N. [119].

4. Refuting the aforesaid contentions, Shri Sarvesh Chouhan, learned counsel for the respondent-wife submitted that the scope and object of the proceedings under Section 125 of Cr. P.C. and under Section 24 of the Hindu Marriage Act are different and learned Court can grant relief in both these cases and in the present case learned Court having found entitlement of the respondent-wife to get benefit under both these provisions, passed the order on the same day and refused to grant adjustment. Shri Chouhan, argues that in doing so learned Court has not committed any error warranting interference in these proceedings under Article 227 of the Constitution.

5. Having heard learned counsel for the parties and on consideration of the provisions of Section 24 of the Hindu Marriage Act and that of Section 125 of Cr.

P.C., it is seen that remedies available to an aggrieved person under both these Sections are quite independent. Rejection of application under Section 125 of Cr. P.C. is not a bar for granting maintenance under Section 24 of the Hindu Marriage Act.

6. The Rajasthan High Court and the Bombay High Court in the cases of *Virendra Kumar vs. Santosh Devi* (1988 {1} HLR 373) and *Alka vs. Vardhaman* (2001 {1} HLR 138) have held that Section 24 of the Hindu Marriage Act is a provision for granting temporary alimony to either the wife or to the husband as the case may be in a proceedings pending before the Court under the Hindu Marriage Act. An application can be filed by either of the spouse seeking interim maintenance in a pending proceedings. The court where the proceedings under the Hindu Marriage Act is pending gets jurisdiction under Section 24 of the Hindu Marriage Act as soon as the proceedings are instituted. The benefit granted in a proceedings under Section 24 of the Hindu Marriage Act is purely temporary in nature, which has effect till the proceedings pending under the Hindu Marriage Act are concluded. The question as to whether during the pendency period of a order under Section 24 of the Hindu Marriage Act, benefit under Section 125 Cr.P.C. can also be granted, is considered by the Andra Pradesh High Court in the case of *Royendra Singh vs. Maya Devi* (1996 II DMC 362 {AP}), the Punjab High Court in the case of *Satish vs. Surjit Singh* (1977 Punj. 383 HLR) and in the case of *Jagadish Kumar vs. Neelam Rani* (1988 {1} HLR 407) wherein it has been held that an order granting maintenance under Section 488, old Cr.P.C. does not oust the jurisdiction of the Court to order maintenance under Section 24 of the Hindu Marriage Act. Further, it has been held by the Gujrat, Punjab and Haryana and Andra Pradesh High Courts in the cases of *Ramesh Chandra vs. Dhiraj Gowri* (1982 HLR 455 {Guj}), *Devinder Kumar vs. Asha Rani* (1988 {2} HLR 452 {P & H}) and *Yedukondalu vs. Vallabhaneni Nageswaramma* (2000 {2} HLR 324 {AP}), that a application for temporary alimony under Section 24 of the Hindu Marriage Act is not a bar merely because an application under Section 125 Cr.P.C. is also allowed.

7. That being so, it is seen that the consistent view of various Courts have been that both the provisions of Section 24 of the Hindu Marriage Act and Section 125 of the Cr.P.C. can be invoked seeking maintenance and alimony pendente lite by either of the spouse. However, a bench of this Court in the case of *Deepak Shukla vs. Savita Shukla* (1999 {2} HLR 631) has held that court can grant adjustment of the amount determined in a proceedings under Section 125 of Cr.P.C. while deciding the question of granting alimony pendente lite in a proceedings under Section 24 of the Hindu Marriage Act. Grant of adjustment, therefore, is a matter to be decided by the court after considering the facts and circumstances of each case and on consideration of the question of maintenance claimed and granted in the proceedings.

8. After relying on a judgment of the Gujrat High Court in the case of *Hansa*

Ben vs. Ramesh Kumar reported in 1992 Cr.L.J. 3688, a Bench of this Court in the case of *Naresh Kumar Rai vs. Smt. Mamta Rai and another* (2003{2} M.P.L.J. 137) has held as under:-

> "5..... that the nature of proceedings under Hindu Marriage Act, and that of maintenance proceedings under Code of Criminal Procedure, are different and hence a wife can pursue both the remedies simultaneously. It is also found explained that the amount of maintenance under Section-125 of the Criminal Procedure Code, cannot be set of against the alimony awarded under a different proceedings and order of maintenance under Section 125 of the Code, can only be modified, altered or set aside under section 125(4),(5) and/or under section 127 of the Code....."

9. It is in the back drop of these provisions that the question involved in this petition is to be considered. In the present case, it has to be taken note of that both the orders under Section 125 of Cr.P.C. and under Section 24 of the Hindu Marriage Act are passed by the same court on the same day and the court was aware of the pendency of one proceedings while deciding the other and after considering the pleadings, granted maintenance. When the application for adjustment was filed, learned court has rejected the same and it has been held that the amount of the maintenance granted need not to be adjusted as maintenance is properly granted in both the proceedings after considering the totality of the circumstances.

10. The Supreme Court in the case of *Sudhip Choudhary* (supra) relied upon by Shri R.K. Sharma, learned counsel for the petitioner, does not say that the amount of maintenance granted should be adjusted, it only says that maintenance amount may be adjusted. In the case of *Narayani Rathore* (supra) after considering the grant of maintenance made, this court found that amount of maintenance granted under Section 125 Cr.P.C. should be adjusted while considering the question of maintenance and simultaneously adjustment was granted, however, this was so held considering the financial condition of the respondent and the amount of maintenance already granted under Section 125 of Cr.P.C. The principal laid down in all the cases are that maintenance may be granted and the question as to whether the adjustment is to be granted or not, is a discretion exercised by the court concerned before whom the adjustment is sought after considering the totality of the facts and circumstances of each case. There is nothing under the law that is brought to the notice of this Court which lays down as a mandatory requirement the principle for grating adjustment or deducting the amount maintenance or alimony granted in a proceedings under Section 125 Cr.P.C. or under Section 24 of the Hindu Marriage Act or vice-versa. The principle laid down is that maintenance under Section 125 of Cr.P.C. and alimony pendente lite under Section 24 of the Hindu Marriage Act can be claimed by resorting to both these provisions and the court is competent under these provisions to grant relief to the person concerned and the question of adjustment to be granted, has to be

decided after taking into consideration the totality of the circumstances, the amount granted and the capacity of the person directed for making the payment. There is nothing to suggest that as a thumb-rule adjustment to the amount is to be granted in each and every case.

11. In the present case, the learned court, which decided the applications under Section 24 of the Hindu Marriage Act and Section 125 of Cr.P.C. was alive to the situation that proceedings under both these Sections are pending and decided the both the applications on the same day by passing two different orders. The court while passing the one order could take note of the same and thereafter could have granted adjustment of the amount while passing the other order. The petitioner may be right in contending that the Court overlooked the question of adjustment. However, when the petitioner filed the application seeking adjustment of the amount, by the impugned order learned court has considered the circumstances and has held that as the award is made individually in both these cases, the application for adjustment was rejected. It is, therefore, clear that learned court after evaluating the totality of the circumstances found that maintenance granted in each case i.e. under Section 125 of Cr.P.C. and Section 24 of the Hindu Marriage Act is sufficient and no adjustment of the amount is necessary, accordingly, dismissed the application. In doing so, I am of the considered view that learned court has not committed any error of law or jurisdiction which warrants interference in these proceedings under Section 227 of the Constitution.

12. Accordingly, finding no merit in the contentions advanced by learned counsel for the petitioner, petition stands dismissed without any order so as to cost.

Petition dismissed.

I.L.R. [2008] M. P., 753

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice Prakash Shrivastava

21 January, 2008*

ARCHANA DHAMAN & anr. Petitioners

Vs.

UNION OF INDIA & ors. Respondents

A. Cantonment Act (41 of 2006), Section 31 - Rule to be framed for reservation of SC/ST and women - Constitutional validity challenged being excessive delegation - Held - Rule is required to be framed on the basis of guidelines provided for such categories of persons as constitutionally envisaged - It cannot be said that any unbridled power has been conferred by virtue of Section 31 - Section 31 not *ultra vires* of Article 14. (Para 11)

B. Cantonment Election Rules, 2007, Rule 5 and 6(a), (b) - Constitutional validity of Rule 6(b) challenged - Rule 6(b) provides that no

*W.P. No. 684/2008 (Jabalpur)

reservation shall be made for women candidate where there is only one ward reserved for SC/ST - One-third Seats out of seats reserved for SC/ST Category are reserved for women - In case of one seat, it is not possible to reserve one third seat for women - It cannot be said that women are being deprived of staking their claim - Provision enacted in rule 6(b) cannot be said to be illegal or arbitrary. (Para 12)

C. Cantonment Election Rules, 2007 , Rule 7 - Rotation of Seats reserved for women - When there is only one seat, it is not possible to reserve seats on the basis of horizontal reservation - Rule 6(b) not *ultra-vires*. (Para 12)

Cases referred :

AIR 1961 SC 1612, AIR 1972 SC 1917, AIR 1980 SC 350, AIR 1982 SC 1126, AIR 1999 SC 1912, AIR 1996 SC 1708

Case distinguished :

(1997) 2 SCC 332

Sanjay K. Agrawal, for the petitioners

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–The writ petition has been preferred by the petitioner challenging constitutional validity of Section 31 of Cantonment Act, 2006 and Rule 6(b) of the Cantonment Election Rules, 2007 framed by the Govt. of India in exercise of powers conferred under section 30 of Cantonment Act, 2006.

2. The petitioners have submitted that they are resident of Ward No. 7 and 3 respectively of Cantonment Board, Mhow. The Cantonment Act, 2006 was published in the Gazette on 14.9.2006. The cantonments constituted under the Act have been broadly classified in four categories on the basis of population. Cantonment Board, Mhow has been placed in category (1). As per section 12(3) such a Board is comprised of 8 elected members. Section 31(d) of the Act provides that the Rules framed by the Central Government may provide for reservation of wards for election of the scheduled caste, scheduled tribes and women.

3. Petitioners have submitted that section 31 confers unbridled and uncanlised power on the Central Government to make rules regulating elections. No policy has been laid down in the act in the aforesaid matter. It has been left to the discretion of the executive to provide for reservation for such category of candidates, thus section 31 suffers from the vice of excessive delegation.

4. The Central Government in exercise of power conferred under section 31 of the Act has framed the rules known as Cantonment Election Rules, 2007 published in gazette on 19.4.2007. Rule 6 of the Rules provides that not less than 1/3rd of the total number of seats reserved for scheduled caste and scheduled tribes shall be reserved for women belonging to SC or as the case may be ST.

Clause (b) of Rule 6 further provides that no reservation shall be made for women candidate of SC or ST whenever there is only one ward reserved for SC or as the case may be ST. Ward No. 7 has been reserved for SC category. Reservation for women belonging to general category has been done. Three wards were reserved for general women candidate.

5. Shri Sanjay K. Agrawal, learned counsel appearing for petitioners has mainly assailed the vires of Rule 6(b) of the Election Rules of 2007. He has submitted that if there is one seat for SC or ST, reservation for women ought to have been provided on that seat of SC/ST category. He has further submitted that Section 31 of the Act of 2006 is unconstitutional as it gives unbridled power to Government to exercise executive powers of framing rules. Section 31 as well as Rule 6(b) is arbitrary and violative of Article 14. Since reservation for women is horizontal reservation, concept of cent percent reservation could not apply. He has further submitted that in case of one ward for SC/ST category, it ought to have been reserved by rotation for women category candidates.

6. In order to appreciate the submission made by the petitioner's counsel, it is necessary to consider section 31 of the Act of 2006, same is quoted below :-

> 31. Power to make rules regulating elections. - The Central Government may, either generally or specially for any cantonment or group of cantonments, after previous publication, make rules consistent with this Act to regulate all or any of the following matters for the purpose of the holding of elections under this Act namely:-
>
> (a) the division of a cantonment into wards;
>
> (b) the determination of the number of members to be elected by each ward;
>
> (c) the preparation, revision and final publication of electoral rolls;
>
> (d) the reservation of wards for election of the Scheduled Castes, the Scheduled Tribes and women;
>
> (e) the registration of electors, the nomination of candidates, the time and manner of holding elections and the method by which votes shall be recorded;
>
> (f) the authority which may be an officer of the State Government by which and the manner in which disputes relating to electoral rolls or arising out of elections shall be decided, and the powers and duties of such authority and the circumstances in which such authority may declare a casual vacancy to have been created or any candidate to have been elected;
>
> (g) the fee to be paid for admission and consideration of any application relating to election or election disputes;

(h) any other matter relating to elections or election disputes in respect of which the Central Government is empowered to make rules under this Chapter or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the Central Government, necessary.

7. Rule 5 of the Rules provides for reservation of seats for Scheduled Castes and Scheduled Tribes, same is quoted below :-

5. Reservation of seats for Scheduled Castes and Scheduled Tribes. - (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Cantonment on the basis of the percentage which their population bears to the total population of the Cantonment according to latest census and the minimum percentage required for such reservation shall be as specified in the First Schedule:

Provided that the Scheduled Caste or the Scheduled Tribe population so exceeds the minimum required percentage in any Cantonment that they become entitled to higher reservation, the number of seats reserved for them may be increased proportionately, according to their population of the area and in determining the number of seats to be reserved for the Scheduled Castes or the Scheduled Tribes, if the Scheduled Caste or Scheduled Tribe population falls short by less than 3% of the required minimum percentage, the figure may be rounded of for the reservation of a seat or seats for which they would have otherwise been entitled.

(2) The number of seat or seats reserved for the Scheduled Castes or the Scheduled Tribes referred to in sub-rule (1) shall be allotted to those ward or wards, which have the highest population of Scheduled Castes or Scheduled Tribes, as the case may be.

(3) The wards reserved in every Cantonment shall be notified by the Central Government in the Official Gazette and shall be effective for complete five years or till the next ordinary election, whichever is later, irrespective of election to fill any casual vacancy.

8. Rules 6 provides for reservation of seats for women, same is quoted below :-

6. Reservation of seats for women. - (a) Not less than one-third of the total number of seats reserved for the Scheduled Castes and the Scheduled Tribes shall be reserved for women belonging to the Scheduled Castes or as the case may be, the Scheduled Tribes.

(b) No reservation shall be made for women candidate of Scheduled Castes or Scheduled Tribes wherever there is only

one ward reserved for the Scheduled Castes or as the case may be, the Scheduled Tribes.

(c) Not less than one-third (including the number of seats reserved for women belonging to the scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled in an ordinary election in every cantonment shall be reserved for women.

(d) The seats reserved under this section shall be effective for complete five years or till the next ordinary election, whichever is later, irrespective of election to fill any casual vacancy.

(e) While calculating the number of seats reserved for women under clauses (a) and (c) a fraction less than half shall be left out and more than half shall be taken as one.

(f) (i) The seats reserved for women in a Cantonment (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) shall be allotted to different wards in the Cantonment in accordance with rule 7.

(ii) The wards reserved for women in every Cantonment shall be notified by the Central Government in the Official Gazette.

9. It is apparent that the power to frame rules has been delegated to the Central Government for the purpose of holding elections under the Act. The matter includes division of cantonment into wards and reservation of wards for election of Scheduled Castes and Scheduled Tribes and women. It is well accepted having regard to the complexity of problems which have to be faced that delegated legislation is a necessity and has its own advantages as observed in *Jyoti Pershad v. Union Territory of Delhi,* AIR 1961 SC 1612; *Tata Iron & Steel Co. v. Workmen,* AIR 1972 SC 1917; *Registrar, Co-operative Societies v. Kunjabmu,* AIR 1980 SC 350, *A.V.Nachane v. Union of India,* AIR 1982 SC 1126, *J.Jayalalitha v. UOI,* AIR 1999 SC 1912.

10. In *Dr.Haniraj L. Chulani Vs. Bar Council of Maharashtra & Goa* - AIR 1996 SC 1708 considering the set up of entire scheme of Advocates Act and rules framed by Bar Council, the Apex Court has observed in the light of the nature of the power entrusted to the elected body of advocates themselves it cannot be said that while regulating the entry to the legal profession the Bar Councils would find themselves without any Yardstick or guidelines and would be treading an unchartered sea and consequently the rules of enrolment framed by them would fall foul on the altar of permissible delegation of legislative power. It cannot therefore, be said that the impugned Rule 1 suffers from the vice of excessive delegation of legislative power or by providing rule making power to the State Bar Councils for regulating entries of new advocates seeking to join the profession the legislature has effaced itself. Any conditions laid down by the State Bar Councils for fructifying this laudable object of legislature would remain

germane to the exercise of this power and can well be said to be logically flowing from it. It cannot therefore, be said that any unguided and unchartered power is handed over on a platter by legislature to the concerned Bar Councils for regulating entry to the legal provession. Rule making power conferred on the State Bar Councils is inherently hedged in with the obligation to frame only such rules regarding enrolment which would fructify the purpose of having efficient members of the Bar who can stand up to the expectation of the noble and learned profession to which they are to be given entry. Any rule which effectuates this purpose will be within the permissible field and will not fall foul on the altar of Article 14 and Article 19(1)(g) read with Article 19(6). It was held that there was no excessive delegation of legislative power. The Apex Court has held thus :-

> 17. In this connection the learned senior counsel for the appellant invited our attention to the decision of this Court in *A.N. Parasuraman v. State of Tamil Nadu,* (1989) 4 SCC 683 : (AIR 1990 SC 40) and *Ajoy Kumar Banerjee v. Union of India,* (1984) 3 SCC 127: (AIR 1984 SC 1130) for buttressing her submission that legislature cannot delegate essential legislative functions to its delegate. There cannot be any dispute about the settled legal position on this aspect. However, as discussed by us earlier, in the set-up of the entire scheme of the Act and the rules framed by the Central Bar Council and in the light of the nature of the power entrusted to the elected body of advocates themselves it cannot be said that while regulating the entry to the legal profession the Bar Councils would find themselves without any yard-stick or guideline and would be trading an unchartered sea and consequently the rules of enrolment framed by them would fall foul on the altar of permissible delegation of legislative power. It is, therefore, not possible to agree with the contention of the learned senior counsel for the appellant that the impugned rule suffers from the vice of excessive delegation of legislative power or by providing rule-making power to the State Bar Councils for regulating entries of new advocates seeking to join the profession the legislature has effaced itself. The power conferred on the State Bar Councils to lay down further conditions for controlling the entries to the legal profession cannot be said to be an unguided power conferred on them. The conditions which the State Bar Councils can lay down by rules must be conditions which would be germane to the high and exacting standards of advocacy expected of the new entrants to the fold of the profession. Implicit in the conferment of such rule-making power is the guideline laid down by the legislature itself that the conditions must be commensurate with the fructification of the very purpose of the Act of putting the profession of advocates on a sound footing so that the concerned

new entrant can well justify his role as an officer of the Court admitted to the fold of the noble profession to which he seeks his admission. Any conditions laid down by the State Bar Councils for fructifying this laudable object of legislature would remain germane to the exercise of this power and can well be said to be logically flowing from it. It cannot, therefore, be said that any unguided and unchartered power is handed over on a platter by the legislature to the concerned Bar Councils for regulating entry to the legal profession. Rule-making power conferred on the State Bar Councils is inherently hedged in with the obligation to frame only such rules regarding enrolment which would fructify the purpose of having efficient members of the Bar who can stand up to the expectation of the noble and learned profession to which they are to be given entry. Any rule which effectuates this purpose will be within the permissible field and will not fall foul on the altar of Article 14 and Article 19(1)(g) read with Article 19(6). Any rule framed for enrolment which does not meet this yardstick will be a taboo. Hence it cannot be said that the rule making power entrusted to the State Bar Councils suffers from absence of any guidelines or exhibits effacement of legislative power. The first point for determination, therefore, is answered in the negative by holding that the impugned rule does not suffer from vice of any excessive delegation of legislative power. That takes us to the consideration of Point No. 2.

11. Section 31 of the Act of 2006 itself contemplates that rule is required to be framed for reservation of SC/ST and women, if rule is required to be framed by the Central Government, it is clear that it has to be on the basis of the guidelines provided for such categories of persons as constitutionally envisaged. Thus it cannot be said that any unbridled power has been conferred by virtue of Section 31 hence it cannot be said to be ultra-vires of Article 14. It cannot be said that any arbitrary power has been conferred on Central Government under section 31 of the Act of 2006.

12. When we consider Rule 5 and 6 of the Rules of 2007, reservation for SC/ ST category is clearly provided under Rule 5, reservation for women has also been provides, one-third seats have to be reserved under Rule 6(a) of the Rules out of the seats reserved for SC/ST category, thus the rule provides reservation for women of SC/ST category also. Rule 6(b) provides that no reservation shall be made for women candidate of Scheduled Castes or Scheduled Tribes wherever there is only one ward reserved for the Scheduled Castes or as the case may be, the Scheduled Tribes. As only one third of total number of seats have to be reserved, in case of one seat, it is not possible to reserve one third seat for women and it being horizontal reservation out of the SC/ST category seats, thus the provision enacted in rule 6(b) cannot be said to be illegal or arbitrary. On the other

hand rule 6(a) provides for reservation of women of SC/ST category out of the seats reserved for SC/ST category. It cannot be said that women are being deprived of staking their claim. Rule 6(a) provides for reservation on one-third seats in the category in question also. When one seat is there it is not possible to make horizontal reservation, thus it cannot be said that rule 6(b) is illegal or arbitrary in any manner. The submission raised that seats should have been reserved on rotation basis, rotation has been dealt with in rule 7, same is quoted below :-

> **7. Manner of rotation of seats reserved for women to different wards of a Cantonment.** - (a) While reserving the wards for women in a Cantonment for the first time, the seats reserved for women belonging to Scheduled Castes or Scheduled Tribes shall be allotted to different wards by drawing lots between the wards reserved for Scheduled Castes or Scheduled Tribes, as the case may be.
>
> (b) Reservation for women in respect of the remaining seats, after reservation in accordance with clause (a), shall be allotted by drawing lots between the remaining wards other than those reserved for Scheduled Castes or Scheduled Tribes.
>
> (c) In case of category IV Cantonments, one ward out of two shall be reserved for women candidate alternately in subsequent ordinary election.
>
> (d) During every subsequent ordinary election in a Cantonment other than category IV Cantonment, the procedure for reservation of wards for women as referred to in clauses (a) and (b) shall be followed but all those wards which had been reserved in just earlier election shall not be included while drawing the lots for reservation.

Rotation has been prescribed in the circumstances provided in the rules, whenever seats have been reserved for women when it has not been reserved, it is not possible to reserve seats on the basis of horizontal reservation out of one seat obviously rotation of the seats cannot be made, thus rule 6(b) cannot be said to be *ultra-vires.*

13. Shri Sanjay K. Agrawal, learned counsel for petitioner has relied upon the decision of Apex Court in *Union of India and another Vs. Madhav and another* - (1997) 2 SCC 332 to submit that even single post in the category can be reserved, here the reservation has been provided for SC/ST category, question involved is of horizontal reservation and out of one seat it is not possible to make horizontal reservation, consequently decision has no relevance with the issue involved in the case.

Resultantly, we find no merit in the writ petition, same deserves to be dismissed. Writ petition is hereby dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 761

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice Prakash Shrivastava

21 January, 2008*

S.C. MEHTA & ors. Petitioners

Vs.

UNION OF INDIA & ors. Respondents

Constitution of India, Article 226 - Indian Railway Establishment Manual, Para 228 (1) - Erroneous promotions - Fixation of Seniority - A person lost promotion on account of administrative error - Should on promotion be assigned correct seniority *vis-a-vis* his juniors already promoted irrespective of date of promotion - Respondents 4 to 55 officiating as Diesel Assistant/Fireman at Bhopal - Considered for promotion in year 1992 due to administrative lapse - On promotion be assigned seniority w.e.f. 13-2-90 - Petitioners as Diesel Assistant came to Bhopal on request basis on different dates in year 1990, 1991 and 1992 - Department placed petitioners at the bottom of Respondent 4 to 55 - Order proper. (Para 8)

Sujoy Paul with *Akash Choudhary,* for the petitioners.

Rajneesh Gupta, for the respondents No. 1 to 3,

Gaurav Sharma, for the respondents No. 10, 13, 17 & 19.

O R D E R

The Order of the Court was delivered by ARUN MISHRA, J. :–The petitioners have assailed order dated 11th April, 2002 passed by Central Administrative Tribunal, Jabalpur in O.A. No.479/94.

2. The facts briefly stated indicate that the petitioners prayed before the tribunal to quash the seniority list (A.1) dated 11.4.94/4.7.94 and for quashment of promotion order (A.2) dated 26.7.94 relating to respondents no.4 to 12 and 16 to 20. The petitioners submitted that they were directly recruited to the post of Assistant Driver/ Diesel Assistant in the pay scale of Rs.950-1500/- on different dates in the year 1988, 1989 and 1990. Subsequently they were transferred to Bhopal Division on the basis of their own request/ mutual basis. Petitioners submitted that respondents no.4 to 55 were also working as Assistant Driver/ Diesel Assistant/ Firemen-II in the pay scale of Rs.950-1500/- in Bhopal Division but they were shown junior to them in the seniority list (A.4). In the seniority list (A.3) dated 1.3.93 the petitioners were assigned correct seniority and they were shown senior to respondents no.4 to 55 as their recruitment to the post of Diesel Assistant was subsequent in point of time. They were selected pursuant to the notice (A.6) circulated on 29.4.92. They were empaneled on 7.10.92 as per (A.8). Later on they were given seniority as Diesel Assistant w.e.f. 13.2.90 in the seniority list (A.1) dated 4.7.94. The petitioners were transferred to Bhopal Division on different dates in the year 1990, 1991 and 1992. It is submitted that post of Diesel

*W.P. No. 3001/2003 (Jabalpur)

Assistant/ Assistant Driver was selection post and selection was on the basis of written test, interview conducted by duly constituted committee as per the Recruitment rules, as such seniority could not have been given to respondents no.4 to 55 before 4.12.92. It was not known to the petitioners on what basis proforma seniority was given from 13.2.90., Respondents no.4 to 55 never participated in the selection held prior to 1992. If some of them participated, they had not fared well.

3. In the return/ additional return filed by respondents no.1 to 3 before the tribunal it was contended that respondents no.4 to 55 were eligible for consideration for selection to the post of Diesel Assistant as per notification dated 28.7.1989 (A.1 = R.1); as they were not considered, however, they were regularized as Diesel Assistant in a subsequent selection, they were given proforma seniority with effect from their due date. Settlement was reached in joint meeting of the recognized unions, as per that impugned seniority list was prepared. Six of the respondents had applied for the selection, however, remaining respondents did not apply nor the Railway Administration called them to appear in the selection. The employees reaching on transfer at own request from other division will also become junior to the staff already promoted in the relevant grade or post. It was further submitted that respondents no.4 to 55 were promoted on adhoc basis prior to posting on request of applicants in Bhopal Division. Due to administrative lapse the cases were not considered of the respondents no.4 to 55, as such they were given the retrospective seniority. The post of Diesel Assistant being selection post the regular promotion could only be made by positive act of selection, hence these senior firemen "B" who were left out by Administrative error were called for selection in 1992 for regular promotion. They qualified in the selection conducted in October, 1992 as per para 302 Indian Railway Establishment Mannual, hereinafter referred to as "IREM". The respondents no.4 to 55 were left out from being called for selection in the year 1990, on their passing selection test, they were assigned original seniority by correcting the administrative mistake. Powers given to General Manager under para 114 of IREM have been withdrawn.

4. The tribunal has dismissed the application holding that the petitioners were not in Bhopal Division in the feeder cadre to the post of Diesel Assistant. The respondents no.4 to55 could not be called by the administration for selection in the year 1989. As soon as this error was discovered by the respondents no.1 to 3, they were considered and promoted in the year 1992, thereafter they consulted with recognized unions of the applicants also. The petitioners were junior in the feeder cadre in the Bhopal Division, thus, no injustice was caused to them. Aggrieved by the order the petitioners have preferred the writ petition.

5. Shri Sujoy Paul, learned counsel with Shri Akash Choudhary appearing on behalf of petitioners, has submitted that the criteria evolved in the joint meeting of the unions was not proper and legal. The post of the Diesel Assistant being selection post, the seniority could not have been assigned w.e.f. 13.2.90. The

respondents in their return have submitted that respondentsno.38, 48, 50 to 53 had applied for their selection, consequently their cases were not covered in the joint decision (R.1) taken on 4.3.94, thus, the change made in the seniority list on 4.7.94 was illegal and the position of the seniority list of the year 1993 deserves to be restored.

6. Shri Rajneesh Gupta, learned counsel for respondents no.1 to 3 and Shri Gaurav Sharma for respondents no.10, 13, 17 & 19, have supported the order and submitted that the cases of petitioners were not considered due to administrative lapse, in Bhopal Division their cases were considered as pointed out in the additional return for the year 1992, thereafter orders were issued, joint decision was taken in the meeting of both the unions and it was decided that those who were working on adhoc basis as Diesel Assistant/ Firemen (A) prior to 28.7.89 and were not called to appear in the selection and got regularized as Diesel Assistant, on subsequent selection to be given proforma seniority position interpolating, their names in the Diesel Assistant penal published on 13.2.90, thus, the injustice done to respondents no.4 to 55 due to administrative lapse was undone, the petitioners came on subsequent dates to Bhopal, the respondents no.4 to 55 were already officiating on adhoc basis as Diesel Assistant; they were working prior to 28.7.89, thus, had been rightly assigned the seniority from 13.2.90 the date on which the penal was published in the Bhopal Division. The petitioners have not assailed the joint decision taken on 4.3.94. Consequently, there is no merit in the writ petition, writ petition deserves to be dismissed.

7. It is clear that petitioners came on mutual basis or on request basis to Bhopal Division and they were promoted as Diesel Assistant on different dates in the year 1990, 1991 and 1992. It is not in dispute that they were rightly assigned the seniority at the bottom of the employees who were holding the post of Diesel Assistant, however, in the instant case, there were certain incumbents in Bhopal Division whose cases were required to be considered for the post of Diesel Assistant, however, due to administrative lapse their cases were not considered as admitted in para-2 of the additional return dated 12.4.2001 filed by respondents no.1 to 3. Following averment has been made :-

> "2. That the post of Diesel Asstt. being selection post the regular promotion could only be made by positive act of selection, hence these senior firemen 'B' who were left out by Administrative error were called for selection in 1992, for regular promotion. These seniors qualified in the selection conducted in October 1992. The contention of the applicants that since these persons were promoted after them, they should be given seniority below them as per para 302 of the I.R.E.M. Since the Respondents 4 to 55 were left out from being called for selection in the year 1990, on their passing selection test, they were assigned original seniority by correcting the administrative mistake."

8. Para 228 of the I.R.E.M. clearly provides that where person has not been promoted at all because of administrative error and where person has been promoted but not on the date from which he should have been promoted and assigned correct seniority *vis-a-vis* their junior already promoted, irrespective of the date of promotion, they have to be assigned correct seniority. Relevant portion of Para-228(1) is quoted below :-

> "228. Erroneous Promotions.- (1) Sometimes due to administrative errors, staff are over-looked for promotion to higher grades could either be on account of wrong assignment of relative seniority of the eligible staff or full facts not being placed before the competent authority at the time of ordering promotion or some other reasons. Broadly, loss of seniority due to the administrative errors can be of two types :-
>
> (i) Where a person has not been promoted at all because of administrative error, and
>
> (ii) Where a person has been promoted but not on the date from which he would have been promoted but for the administrative error.
>
> Each such case should be dealt with on its merits. The staff who have lost promotion on account of administrative error should on promotion be assigned correct seniority vis-a-vis their juniors already promoted, irrespective of the date of promotion. Pay in the higher grade on promotion may be fixed proforma in the proper time. The enhanced pay may be allowed from the date of actual promotion. No arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts."

It is clear that the respondents were officiating as Diesel Assistant/ Firemen Grade-A; their cases were required to be considered but due to administrative lapse the cases were not considered, consequently their cases were considered in the year 1992, thereafter with effect from the date of entitlement, when they were ignored the seniority was assigned to them w.e.f. 13.2.90. The petitioners came to Bhopal subsequently on different dates, they were entitled to seniority w.e.f. that date, placing them at the bottom, as the entitlement of the respondents no.4 to 55 was from the aforesaid earlier date, thus, the action of the respondents no.1 to 3 was proper.

9. There is yet another serious flaw in the petition preferred by the petitioners, they have not assailed the decision taken in the joint meeting of both the unions, on the other hand they submitted that they were not aware on what basis the decision was taken, when the unions have represented them and joint decision was taken, in all fairness it should have been disclosed and assailed as per the

legal requirement, that has not been done, that also precludes the petitioners from obtaining any relief beside we do not find any merit in the submission on merits of the case raised on behalf of the petitioners.

10. Resultantly, writ petition sans merit, is hereby dismissed. However, we leave the parties to bear their own costs as incurred of the petition.

Petition dismissed.

I.L.R. [2008] M. P., 765

WRIT PETITION

Before Mr. Justice Rajendra Menon

24 January, 2008*

JAI MAHADEV TRADERS, GWALIOR — Petitioner

Vs.

STATE OF M.P. & ors: — Respondents

Vanijyik Kar Adhiniyam, M.P. 1994 (5 of 1995) - Section 2(w) - Taxable Turnover - Subsequent cancellation of registration certificate of selling dealer - Transaction made by Petitioner with various selling dealers when their registration certificate were valid - Subsequent cancellation of registration certificate with retrospective effect would not effect the deduction claimed by petitioner. (Para 6)

Cases referred :

16 TLD (1996) 185, (1986) 19 VKN 420

N.K. Jain, with *Arvind Dwivedi,* for the petitioner,

Praveen Newaskar, Dy. G.A. for the respondents.

O R D E R

Rajendra Menon, J. :–As common questions are involved in all these cases and as the legal questions are also identical, all the four petitions are being disposed of by this common order.

2. Petitioner in all these petitions have challenged various orders passed by the Commercial Tax Authority assessing the Commercial Tax on the petitioner establishment for various periods. Grievance of the petitioners are that initially tax was assessed and the assessment orders were passed for various period. Petitioner had purchased goods from registered dealer on which local tax were paid by the dealers and therefore, goods so purchased were exempted. However, after the assessment orders were passed the same is review and re-assessment ordered on the ground that the certificate of registration of the dealer from whom purchase have been made by the petitioners are cancelled, retrospectively, assessment were re-opened and after re-opening of the assessment without granting proper opportunity to the petitioner, orders of re-assessment have been passed and the revision filed by the petitioners have also been dismissed without

*W.P. No. 849/2003 (Gwalior)

taking note of various irregularities committed in the matter of re-assessment. It is pointed out by Shri N.K. Jain, learned senior counsel that when the transaction in question for which re-assessment took place the certificate of registration of the dealer from whom purchase was effected had not been cancelled. Placing reliance to a judgment of a Division Bench of this court in the case of *Commissioner Sales Tax Vs. Govind Trading Co. Morena* decided on 19th September 1995 and reported in 16 TLD (1996) 185, Shri Jain submits that if on the date of transaction dealer was having a valid registration then on the ground of canceling of registration on a subsequent date retrospectively, transaction made cannot be re-opened and tax assessed on the ground that registration of the dealer stood cancelled as on the date of transaction. Accordingly, Shri Jain submits that in all these cases action taken on the ground of retrospective cancellation of dealers registration is unsustainable. That apart it is emphasized by Shri Jain that order of re-assessment have been done without hearing the petitioner and without granting them any opportunity to give their say in the matter.

3. Respondents have filed the return and have refuted the aforesaid and it is only stated by them that finding irregularities in the matter, re-assessment was ordered and as after re-assessment, petitioner were granted opportunity of hearing during the proceeding of revision, there is no irregularities in the matter. It is pointed out by Shri Praveen Newaskar, learned Deputy Government Advocate for respondents that in some of the transaction registration certificate is cancelled prospectively and transaction in question were entered into after cancellation of the registration and therefore, contention of Shri N.K. Jain, learned counsel for petitioner is refuted.

4. I have heard learned counsel for parties and perused the records.

5. As far as re-opening of the assessment and proceeding to decide the same by re-assessment is concerned, records indicate that proper notice and opportunity of hearing have not been granted to the petitioner this itself is an infirmity. That apart in most of the cases it is seen that registration certificate of the registered dealer from whom petitioners had made purchases were cancelled retrospectively for example in W.P. 4722/06 petitioner M/s. Jai Mahadev Traders had purchased certain goods from Laxmi Trading Co. Datia during the period of 26-03-92 to 31-03-92, during this period the licence and registration certificate of Laxmi Trading Co. Datia was not cancelled, the licence of this firm was cancelled retrospectively w.e.f. 12-08-91 vide order dated 20-11-92. Similarly the registration of one M/s. Jagdamba Oil & Floor Mill, Dabra was cancelled on 12-11-98 with retrospective effect, in doing so transaction entered into by the petitioner with this firm on 10-10-91 and 11-10-91 has been held to be with a unregistered firm. Similarly in the case of one M/s Manoj Kumar Dharamdas, Dal Bazar, Lashkar, Gwalior, the registration certificate was cancelled on 23-05-92 retrospectively w.e.f. 11-08-91 and in this process the transaction made by the petitioner with this firm on 26-03-92 and 27-03-92 has been held to be without payment of tax. These facts clearly

demonstrate that there is some force in the contention advanced by Shri N.K. Jain, Sr. Advocate. The said question is considered and answered by a Division Bench of this court in the case of *Govind Trading Company* (supra), in the aforesaid case which arose out of reference made by the Department under Section 44(1)of the M.P. General Sales Tax, 1958, question no. 2 referred for consideration reads as under :

> (2)Whether on the facts and circumstances of the case, the Tribunal was justified in holding that on the particular date of transaction the dealer had a valid registration certificate even though it was subsequently cancelled with retrospective effect."

6. After taking note of certain judgments rendered in earlier decision in the case of *Commissioner of Sales Tax Madhya Pradesh Vs. Roshanlal Gulshanlal, Bhatapara,* (1986) 19 VKN-420 the question was answered in para 9 by holding that cancellation of registration of a selling dealer retrospectively would not result in disallowing the deduction claimed by the purchaser if at the time when the transaction took place there was a valid certificate of registration with the selling dealer. It is held that the dealer is entitled to claim deduction irrespective of subsequent cancellation of registration of the selling dealer. Keeping in view the aforesaid principle, it has to be held that transaction made by the petitioners with the various selling dealers at a time when registration certificate of the selling dealers were valid would not effect the deduction claimed by the petitioner if the registration certificate of selling dealer is subsequently cancelled retrospectively. That being so Shri Jain is right in contending that deductions are disallowed on incorrect consideration. However, after scrutiny of the records it is found that in some of the cases the transaction have been effected after the registration was cancelled but in most of the cases transaction were made at the time when registration certificate was valid but was subsequently cancelled. That apart the question of knowledge of the petitioner with regard to cancellation of the certificate and bona fide of the petitioner in entering into the transaction on the assumption that the registration of the dealer is effective and claiming tax deduction on the said ground has to be considered at the time of re-assessment, as the re-assessment orders are passed mechanically without considering these factors that also without giving any opportunity of hearing to the petitioner, all these petitions have to be allowed and matters remanded back to the Re-assessing authority for consideration as indicated hereinabove and after granting opportunity of hearing to the petitioner and to claim exemption on the ground of bona fide belief of entering into the transaction and deciding the same in accordance with law. All these petitions are allowed orders of re-assessment passed by the assessing authority the orders of the revisional authority impugned in all these petitions are quashed. Matter is remanded back to the assessing authority to conduct re-assessment proceedings after taking note of the legal principle as indicated hereinabove and after granting opportunity of submitting their say to the petitioners. Petitioners are entitled to raise all objection as may be permissible under law and

the assessing authority is directed to consider the same and decide it by speaking order. Petitioner shall appear before the assessing authority along with certified copy of this order, thereafter, assessing authority shall proceed in accordance with law.

7. All these petitions are allowed and disposed of with the aforesaid, without any order so as to costs.

Petitions allowed.

I.L.R. [2008] M. P., 768
WRIT PETITION

Before Mr. Justice S.K. Kulshrestha & Mrs. Justice Manjusha P. Namjoshi
7 February, 2008*

KAILASHBAI — Petitioner
Vs.
UNION OF INDIA & ors. — Respondents

A. Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act (46 of 1988) - Section 3 - Maintainability or continuance - Whether a Writ Petition of habeas corpus in the case of preventive detention can be maintainable/continue even after the period of detention is over - Yes - If the effect of detention is forfeiture of the property of detenu - High Court can go into legality, propriety and validity of the order of detention - However, can not issue writ of habeas corpus on efflux of the period of detention. (Para 9)

B. Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act (46 of 1988) - Section 3 - Satisfaction of Detaining Authority - At the time of passing detention order - Subjective satisfaction is required to be derived from some objective criteria and cannot be capricious or whimsical - Eminent possibility of release of detenu must be based on cogent material - Order suffers from undue delay of 8 ½ months after incarceration of detenu - No cogent material has been placed before Detaining Authority to reached the satisfaction - Order unsustainable in law. (Para 14)

Cases referred :

(2007) 1 SCC (Cri) 464, AIR 2000 SC 3675, AIR 1974 SC 1264, AIR 1975 SC 1517, (2006) 2 SCC (Cri) 418, AIR 2006 SC 3053, (2006) 1 SCC (Cri) 593.

S.R. Saraf & C.R. Joshi, for the petitioner,
V.K. Zelawat, Assistant Solicitor General for the respondent Nos. 1 to 3,
Girish Desai, Dy. A.G. for the respondent No.4.

ORDER

The Order of the Court was delivered by S.K. KULSHRESTHA, J. :–These petitions raise an interesting and important question

*W.P. No. 2897/2007 (Indore)

with regard to the maintainability/continuance of the petition for a writ of habeas corpus in the case of preventive detention even after the period of detention is over if the detenu is likely to be visited with civil or other consequences to his detriment under the provisions flowing from detention under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

2. For the purposes of this decision, reference is being made to the facts stated in Writ Petition No.2899/2007 unless stated otherwise, as both the petitions proceed on similar contentions and are based on very similar facts except that in the case of detenu Nikku Singh, an application was made for his release on bail, which was dismissed by order dated 12.05.2006 while in the case of detenu Shyamsundar, no such application was made till the passing of the order of detention dated 27th December, 2006. Both the petitions are, therefore, being decided by this common order.

3. The wives of the two detenus have challenged the order of detention (Annexure A) dated 27th December, 2006 passed by the 2nd respondent – Joint Secretary to the Government of India in purported exercise of the power granted by Section 3 (1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (herein after referred to as the Act). In pursuance of the said order, grounds were simultaneously served on the detenu stating that both the detenus were found in possession of 23.700 kilograms of opium, which they were transporting in a jeep. It is not disputed that a case under the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 was registered for the substantive offence and the detenus were in judicial custody in respect of the said offence ever since their arrest on 12.04.2006. Since the order was passed on 27.12.2006 and served on the detenu, as late as, on 23.01.2007, although both the detenus were in custody, and the order could have been served on the same day or soon thereafter, delay in effecting service from the date of the order till its actual service, has not been explained.

4. It is not disputed that within the prescribed period the order of detention along with the record, on which the order was based, was placed before the Central Advisory Board and on receiving the opinion of the Board that sufficient grounds existed for the detention, the detention was confirmed for a period of one year from the date of detention i.e. 23.01.2007 by order dated 10th April, 2007 (Annexure B). It is in this context that the period having elapsed on 22.01.2008, learned Assistant Solicitor General contends that the petition has become infructuous as the writ of habeas corpus cannot be issued in case of a person who is not in confinement insofar as the order of detention (Annexure A) is concerned.

5. The first question, in the light of the contention of the learned Assistant Solicitor General, that falls for our consideration is as to whether in a petition of habeas corpus seeking release of the detenu a new ground can be urged for seeking a different writ to save the detenu from the civil consequences which flow from the order of detention and the said order can be interferred, if it is

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vitiated in the eye of law. The order of detention having not been disputed and expiry of the period of detention having been admitted, we proceed to consider whether on the basis of the changed circumstances, the Court has jurisdiction to consider the validity, legality and propriety of the order of the detention passed under Section 3(1) of the Act.

6. Learned counsel for the petitioners has invited our attention to the decision of the Supreme Court *Adishwar Jain vs. Union of India and another* [(2007) 1 Supreme Court Cases (Criminal) 464] in which their lordships have observed that it may be true that the detenu having remained in detention for the entire period, a writ of habeas corpus cannot be issued but it is another thing to say that an order of detention is required to be quashed so as to enable the detainee to avoid civil liabilities. The said case was in respect of the preventive detention which entailed adverse consequences under SAFEMA. The observations contained in paragraph 18 of the report read as follows: -

> "18. Although learned Additional Solicitor General may be correct in his submissions that ordinarily we should not exercise our discretionary jurisdiction under Article 136 of the Constitution of India by allowing the appellant to raise new grounds but, in our opinion, we may have to do so as an order of detention may have to be considered from a different angle. It may be true that the period of detention is over. It may further be true that the appellant had remained in detention for the entire period but it is one thing to say that the writ of habeas corpus in this circumstance cannot issue but it is another thing to say that an order of detention is required to be quashed so as to enable the detainee to avoid his civil liabilities under SAFEMA as also to protect his own reputation."

7. Our attention has been invited to the provisions contained in Section 68A of the Narcotic Drugs & Psychotropic Substance Act, 1985 providing for forfeiture of the property derived or used in illicit traffic. Provisions apply to the persons specified in Sub Section (2) thereof which includes a person in respect of whom an order of detention has been made under the Act subject to the condition that the order has not been revoked on the report of the Advisory Board constituted under the Act or such order of detention has not been set aside by a Court of competent jurisdiction. The provisions of Section 68 (A) of the NDPS Act contained in Sub Section (1) and (2) with proviso thereunder read as extracted hereunder: -

> **"68A. Application.** - (1) The provisions of this Chapter shall apply only to persons specified in sub-section (2).
>
> (2) The persons referred to in sub-section (1) are the following, namely: -
>
> (a) every person who has been convicted of an offence punishable under this Act with imprisonment for a term of [ten] years or more;

(b) every person who has been convicted of a similar offence by a competent court of criminal jurisdiction outside India;

(c) every person in respect of whom an order of detention has been made under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (46 of 1988), or under the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (J & K Act XXIII of 1988):

Provided that such order of detention has not been revoked on the report of the Advisory Board constituted under the said Acts or such order of detention has not been set aside by a court of competent jurisdiction;

[(cc) every person who has been arrested or against whom a warrant or authorisation of arrest has been issued for the commission of an offence punishable under this Act with imprisonment for a term of ten years or more, and every person who has been arrested or against whom a warrant or authorisation of arrest has been issued for the commission of a similar offence under any corresponding law of any other country.]

(d) every person who is a relative of a person referred to in clause (a) or clause (b) or clause (c) [or clause (cc)];

(e) every associate of a person referred to in clause (a) or clause (b) or clause (c) [or clause (cc)];

(f) any holder (hereafter in this clause referred to as the "present holder") of any property which was at any time previously held by a person referred to in clause (a) or clause (b) or clause (c) [or clause (cc)]; unless the present holder or, as the case may be, any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration."

8. It is in the context of the above civil consequences that the learned counsel contends that the petition cannot be dismissed at the threshold and if the order passed by the detaining authority is illegal, the same cannot be continued merely because the detenus have served out the entire period mentioned thereunder. We find that if the principles laid down by the Supreme Court in *Adishwar Jain* (supra) are culled out and applied in their proper perspective and spirit, the observations of the Supreme Court notwithstanding that it was in regard to the preventive detention under the different enactment and the civil consequences ensuing therefrom, we are of the view that this Court continues to have jurisdiction to consider the legality of the order as contra-distinguished from the case of continuance of detention. A discussion effect is also contained in *Amritlal and other vs. Union Government through Secretary, Ministry of Finance and*

others [AIR 2000 Supreme Court 3675] of which portion of paragraph 3 of the report reads as extracted hereunder: -

> "3. Learned advocate appearing in support of the appeals during the course of hearing informed this Court that while it is true that by reason of efflux of time the period of detention has otherwise expired but continued to press the appeal with some emphasis by reason of the consequences as provided in the statute to wit: the forfeiture of the property of the detenu and it is in this context strong reliance has been placed on the decision of this Court in *Rivadeneyta Ricardo Agustin v. Govt. of the National Capital Territory of Delhi,* 1994 Supp (1) SCC 597. This Court while dealing with the matter and relying upon the decision of this Court in *Kamarunnissa v. Union of India,* (1991) I SCC 128 came to the conclusion that the order of detention cannot but be quashed."

9. The decisions referred to above clearly repel the contention that after period of detention is over, the petition does not survive. In fact, if the effect of the detention is forfeiture of the property, this Court can go into the legality, propriety and validity of the order of detention to see whether the order was legal or proper. This Court cannot, however, issue any writ of habeas corpus on efflux of the period of detention.

10. While not disputing the order of detention on merits, and rightly so, the submission of the learned counsel for the detenus that the detenus were taken into custody on 12.04.2006 on the charge of violation of the provisions of the Narcotic Drugs and Psychotropic Substance Act, 1985 as they were found in possession of opium weighing 23.700 kilograms and after their production before the Court having jurisdiction, they were sent to jail as under-trial prisoners. The order of detention was, however, passed on 27.12.2006, more than 8 months thereafter, and served on 23.01.2007 when both the detenus were confined in jail. According to the learned counsel, this delay vitiates the order of detention. Learned counsel has brought to our notice the decision of the Supreme Court in AIR 1974 Supreme Court 1264 *[Lakshman Khatik versus The State of West Bengal]* to the effect that in the absence of any explanation regarding the delay, the order of detention passed with a view to prevent disruption of supplies of food-grains on the ground based on incidents of removal of rice which took place about seven months earlier, was invalid. Attention has also been invited to the decision in *S.K.Serajul versus State of West Bengal* [AIR 1975 Supreme Court 1517] in relation to the detention under MISA. In the wake of undue delay in passing the order of detention, and in the actual arrest thereafter, the detention order was quashed. In this context, reference has also been made to the decision in *Rajendra Arora versus Union of India and others* [(2006) 2 Supreme Court Cases (Criminal) 418] wherein the detention order passed after 10 months of the illegal act and for which no explanation was given, was considered to be a sufficient

ground to quash the order of detention. Same is the observation in *Adishwar Jain versus Union of India and another* [(2007) 1 Supreme Court Cases (Criminal) 464].

11. Learned Assistant Solicitor General for the respondents has invited our attention to paragraph 6.8 of the return in which the detaining authority has clearly stated that the matter was raised before the Advisory Board and after the Advisory Board communicated its opinion with regard to the sufficiency of grounds for detention, the matter was considered and the order was passed on 27.12.2006.

12. We have perused the order of detention and the accompanying grounds (Annexures A & B) and we find that the order is mainly founded on apprehension that the release of the detenus on bail was imminent. Nikku Singh's application for bail had been rejected way back on 12.05.2006 and Shyamsundar had not made any application whatsoever. Learned counsel for the petitioners submits that in the light of the stringent provision contained in Section 37 of the NDPS Act with regard to the necessity of conclusion that the accused were innocent, there was no likelihood of the bail having been granted to any of the detenus specially when the bail application of Nikku Singh had already been rejected on 12.05.2006. Section 37 of the Narcotic Drugs & Psychotropic Substances Act reads as follows: -

> "37. Offences to be cognizable and non-bailable. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless -
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]"

13. The section clearly begins with a non-obstante clause to the applicability of the Code of Criminal Procedure and provides that when the public prosecutor opposes the application for bail, the Court should first satisfy itself that reasonable grounds exist for believing that the person is not guilty of such offence and that, he is not likely to commit any offence while on bail. There is nothing in the

grounds of detention to indicate that the Detailing Authority apprehended that the case of the detenus would fall under the excepted category and it was, therefore, necessary to pass an order of detention. We may reiterate that the application of Nikku Singh had already been rejected on 12.05.2006 and it is not the case of the respondents that any application was filed by either or both for release on bail thereafter. Under these circumstances, the delay in passing the order of detention and the indifference thereafter in effecting its service up-to 23.01.2007 clearly vitiated the order of detention.

14. The order of detention is even otherwise based on possibility of the bail being granted to the detenus. The detenus were already in jail and though the apprehension of their release from custody has been recorded in the grounds of detention, there does not appear any application of mind with regard to its necessity as no cogent material has been placed on record necessitating such order except that there was likelihood of release on bail. In *Amritlal's case* (supra) their lordships have observed that likelihood of the detenu moving an application for bail is not sufficient for passing the order as it is different from likelihood of being released on bail. As on the date of the order, even application for bail was not pending before the Court and, therefore, it was a case of likelihood of moving an application for bail and not of release. It is contra-indicated by the conduct of the detaining authority that any release was apprehended. Not only that the order was passed after more than eight months of the incarceration of the detenus but it was served long thereafter on 23.01.2007. We are conscious of the fact that as rightly pointed out by the learned Assistant Solicitor General by reference to A. *Geetha* versus *State of Tamil Nadu & another* [AIR 2006 Supreme Court 3053] that satisfaction of the likelihood of being released on bail being subjective, the Court cannot interfere. We are also aware that it is the subjective satisfaction of the Detaining Authority on which detention can be ordered but this subjective satisfaction is required to be derived from some objective criteria and cannot be capricious or whimsical. As observed by the Supreme Court in *T.V. Sravanan Alias S.A.R. Prasana Venkatachaariar Chaturvedi versus State through Secretary and another* [(2006) 1 Supreme Court Cases (Criminal) 593] apprehension of the detaining authority regarding imminent possibility of the release of the detenu must be based on cogent material. The order was passed by the detaining authority after 8 ½ months and served on the detenus who were in jail nearly after a month. Apart from the fact that there was likelihood of filing the bail application and their release was imminent, nothing was placed on record to show that there was some objective criteria for the satisfaction of the detaining authority that the detention of the detenus was necessitated. The only recital in the grounds of detention, apart from the facts about the commission of the offence for which the detenus were under-trial accused, was that they were likely to be released though mention was made in the grounds of detention against Nikku Singh that his bail application has been rejected on 12.05.2006 and Shyamsundar had not made any application for bail till the date of detention order. It was, therefore, not a case where on any

objective criteria and for cogent reasons the detention order was passed. Thus, we find that notwithstanding the case relied upon by the learned Assistant Solicitor General about non-interference of the Courts in matters of subjective satisfaction of the detaining authority, there being total absence of any cogent material to derive the subjective satisfaction, the order is rendered illegal. The inexplicable delay in passing the order, further adds to its invalidity.

15. As a result of the discussion herein above, we find that the order (Annexure A) passed for the detention of Shyamsundar and Nikku Singh not only suffers from undue delay of 8 ½ months after the incarceration of the detenus, it is also vitiated on the ground that no cogent material has been placed on record from which the said satisfaction could have been reached. We are, therefore, unable to sustain the order Annexure A.

16. In the result, the order of detention passed in each case (Annexure A) is quashed. Since the detenus have already undergone the period of preventive detention, no consequential order is required for their release from detention. We may also record that we have quashed the order of detention on the basis of principle governing the preventive detention and observations contained in this order shall not affect the merits of the criminal case pending before the Court having jurisdiction.

Both the petitions are, thus, allowed to the extent indicated herein above.

Petitions allowed.

I.L.R. [2008] M. P., 775
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
13 February, 2008*

STATE OF M.P. & anr. Petitioners
Vs.
GANGARAM PORWAL & ors. Respondents

Industrial Employment (Standard Standing Orders) Rules, M.P. 1963 - Clause 2(vi) - Classification - Respondent holding post of Chowkidar - Was asked to perform duties of Time Keeper on ad hoc basis to meet emergent requirement of additional work - Post of Time Keeper is higher and pay scale is also higher than that of post of Chowkidar - Respondent cannot claim classification to such higher post - Order passed by Industrial Court quashed - Employer's petition allowed. (Para 8)

Case referred :

1994 MPLSR 523

Arvind Gokhale, G.A. for the petitioners
None, for the respondents

*W.P. No. 1465/2002 (Indore)

ORDER

SHANTANU KEMKAR, J.:–By filing this petition under Article 227 of the Constitution of India the petitioners have challenged the order dated 11.5.2001 passed by the Member Judge, Industrial Court, Madhya Pradesh, Indore in Appeal No. 153/ MPIR/2001 setting aside the order dated 28.3.2001 passed by the Labour Court, Ujjain in Case No. 121/92/Labour.

2. Briefly stated, as per the first respondent he was appointed by the petitioners in the year 1972 on the post of Chowkidar. According to him in the year 1975 he was asked to perform the work of time keeper for about 3 to 4 months. Thereafter again in the year 1983 and in 1991 he was asked to work as Time-Keeper. He alleged that inspite of taking work of Time-Keeper and paying salary of the said post the petitioners did not classify him on the post of Time-Keeper. In the circumstances he had to approach the Labour Court by filing an application under Section 31 (3) read with Sections 61 and 62 of the M.P. Industrial Relations Act, 1960 ('Act' for short) seeking classification on the post of Time Keeper in view of clause 2 (vi) of the M.P. Industrial Employment (Standard Standing Orders) Rules, 1963 ('S.S.O.' for short).

3. The aforesaid application filed by the first respondent was contested by the petitioners stating therein that the first respondent was merely asked to work as Time-Keeper from time to time as per the need of the work. He was posted as Time-Keeper for some period to meet the additional burden of work due to 'Sinhasth Festival'. It was also stated that the minimum qualification for the post of Time-Keeper is passing of Higher Secondary with 'mathematics' subject whereas the first respondent has not passed Higher Secondary with the subject 'mathematics'. It is further stated that the first respondent is holding the permanent post of Chowkidar and as such cannot be classified to a higher post of Time Keeper.

4. The Labour Court after recording the evidence led by both the sides dismissed the petitioners' application vide order dated 28.3.2001 holding therein that the first respondent cannot claim classification to higher and/or promotional post of Time Keeper as he had been already classified as Chowkidar.

5. The first respondent challenged the aforesaid order passed by the Labour Court in an appeal filed under Section 65 of the Act before the Industrial Court of M.P., Indore. The Industrial Court vide order dated 11.5.2001 (Annexure P-7) allowed the appeal and set aside the order of the Labour Court and ordered for the first respondent's classification on the post of Time-Keeper holding that he has worked for more than six months satisfactorily on the post of Time Keeper and as such he is entitled for classification under clause 2 (vi) of the S.S.O. Feeling aggrieved the petitioners have filed this petition.

6. Shri Arvind Gokhale, learned Govt. Advocate has contended that initially the first respondent was appointed on the post of Chowkidar. On account of the

exigencies of the work due to 'Sinhastha' Festival he was posted to work as Time-Keeper from time to time. He submitted that the post of Time Keeper is a higher and promotional post for which qualifications are that the person should hold higher secondary certificate with mathematics subject. The first respondent having not passed the higher secondary examination with mathematics subject he could not have been ordered to be classified on the said post by the Industrial Court. He submitted that the Industrial Court though has placed reliance on the judgment passed by this Court in case of *M.P. State Road Transport Corporation and another vs. Narayan Singh Rathore and two others* (1994 MPLSR 523) but has misconstrued the said judgment and has committed gross illegality in ordering classification of the first respondent on the post of Time Keeper.

7. On the other hand the case of the first respondent is that he being asked to perform the work of Time Keeper for more than six months and his work being satisfactory he is entitled to be classified in terms of clause 2 (vi) of the S. S. O.

8. Admittedly, the post of Time Keeper is a higher post and the pay scale is also higher than that of the post of Chowkidar. From the perusal of the impugned order and the annexures, I find that though the first respondent was holding the post of Chowkidar but in order to meet the emergent requirement of additional work he was asked to perform the duties of higher post of Time Keeper on ad hoc basis. On the basis of such orders one cannot claim classification to such higher post.

9. A Full Bench of this Court in case of *M.P. State Road Transport Corporation and another vs. Narayan Singh Rathore and two others* (supra) in a similar set of facts has held:

> "In other words, the classification contemplated in Item-1 of Schedule to the Acts and clause (2) of the Annexure to the Rules is classification at a stage which could be spelled out from the classification contemplated, namely, permanent, permanent seasonal, probationer, Badli, Apprentice and temporary. The stage is only the entry stage, i.e., the stage at which the person enters employment. The classification cannot relate to the stage of promotion or the promotion post which can be governed only by the service conditions applicable to the employees. Rules or Regulations framed by the Corporation providing for channel of promotion do not in any way detract from the Standing Orders and Clause (2) of the Annexure to the Rules and Clause (2) of the Annexure to the Rules does not detract in any way from the scheme of promotion provided by the rules or regulations. To say that an employee who was asked to work on a higher post for a period on account of exigencies of situation is not asking for promotion and he is asking only for appropriate classification on the post on which he is working is to ignore both the scheme underlying the rules relating to classification and the promotion rules. An employee

may be asked to work in a higher post for some time on account of administrative exigencies. He does not thereby acquire a right to the higher post, as long as he has not been promoted by the competent Authority in accordance with the regulations or rules and on a consideration of all employees in the feeder categories who are in the field of choice. An employee who is not entitled to be considered for promotion or who is yet to be considered for promotion and, therefore, cannot be deemed to have been promoted, cannot secure the same and by stating that what he is seeking is classification and not promotion. What cannot be achieved directly cannot be permitted to be achieved in an indirect manner. It is one thing to say that an employee who has been asked to work in a higher post temporarily must get the emoluments attached to the higher post; it is quite a different thing to say that he must be regarded as a permanent incumbent of the higher post by being classified as such. The question of exploitation and unfair labour practice does not arise since it will be the duty of the employer to pay him the emoluments attached to the higher post as long as he discharges the duties attached to the higher post and on the failure of the employer, it will be open to the employees to enforce his claim. In a large organisation like the Corporation with Officers and bus-stations spread over the vast expense of the State, it may not always be possible, though it may be desirable, for the competent authority to keep a watchful vigil and take prompt action for filling up the promotional post on occurring of the vacancy. Officers in fact off places may have to make temporary arrangements for discharge of the duties attached to the higher posts which fall vacant. They can only entrust the duties to an employee available locally who may not have the requisite seniority or even the eligibility for being considered for promotion. It is not in the scheme of clause (2) of the Annexure to the Rules to anvert such temporary arrangement into a permanent one. The scheme of classification spells out clearly the underlying intention that it is intended to apply to the entry stage and not to promotional post."

10. Thus, the first respondent having been appointed on the post of Chowkidar cannot be ordered to be classified on the higher post of Time-Keeper merely on the basis of assignment of duties of Time-Keeper to him to meet the administrative exigencies. The order passed by the Industrial Court is contrary to the provisions contained in the S.S.O. as also the law laid down by the Full Bench of this Court in case of *M.P. State Road Transport Corporation and another vs. Narayan Singh Rathore and two others* (supra). In the circumstances the order of the Industrial Court cannot be sustained and is hereby quashed.

11. In view of the aforesaid, the petition is allowed. The impugned order passed by the Industrial Court is quashed. The order of the Labour Court stands restored. No orders as to cost.

Petition allowed.

I.L.R. [2008] M. P., 779
WRIT PETITION
Before Mr. Justice K.K. Lahoti
19 February, 2008*

UMASHANKAR USRETE — Petitioner
Vs.
STATE OF M.P. & ors. — Respondents

A. Forest Act (16 of 1927), Section 52-A - Provided an appeal against order of confiscation and not provided appeal against order of release of property - Appeal is a creature of statute and until and unless such appeal is provided under the act - Appellate authority has no jurisdiction to entertain appeal.

(Paras 5 & 6)

B. Forest Act (16 of 1927), Section 52-A - "Person aggrieved" - Mean a person who has suffered legal injury or one who has been deprived with something which he would have entitled to obtain in usual course - Range Officer who initiated proceeding for confiscation U/s 52 of Act may be a person aggrieved - But not entitled to file an appeal U/s 52-A of Act - As such appeal has not been provided U/s 52-A of Act. (Para 8)

Cases referred :

AIR 1999 Orissa 37, (1998) 5 SCC 26

Tulika Gulatee, for the petitioner (appointed by the Court to assist)
Jaideep Singh, Dy. Govt. Advocate for the State

ORDER

K.K. LAHOTI, J. :–This petition is directed against the order-dated 30.6.2001 in Criminal Revision no.44/2000 by the Second Additional Sessions Judge, Seoni by which the order passed by the appellate Authority annexure P/2 dated 23.6.2000 was affirmed.

2. The learned counsel submitted that the competent authority issued a show cause notice to the petitioner and the petitioner in reply explained that the vehicle was used without his knowledge or connivance and that all reasonable and necessary precautions were taken against the use of the vehicle for commission of any forest offence. The competent authority vide order 23.7.1999 Annexure P/1 after appreciating the evidence produced before him found that the forest produce was transported without his knowledge and connivance and he had taken all the

*W.P. No. 4856/2001 (Jabalpur)

precautions for use of the said vehicle in the forest offence. The order passed by the competent authority Annexure P/1 was challenged by the Range Officer, Kanhiwada before the Conservator of Forest, who happens to be the appellate authority under Section 52-A of the Indian Forest Act, 1927. The appellate authority- issued notices to the petitioner and by reversing the finding of the competent authority found that the petitioner failed to prove that the vehicle was used without his knowledge and connivance by his servant and directed confiscation of the vehicle. The order passed by the appellate authority was assailed by the petitioner before the Sessions Judge, Seoni which was decided by order Annexure P/5 by the Second Additional Sessions Judge, Seoni on 30.6.2001.

3. Before the revisional authority, the petitioner's contention was that such appeal was not maintainable before the appellate authority as under Section 52-A of the Act only an appeal is provided against an order of confiscation but the revisional Court turned down the aforesaid contention in paras 8 to 13 of the order and dismissed the revision. It is submitted that under Section 52-A of the Act, no such appeal is provided to the Range Officer. Apart from this, the Range Officer was not a person aggrieved as provided under Section 52-A of the Act. Reliance is placed to judgment of the Apex Court in *Adi Pherozshah Gandhi vs. H.M.Seervai,* AIR 1971 SC 385 and submitted that this petition be allowed and the orders passed by the Revisional Court and the appellate authority may be set aside.

4. The learned counsel appearing for the State opposed the aforesaid contention and submitted that under Section 52A of the Act, the appellate authority was rightly approached by respondents by filing an appeal. The appellate authority was having jurisdiction under Section 52A of the Act to entertain and decide the appeal against an order releasing the property in confiscation proceedings.

5. To appreciate rival contentions of the parties, the legal position in this regard may be seen.

Section 52-A of the Act reads as under:

> **52-A. Appeal against order of confiscation** (1) Any person aggrieved by an order of confiscation may, within thirty days of the order, or if fact of such order has not been communicated to him, within thirty days of date of knowledge of such order, prefer an appeal in writing, accompanied by such fee and payable in such form as may be prescribed, and by certified copy of order of confiscation to the Conservator of Forests of the forest circle in which the forest produce, has been seized.
>
> **Explanation.-** (1) The time requisite for obtaining certified copy of order of confiscation shall be excluded while computing period of thirty days referred to in this sub-section.
>
> (2) The Appellate Authority referred to in sub-section (1), may,

where no appeal has been preferred before him, "suomotu" within thirty days of date of receipt of copy of order of confiscation by him, and shall on presentation of memorandum of appeal issue a notice for hearing of appeal or, as the case may be, of "suomotu" action to the officer effecting seizure and to any other person (including appellant, if any) who in the opinion of the Appellate Authority, is likely to be adversely affected by the order of confiscation, and may send for record of the case:

Provided that no formal notice of appeal need be issued to such amongst the appellant, officer-effecting seizure and any other person likely to be adversely affected as aforesaid, as may waive the notice or as may be informed in any other manner of date of hearing of appeal by the Appellate Authority."

The aforesaid provision specifically provides that an appeal is provided against an order of the confiscation within 30 days from the date of the order. Sub-Section (2) also provides *'suo motu'* power to the appellate authority to take cognizance against the order of confiscation, but sub section (1) or sub section (2) does not provide any appeal against an order releasing the property from seizure. The legislation has specifically provided an appeal against an order of confiscation and has not provided an appeal against an order of release of the property from seizure.

6. The appeal is a creature of the statute and until and unless such appeal is provided under the Act, the appellate authority was having no jurisdiction to entertain an appeal filed by Range Officer, Kanhiwada. A Division Bench of Orissa High Court in the case of *Rajkishore Mohanty vs. Sate of Orissa:* [AIR 1999 Orissa 37] considering the similar situation held that the Conservator of Forest should have exercised that power either suo motu or on an application, in case where order of 'confiscation' is made by authorised officer and when the authorised Officer has ordered release of the seized goods/vehicle on payment of fine, it is an order of 'non confiscation'. Hence the appeal was not maintainable before the Conservator of Forest.

7. The language of Section 52-A of the Act is very clear and it is not necessary for this Court to take help of any other statute to decide the controversy between the parties. But for the sake of reference, it may be mentioned here that under the Contempt Courts Act, 1971, Section 19 provides an appeal from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt, but in case, no punishment is awarded or the proceedings are closed, no appeal can be entertained against dismissal of the proceedings. If the Court comes to its conclusion that there is no violation of its order by the contemner and refused to take any action against the contemner for the alleged disobedience, such order of refusal is not appealable under Section 19 of the Act. The apex Court in *D.N.Taneja vs. Bhajan Lal* [1988 (5) SCC 26] considering the question held that

right to appeal under Section 19 of the Contempt of Courts Act, 1971 is available only when High Court in exercise of its jurisdiction imposes punishment on the contemner, but dismissal of the contempt application by High Court does not amount to exercise of its jurisdiction for contempt within the meaning of Section 19(1) and hence the appeal would not lie and a remedy by way of appeal under Article 136 of the Constitution is open in such case. Section 52-A of the Act specifically provides an appeal against an order of confiscation and no appeal is provided if the property is released or confiscation proceedings are dismissed. The language of Section is very clear and there is no scope for filing an appeal against such an order. When the statute specifically has not made any provision for filing an appeal against the order dismissing the proceedings, then such an appeal cannot be filed before the appellate authority under Section 52-A of the Act.

8. The person aggrieved would mean a person who has suffered legal injury or one who has been deprived with something which he would have entitled to obtain in the usual course. In the present case, the Range Officer who initiated proceedings for confiscation of the vehicle under Section 52 of the Act may be a person aggrieved, but was not entitled to file an appeal under Section 52-A of the Act. As such, an appeal has not been provided under Section 52-A of the Act, hence the appellate authority erred in entertaining the appeal filed by the Range Officer. The Revisional Court also erred in not considering the aforesaid objection raised by the petitioner in proper perspective. The Revisional Court ought to have taken cognizance in the matter and should have considered the aspect in the light of the specific provision under Section 52-A of the Act.

9. In the result, the orders passed by the appellate Court (Annexure P/2) and the Revisional Authority (Annexure 5) are not sustainable under the law and both the orders are hereby quashed. As this Court has found that the appeal itself was not maintainable before the Conservator of Forest, so it is not necessary in this petition to deal with other contentions of the petitioner. This petition is accordingly allowed. The vehicle of the petitioner be released forthwith by the respondents. No order as to cost.

Petition allowed.

I.L.R. [2008] M. P., 782
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice S.C. Sharma
27 February, 2008*

AJAY TRIPATHI & ors. — Petitioners
Vs.
STATE OF M.P. & ors. — Respondents

A. Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rule, M.P. 2005, Rule 6, M.P. Panchayat Raj Adhiniyam, 1993,

*W.P. No. 7828/2006 (Jabalpur)

Preamble, Constitution of India, 243-G - Constitutional validity of Rules, 2005 challenged being violative of Preamble of Act, 1993 - Held - Power to appoint or power of local administration or power for development activities has not been withdrawn - Under Rules,2005, appointing authority is Panchayat and has effective control over Samvida Shala Shikshak - Rules 2005 do not run contrary to preamble of Act. (Paras 13 & 14)

B. Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rule, M.P. 2005, M.P. Panchayat Raj Adhiniyam, 1993, Section 53, Constitution of India, 243-J - Power of State Government in relation to functions of Panchayats - State Government may by general or special order, add to any of functions of Panchayats or withdraw functions and duties entrusted to such Panchayats, when State Government undertakes the execution of any of the functions entrusted to Panchayat. (Para 18)

C. Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rule, M.P. 2005, Rule 6, M.P. Panchayat Raj Adhiniyam, 1993, Section 47 - Rule 6 of Rules, 2005 not *ultra vires* the Constitution or Section 47 or other provisions of Panchayats Act, 1993. (Paras 22 & 23)

Vivek Rusia, for the petitioners
Rahul Jain, G.A. for the respondent/State

JUDGMENT

The Judgment of the Court was delivered by **R. S. GARG, J** :-By this writ petition filed under Article 226 of the Constitution of India the petitioners are challenging the constitutional validity of Madhya Pradesh Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rule, 2005 (hereinafter referred to as 'Rules of 2005') as *ultra vires* the Constitution of India and being violative of the provisions of Madhya Pradesh Panchayat Raj Awam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as "Panchayats Act 1993'). They are also seeking a direction that the Court may by issuing appropriate writ, direction or order strike down sub rules (1) to (13) of Rule 6 of 2005 Rules and the Court may issue appropriate writ declaring that Madhya Pradesh Panchayat Samvida Shala Shikshak (Employment and Conditions of Services) Rules, 2001 dated 11.7.2001 to be valid piece of legislation and issue appropriate writ, direction or order quashing the entire process of selection of Samvida Shala Shikshak which commences from 4-5-2006.

2. According to the petitioners, the petitioners are elected Vice President of Janpad Panchayat falling within territorial jurisdiction of Zila Panchayat, Jabalpur. They are interested and concerned in maintaining power, authority and responsibilities of the Panchayats. According to them the State Government cannot enact any law which runs contrary to Article 243-G of the Constitution of India and/or Section 47 of the Panchayat Act.

3. For proper appreciation of the dispute between the parties it would be

necessary to note that before coming into force of 2005 Rules, the appointment of Samvida Shala Shikshak was to be governed and controlled by Madhya Pradesh Panchayat Samvida Shala Shikshak (Appointment and Conditions of Service) Rules, 2001. The said rules provided that the appointments shall be made by a selection committee as provided under Rule 2(c) and 5 of the said Rules. The Samvida Shala Shikshak were classified into Class I, Class II and Class III, for Class I appointing authority was Zila Panchayat while for Class II and Class III appointing authority was Janpad Panchayat. The Schedule II provided for constitution of different committees for selection and appointment of Class I, Class II and Class III Samvida Shikshak. Number of appointments were made under the said rule and such appointments came to be challenged before various authorities on ground of illegalities, nepotism, favoritism and fraudulent action on the part of the appointing authority. However, we would not discuss the said matter further because we are concerned with the Rules of 2005.

4. Vide notification dated 6.5.2005, in exercise of the powers conferred by sub section 1 to Section 95 read with sub section 2 of Section 70 of Madhya Pradesh Panchayat Raj Awam Gram Swaraj Adhiniyam, 1993 (No.1 of 1994) the State Government made the rules known as Madhya Pradesh Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, 2005. The rules also provided that after coming into force of 2005 Rules, the Rules of 2001 and all other rules corresponding to 2001 Rules coming in force immediately before the commencement of 2005 Rules shall stand repealed with effect from the date on which date the 2005 Rules come into force.

5. Rule 2 provides the definition of various words and phrases. Clause (f) of Rule 2 defines the "Employing Authority" in relation to 'Samvida Shala Shikshak' an authority specified in Column (4) of Schedule I. Clause (i) defined "Panchayat" to mean 'Zila Panchayat or Janpad Panchayat, as the case may be, constituted under the Panchayats Act'. Rule 3 provides that the rule would apply to Samvida Shala Shikshak employed by Janpad Panchayat or Zila Panchyat, as the case may be, for the schools under their control. Rule 4 requires committee constituted under the Chairmanship of the Collector to assess the vacancy for appointment of Samvida Shala Shikshak. Rule 5 provided for classification of Samvida Shala Shikshak and contract remuneration should be such, as may be specified in Schedule I.

6. Rule 6 which in particular is under challenge before this Court refers to selection and method of employment. Sub-rule (8) refers to receipt of the application by Panchayat. Sub rule (9) of Rule 6 refers to criterion of selection while sub-rule (10) and sub rule (11) refer to preparation of provisional select list and publication of provisional and final select list.

7. Rule 7 makes special provision for Primitive Tribes whereas Rule 8 refers to compassionate appointment and Rule 9 relates to extension in contract period. Rule 10 provides that discipline and control of Samvida Shala Shikshak shall be

under the hands of Zila Panchayat/Janpad Panchayat. If any party is aggrieved by any order passed under the Rules he would have a right of appeal under Rule 11. We are not concerned with rest of the rules at this stage.

8. Schedule I provides for classification of Shala Samvida Shikshak as Grade I, Grade II and Grade III. For the Grade I the employing authority is Zila Panchyat while for Grade II and Grade III Janpad Panchayat would be the employing authority. Schedule II refers to age, qualification, disqualification and constitution of the appellate committee for Samvida Shikshak. Schedule III refers to constitution of contract extension committee while Schedule IV is in consonance with Rule 6(13)(b).

9. The grievance of the petitioner in nutshell is that the State Government by issuing these rules has withdrawn all the powers which the Zila Panchayat and Janpad Panchayat enjoyed under Section 47 of the Panchayats Act and are also making an inroad into the powers of the Janpad Panchayat and Zila Panchayat and, the action of State Government runs contrary to Article 243-G of the Constitution of India. It is submitted by Shri Rusia, learned counsel for the petitioners, that 2001 Rules provided for constitution of a selection committee and in the said committee the control was in the hands of the office bearers of the Panchayats. According to him the State Government could not resume all powers in its hands, denude the Panchayat of their powers and simply require the Panchayat to fill in the blanks in accordance with the employment rules and offer employment. It is also submitted by him that the selection process as provided in Rule 6 is also bad because 20% marks have been offered to a person who holds additional qualifications like B.Ed and D.Ed. etc. His submission is that ordinary villagers would not be in a position to obtain such degrees and under the circumstances the local people would not get any appointment. The submission in fact is that for up-keep, betterment and the future of citizens every power should be given to the Panchyat because they know what are the local conditions.

10. Referring to Section 47 it is submitted that subject of education is within the domain of the Zila Panchayat and/or Janpad Panchayat, therefore, also the powers of appointment could not be assumed by the State Government.

11. Shri Rahul Jain, learned counsel for the State, on the other hand submitted that the Rules of 2005 in fact are more scientific and do not leave anything in the hands of the human agency. According to him the manner in which the marks are to be distributed clearly show that 65% marks are to be awarded to the candidate in proportion to the marks obtained by the candidate in the Samvida Shala Shikshak eligibility examination. Maximum 15 marks shall be awarded for teaching experience in any School, for experience of one, two and three years, 5, 10 and 15 marks shall be awarded respectively and a maximum 20 marks are to be awarded to the candidate to the different grades of the Samvida Shala Shikshak on their proving that they hold a particular degree or diploma. According to Shri Jain when a system is evolved for making the appointments then such system should always be foolproof and there should be no scope in the rules for any interference

by any human agency. He also submitted that on earlier occasions State Government received thousands of complaints in relation to illegal appointments and hundreds of petitions were filed in this Court against the illegal appointments. His submission is that the State Government which has general power of superintendence and has the authority to confer additional power on Panchayat or withdraw the existing powers can always make rules for betterment of the public. It is submitted by him that Section 47 has at all not been violated because the education committee would still continue to function but the appointments are to be made in accordance with the rules. His further submission is that the provisions of Article 243-G of the Constitution of India have at all not been violated. We have heard the parties at length.

12. Article 243-G of the Constitution of India reads as under :

> "243G Powers, authority and responsibilities of Panchayat - Subject to the provisions of this Constitution the Legislature of a State may, by law, endow the Panchayats with such powers and authority and may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to -
>
> (a). the preparation of plans for economic development and social justice;
>
> (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule."

Article 243-G provides that Legilature of a State may, by law, endow the Panchayats with such powers and authority which may be necessary to enable them to function as institutions of the Self Government. The 1993 Panchayats Act in fact is an Act in consonance with Article 243-G of the Constitution of India. There is no challenge to any of the provisions of the Panchayats Act , therefore, we are not entering into the said details. The question before us is that whether 2005 Rules violate the preamble of Panchayats Act 1993 and the provisions contained in Section 47 of the Act.

13. The preamble says that 1993 Act is an Act to consolidate and amend the law relating to establishment of Panchayat with a view to ensure effective fulfillment of the Panchayat Raj Institution in the Local Administration and Development Activities. It would be clear from the preamble that the intention of the Government was to consolidate and amend the law relating to establishment of the Panchayats and the laudable object was to ensure effective involvement of the Panchayat Raj Institution in the Local Administration and Development Activities. The grievance of Shri Rusia, learned counsel for the petitioners, was

that as the power of appointment has been withdrawn from the Janpad Panchayat and the Zila Panchayat, the said Panchayats would not now have effective involvement in the local administration and development activities.

14. Present is not a case where the powers to appoint or the power of local administration or the power for development activities have been withdrawn from the Zila Panchayat or Janpad Panchayat. The Panchayats will have power of local administration and can still effectively involve in the development activities. Under 2005 Rules the employing authority is Zila Panchayat and Janpad Panchayat. These Panchayats would have the effective control over the Samvida Shala Shikshak and in case it is found that they are not discharging their duties properly then these Panchayats would be entitled to take proper action against them. It is also to be noted that in the contract extension committee the office bearers/some office bearers of the Panchayat/Education Committee have an effective say. If they are of the opinion that a particular contract need not be extended then such contract cannot be extended.

15. In our opinion the Scheme/Rules of 2005 do not run contrary to the preamble of the Act.

16. Section 47 of 1993 Act provides for constitution of Standing Committees of Janpad Panchayat and Zila Panchayat. These Panchayats shall be obliged to constitute five standing committees viz. (a) General Administration Committee; (b) Agriculture Committee; (c) Education Committee; (d) Communication and Works Committee; (e) Cooperation an Industries Committee. Section 47(2) provides that in addition to the five standing committees a Janpad Panchayat or Zila Panchayat may with the approval of the prescribed authority constitute one or more of such committees for other matters not specified in sub-section (1).

17. The grievance of the petitioner is that if under Section 47 there is a standing committee known as Education Committee which is for education, including adult education, social welfare etc. then these committees only are authorized to look into the work of education including adult education and make appointments.

18. In our opinion the submission made by learned counsel for the petitioner cannot be accepted. True it is that an education committee would be constituted for education including adult education etc. but that does not mean that such education committee shall be entitled to make every appointment. When the State Government is entitled to exercise general powers of superintendence as provided in Section 53 and Section 86 and other allied sections to have control over the Panchayats then the State Government would be entitled to issue such directions. Section 53 if 1993 Act reads as under:

> "53. Power of State Government in relation to functions of panchyats - (1)(a) Subject to such conditions as may be specified by general or special order issued by the State Government, the Panchayat at the appropriate level shall have the powers and

authority as may be necessary to enable them to function as institutions of self government in relation to matters listed in Schedule IV, including preparation of plans, implementation of schemes for economic development and social justice, and other duties and functions assigned to them under Sections 49, 49-A, 50, 52 and Chapter XIV-A.

(b) The State Government may by notification endow Panchayats at the appropriate level with powers and responsibilities for the selection, recruitment, appointment and management of any cadre or cadres of employees required for the efficient implementation of schemes, subject to the staffing pattern approved by the State Government and such other conditions as it may deem fit.

(2) The State Government may, by general or special order, add to any of the functions of Panchayats or withdraw the functions and duties entrusted to such Panchayats, when the State Government undertakes the execution of any of the functions entrusted to Panchayat. The Panchayat shall not be responsible for such functions so long as the State Government does not re-entrust such functions to the Panchayats."

A fair understanding of sub-section (2) would make it clear that the State Government may by general or special order, add to any of the functions of Panchayats or withdraw the functions and duties entrusted to such Panchayats, when the State Government undertakes the execution of any of the functions entrusted to Panchayat.

19. If the Panchayat is required to make appointment of Samvida Shala Shikshak then that is a functions assigned to the Panchayats. If the Government is of the opinion that such function or duty entrusted to Panchayats is required to be withdrawn then the Government certainly can withdraw such functions or the duties. In the present matter however, it is to be noted that the power of appointment is still with the Panchayats as they are the employing authority. The appointed persons would be under the supervision, superintendence and control of the employing authority. The employing authority would be the disciplinary authority and would also have an effective control in the contract extention committee.

20. From these rules it only appears that the members of the Panchayats or the office bearers of Janpad Panchyats and/or Zila Panchayat would have no power to appoint people of their liking. The grievance of the petitioners that no interview marks are kept at their disposal in fact would prove that to disturb the foolproof system of appointment they wish to exercise the discretion and disturb the entire system.

21. We are unable to understand as to how the petitioners are aggrieved if a scientific procedure is provided to complete the procedure of appointment, particular

marks are to be given on happening of a particular event and no discretion is left with the members of the Panchayat or the State Government. The system appears to be foolproof and in fact is a system to achieve the best possible result.

22. It was then submitted that Rule 6 of 2005 Rules is *ultra vires* the Act.

23. After going through the rules we are unable to find that there is any illegality in these rules. Sub-rule (1) of Rule 6 says that the employment shall be in accordance with the provisions of the rules. Sub-Rule 2 says 'Samvida Shala Shikshak Eligibility Examination' shall be conducted for employment of Samvida Shala Shikshak. The examination as per sub rule 3 would be conducted by an agency prescribed by the Government, the vacancy and the selection to be made shall be advertised. Sub-rule 4 provides the educational qualifications, sub-rule 5 provides the minimum percentage of marks to qualify in the eligibility examination. According to sub-rule 6 the provisions of Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Janjatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994, shall apply to the said employment, according to sub-rule 7 particular reservation would be made. Sub-rule 8 provides for submission and receipt of the candidature. Sub-rule 9 refers to criterion of selection while sub-rules 10 and 11 refer to preparation of provisional select list and publication of provisional and final select list. Sub-rule 12 provides for period of contract employment while sub-rule 13 directs and mandates that the employment shall be from the select list only. Al these provisions by no stretch of imagination can be held to be *ultra vires* the Constitution or *ultra vires* Section 47 or other provisions of the Panchayats Act, 1993. By making Rules of 2005 the Government in fact has plugged the holes from which the illegality could seep in.

24. The submission that in the selection process the office bearers of the Panchayats have no say and, therefore, the rules are violative of the provisions of Panchayats Act, 1993, in our opinion is an argument of frustration. It appears that the office bearers of the Panchayats when found that they would not be entitled to exercise powers in favour of the chosen few have filed this petition.

25. After giving our thoughtful consideration to the totality of the circumstances, the laudable object behind 2005 Rules, we are unable to hold that the rules are ultra vires the Constitution of India or they run contrary to the provisions of the Panchayats Act, 1993.

26. The petition deserves to be and is accordingly dismissed. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 790

WRIT PETITION

Before Mr. Justice S.C. Sharma

4 March, 2008*

RAM PRAKASH — Petitioner

Vs.

STATE OF M.P. & ors. — Respondents

Constitution of India, Article 226, M.P. Civil Services (Classification, Control & Appeal) Rules, 1966, Rule 14 (5) (c) - "Enquiry Officer" ought not to act as a "Presenting Officer" - Departmental proceedings - No Presenting Officer appointed as per rule 14 (5) (c) - Enquiry Officer played the role of Presenting Officer - Proceedings stand vitiated - Order of reversion from the post of Head Constable to post of Constable - Quashed. (Para 11)

Case referred :

2005 (1) JLJ 931

D.K. Katare, for the petitioner

Praveen Newaskar, Dy. G. A. for the respondents

O R D E R

S.C. Sharma, J.:–The petitioner before this Court is working in the police department in the State of Madhya Padesh. Initially, petitioner filed this petition before the State Administrative Tribunal and on abolition of the Tribunal, the matter stands transferred to this Court.

2. The petitioner has challenged the order dated 29th November, 1997 (Annexure A/13) passed by the Superintendent of Police, Gwalior by which he has been reverted from the post of Head Constable to the post of Constable and the order dated 5th February, 1998 passed by the Deputy Inspector General of Police, Gwalior (Annexure A/14) by which his appeal has been dismissed. It the case of the petitioner that the petitioner was initially appointed as Constable and by virtue of his excellent service record, he was promoted to the post of Head Constable vide order dated 16th November, 1996.

3. The petitioner while he was posted at the Police Station, Dabra on the directions of S.D.M., he accompanied one Shri Harkishore to his village Barotha. While, the petitioner was accompanying Harkishore, some miscreants assaulted him and he succumbed to the injuries. A preliminary enquiry was conducted by the S.D.O.P., Dabra and the report was submitted on 12th March, 1997. On the basis of the preliminary enquiry report, a charge sheet was issued to the petitioner on 22nd March, 1997. It was alleged in the charge sheet that the petitioner has shown dereliction of the duties by way of not protecting one Harkishore on 16th November, 1996. The petitioner denied the charges levelled against him. The disciplinary authority not being satisfied with the reply filed by the petitioner

*W.P. No. 4059/2003 (Gwalior)

directed for departmental enquiry. The Enquiry Officer conducted the enquiry and examined large number of witnesses and finally submitted enquiry report to the Superintendent of Police, Gwalior. The Superintendent of Police, Gwalior has issued a notice to the petitioner on 12th November, 1997 (Annexure P/11) along with the enquiry report and the petitioner submitted reply to the said show cause notice and denied the charges levelled against him. The disciplinary authority, i.e., the Superintendent of Police holding guilt of the petitioner proved inflicted the punishment of reversion from the post of Head Constable to the post of Constable vide order dated 29th November, 1997. The petitioner being aggrieved by the impugned order passed by the disciplinary authority preferred an appeal before the Deputy Inspector General of Police, Gwalior and the same was rejected vide order dated 5th February, 1998 (Annexure A/14). The petitioner in this petition has assailed the order passed by the disciplinary authority and the order passed by the appellate authority on various grounds. The first ground raised was that the appointing authority of the petitioner is the Deputy Inspector General of Police, and therefore, the entire action of issuing charge sheet and reversion of the petitioner from the post of Head Constable to the post of Constable is unsustainable. The second ground urged by the petitioner was that various other employees were also charged along with him, therefore, the competent authority should have passed an order under rule 18 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as the CCA Rules of 1966) for holding a joint enquiry and as the same was not done, the entire enquiry proceeding against the petitioner is vitiated. It was further contended by the petitioner that the Enquiry Officer during the course of enquiry has acted as presenting officer and has examined and cross-examined the petitioner whereby acted as prosecutor, therefore, the entire enquiry stands vitiated. Besides the aforesaid grounds, it has also been alleged by the petitioner that the orders had been been passed by the competent authority without affording proper opportunity of hearing and without considering the evidence on record and the defence deposed during the enquiry by the petitioner. The petitioner has thus prayed for quashing the order of reversion passed by the disciplinary authority and the order passed by the appellate authority dismissing his appeal.

4. The respondents have filed a detailed return and it has been stated in the return that the petitioner was assigned the duty to escort for the safety of one Harkishore on the instructions of S.D.O.P., However, while on duty, the petitioner has not discharged the duties effectively to protect the life of one Harkishore who succumbed to the injuries on account of gun shot by some miscreants, and therefore, the petitioner showed dereliction of duties. It has been further stated that a preliminary enquiry was conducted by the S.D.O.P., and on the basis of the preliminary enquiry, the Superintendent of Police, Gwalior constituted the departmental enquiry. The respondents have further stated that the disciplinary enquiry has been conducted as per the provisions of law extending the principles of natural justice and the disciplinary authority found proved guilt of the petitioner,

therefore rightly inflicted the punishment of reversal from the post of Head Constable to the post of Constable and the appeal also met dismissal.

5. Learned counsel were heard at length and perused the original record relating to the disciplinary proceedings.

6. The petitioner has raised various grounds before this Court assailing the order of reversion and the order passed by the appellate authority. It has been urged by the petitioner that no Presenting Officer was appointed by the disciplinary authority and the Enquiry Officer himself has acted as the Presenting Officer conducting the chief examination of prosecution witnesses and cross-examining the defence witnesses. The Enquiry Officer himself has conducted the examination and cross-examination of the petitioner.

7. From a bare perusal of the enquiry proceedings which took place before the Enquiry Officer, it is evident that the Enquiry Officer has acted as the Presiding Officer conducting the chief examination of the prosecution witnesses as well as cross-examination of the defence witnesses. The enquiry has been conducted examining and cross-examining the delinquent government servant by the Enquiry Officer.

8. Rule 14 of the CCA Rules of 1966 provides procedure for imposing penalties. Relevant Rule 14 (5) (c) reads as under:

> "Where the disciplinary authority itself inquires into any article of charge or appoints an inquiring authority for holding an inquiry into such charge, it may, by an order, appoint a Government servant or a legal practitioner, to be known as the "Presenting Officer" to present on its behalf the case in support of the articles of charge."

9. The Presenting Officer appointed under rule 14 (5) (c) of the CCA Rules of 1966 is in fact is a person appointed like a prosecutor and the person has to prove the misconduct before the Enquiry Officer. It is the Enquiry Officer who conducts the chief examination of the prosecution witnesses as well as cross-examination of the defence witnesses. It is again the Presenting Officer who conducts the cross-examination of the delinquent government servant in order to arrive at a finding of guilt. In the present case after going through the record minutely, it is evident that the Enquiry Officer has conducted the chief examination and he has conducted the cross-examination of the defence witnesses as well as cross-examined the delinquent government servant. Thus, the Enquiry Officer himself has played the role of the prosecutor.

10. A Division Bench of this Court in the case of *Union of India through its Secretary, Ministry of Railway, New Delhi and others vs. Mohd. Naseem Siddiqui* 2005 (1) LLJ 931 in paragraph 16 has held as under:

> We may summarise the principles thus:
>
> (i) The Inquiry Officer, who is in the position of a Judge shall not act as a Presenting Officer, who is in the position of a prosecutor,

(ii) It is not necessary for the Disciplinary Authority to appoint a Presenting Officer in each and every inquiry. Non-appointment of a Presenting Officer, by itself will not vitiate the inquiry.

(iii) The Inquiry Officer, with a view to arrive at the truth or to obtain clarifications, can put questions to the prosecution witnesses as also the defence witnesses. In the absence of a Presenting Officer, if the Inquiry Officer puts any questions to the prosecution witnesses to elicit the facts, he should thereafter permit the delinquent employee to cross- examine such witnesses on those clarifications.

(iv) If the Inquiry Officer conducts a regular examination-in-chief by leading the prosecution witnesses through the prosecution case, or puts leading questions to the departmental witnesses pregnant with answers, or cross-examines the defence witnesses or puts suggestive questions to establish the prosecution case employee, the Inquiry Officer acts as prosecutor thereby vitiating the inquiry.

(v) As absence of a presenting Officer by itself will not vitiate the inquiry and it is recognised that the Inquiry Officer can put questions to any or all witnesses to elicit the truth, the question whether an Inquiry Officer acted as a Presenting Officer, will have to be decided with reference to the manner in which the evidence is let in any recorded in the inquiry.

Whether an Inquiry Officer has merely acted only as an Inquiry Officer or has also acted as a Presenting Officer depends on the facts of each case. To avoid any allegations of bias and running the risk of inquiry being declared as illegal and vitiated, the present trend appears to be to invariably appoint Presenting Officers, except in simple cases. Be that as it may.

11. In the present case, it is evident from a perusal of the enquiry proceedings that no Presenting Officer was appointed by the Enquiry Officer. The evidence on behalf of the disciplinary authority has been presented by the Enquiry Officer, by conducting a regular examination- in-chief of prosecution witnesses by taking them through the prosecution case. The Enquiry Officer has also conducted in the present case regular cross-examination of the defence witnesses. The Enquiry Officer has also conducted the cross-examination of the delinquent government servant. It is not a case where the Enquiry Officer in the absence of the Presenting Officer has simply put clarificatory questions to the delinquent government servant.

12. Thus, in the present case, the Enquiry Officer has acted as the Presenting Officer which is evident from the departmental enquiry proceedings, and therefore, relying upon the principle laid down by a Division Bench of this Court in the case of *Union of India through its Secretary, Ministry of Railway, New Delhi and others* (supra) and adverting to the sacred principle that no man can be a good

judge of his own cause, the enquiry proceedings stand vitiated. Resultantly, the order of reversion dated 29th November, 1997 (Annexure A/13) passed by the disciplinary authority and the order passed by the appellate authority dated 5th February, 1998 (Annexure A/14) are quashed. However, the respondents are free to resume the enquiry proceedings from the stage of appointing the Presenting Officer and conclude the disciplinary proceedings initiated against the petitioner in accordance with law.

13. Petition stands allowed and disposed of with the aforesaid. No order as to cost.

Petition allowed

I.L.R. [2008] M. P., 794
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
7 March, 2008*

GOEL COAL CO. THROUGH PARTNER MOTILAL GOEL — Petitioner
Vs.
ADDITIONAL COMMISSIONER OF COMMERCIAL TAX & ors. — Respondents

A. Entry Tax Act, M.P. (52 of 1976), Sections 7, 14, Entry Tax Rules, 1976, Rule 7 - Entry Tax - Whether non affixture of seal by selling dealer on bills as required U/s 7 of Act r/w Rule 7 would absolve dealer for payment of entry tax - Yes, in absence of any proof to the contrary. (Paras 8 & 9)

B. Entry Tax Act, M.P. (52 of 1976), Sections 7, 14, Entry Tax Rules, 1976, Rule 7 - Entry Tax - Burden of proof - How discharged by dealer - By producing bill which does not contain rubber stamp endorsement as required to be affixed by selling dealer U/s 7 - Absence of stamp is *prima facie* proof of fact that goods sold by selling dealer were not of local origin. (Paras 8 and 9)

Cases referred :

(2004) 4 STJ 330, (1985) 18VKN 53 (M.P.) = 1984 MPLJ 585

G.N. Purohit, with *Abhishek Oswal,* for the petitioner,
Sudesh Verma, G.A. for the respondents

O R D E R

SHANTANU KEMKAR, J. :–By this petition under Articles 226 & 227 of the Constitution of India the petitioner has challenged the order dated 20.12.2002 (Annexure P/2) passed by the Assistant Commissioner (I) Commercial Tax, Satna and also the order dated 23.9.2003 (Annexure P/4) passed by the Additional Commissioner of Commercial Tax, Jabalpur in Revision No. 83/R/2003.

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*W.P. No. 2422/2004 (Jabalpur)

2. The petitioner claims to be a partnership firm and a registered dealer engaged in the business of purchase and sale of coal.

3. The Assistant Commissioner initiated proceedings of reassessment against the petitioner under Section 14 of the Entry Tax Act, 1976 (for short 'Act'). In the said proceedings it was held that during the period of 1.4.1995 to 31.3.1996 the petitioner purchased the goods from M/s Rewa Fuels Pvt. Ltd, Rewa and M/s Pawan Wires Pvt. Ltd., Panna and did not pay the entry tax on the purchases made by it while effecting the entry of the aforesaid goods. Accordingly, the petitioner was held liable to pay the entry tax to the tune of Rs. 4, 07, 712/-.

4. Feeling aggrieved, the petitioner filed a revision before the Additional Commissioner contending therein that the order passed by the Assistant Commissioner levying the entry tax is apparently illegal since in the bills/invoices issued to it by the selling dealer, no specification and no rubber seal was put by the selling dealer to the effect that the goods are local goods and entry tax not paid. The Revisional Authority dismissed the revision vide order dated 23.9.2003 (Annexure P/4) holding that non affixure of the rubber seal by the selling dealer will not absolve the petitioner purchasing dealer from paying the entry tax as it would merely attract penalty to be imposed upon the selling dealer. Feeling aggrieved, the petitioner has filed this petition.

5. The case of the petitioner is that in view of Section 7 of the Act read with Rule 7 of the Entry Tax Rules, 1976 (for short 'Rules') the selling dealer was required to affix the rubber seal on the invoices to the effect " local goods for the area, entry tax not paid" . In the absence of such seal on the invoices he was not required and expected to establish more than to produce the invoices to show that they are not having rubber seal in confirmity of Rule 7 and by production of those bills he had prima facie discharged his burden to establish the fact that the goods sold by the selling agent were not of local origin and therefore, he was not liable to pay the entry tax. He having submitted such bills before the Assessing Officer the liability to pay the entry tax upon him could not have been fastened. In support the petitioner has placed reliance on the Full Bench judgment of this Court passed in the case of *Mohansingh & Sons Vs. Commissioner of Sales Tax*, M.P. [(2004) 4 STJ 330] in which it has been held in paragraphs 15 & 16 :

> "15. Whenever goods are sought to be moved from one local area to another, *prima facie* entry tax is liable to be paid by registered dealer who causes the entry. If he seeks exemption from deduction, it is for him to show that the taxable event had not occurred or that the goods had already moved from one local area into another and thereby enabling an inference that taxable event had occurred with liability in another registered dealer to pay tax. That burden can be discharged by the purchasing registered dealer by producing the bill he receives from the selling registered dealer which does not contain the rubber stamp endorsement as required

by Section 7 of the Act and Rule 7 of the Rules to the effect that the goods are local goods and entry tax has not been paid. By not affixing the rubber stamp endorsement on the bill, the selling registered dealer makes an implied representation that the taxable event had already occurred with liability already created either in him or in a registered dealer who dealt with the goods previously and that application of proviso (iv) to Section 7(1) is invited. Absence of rubber stamp endorsement on the bill is entitled to some weight and it can be said that by producing such a bill, the assessee has discharged the burden on him.

16. Absence of rubber stamp endorsement cannot, of course, be conclusive. There may be a variety of reasons why the rubber stamp has not been affixed. One is that the goods are really not local goods and tax had been paid or tax liability had been incurred. Another is that seal had not been affixed on account of negligence or carelessness. The assessee certainly can take advantage of the *prima facie* import of absence of rubber stamp. It is then for the Revenue to collect materials to indicate that the goods had not subjected entry into the local area and taxable event had not occurred earlier and that absence of rubber stamp is not deliberate and is accidental or negligent."

6. The case of the respondents is that the seller of the goods did not pay the entry tax as it was enjoying the benefit of exemption from payment of entry tax. In the circumstances, the petitioner cannot be absolved from its liability to pay the entry tax. According to the respondents, since there was a seal "entry tax exempted goods" the non affixure of seal as required under Rule 7 of the Rules would not absolve the petitioner for payment of entry tax.

7. Having heard the learned counsel for the parties and after going through the bills of the alleged transaction, I am of the view that the contention of the petitioner deserves to be accepted. On a perusal of the bills, I find that though there is seal on it but the same is not in confirmity of the seal required to be affixed under Section 7 of the Act read with Rule 7 of the Rules. There is no mention to the effect that the "goods are local goods for the area."

8. In the case of *Ranomal Vs. State of M.P.* (1985) 18 VKN 53 (M.P.)= 1984 MPLJ 585 it has been held by a Division Bench of this Court that the burden which rests on the dealer is discharged by producing a bill which does not contain rubber stamp endorsement in the nature required to be affixed by the selling dealer under Section 7, as absence of stamp is prima facie proof of the fact that the goods sold by the selling dealer were not of local origin and, therefore, had incurred liability to the entry tax in the hands of the selling dealer. In view of the law laid down in case of *Ranomal* (Supra) and *Mohan Singh* (Supra) the petitioner is entitled to take advantage of the prima facie import of absence of rubber stamp.

9. In the absence of any material collected by the respondents/Revenue to indicate that the goods had not subjected entry in to the local area and taxable event had not occurred earlier, in my considered view, the petitioner who had discharged his burden by producing the bills which had no rubber seal to the effect "local goods for the area", cannot be held liable to pay the tax in the absence of any proof to the contrary.

10. Accordingly, the impugned order of reassessment and the order passed by the Revisional Authority holding the petitioner liable to pay the entry tax are liable to be and are hereby quashed. However, the assessing authority shall be at liberty to pass fresh order after collecting the material, if available by supplying the same to the petitioner and after affording opportunity to it to submit its reply.

11. The petition stands allowed. No orders as to the costs.

Petition allowed.

I.L.R. [2008] M. P., 797

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Prakash Shrivastava

28 March, 2008*

SHANKER MIHANI — Petitioner

Vs.

STATE OF M.P. & ors. — Respondents

A. National Security Act (65 of 1980), Section 3 - Stale incidents which are remote to date of order of detention cannot constitute basis for passing order of detention - Order of detention passed on 10-10-2007 - Incidents of years from 1994 to 2006 prior to one year before date of order were stale incidents - Could not constitute basis for detention. (Para 10)

B. National Security Act (65 of 1980), Section 3 - Detention order - Public Order or Law & Order - Detenu caught hold of police personal and tried to snatch his revolver in a public place and thereafter ran away from custody of police - Act of detenu must have caused panic amongst public and has direct nexus with public order. (Para 12)

C. National Security Act (65 of 1980), Section 3 - Grounds of Detention-Truthfulness - High Court while examining validity of an order of detention is not to examine truth or otherwise of allegation mentioned in grounds of detention-Has to assume that ground of detention is true. (Para 13)

D. National Security Act (65 of 1980), Section 3 - Order of detention is essentially a precautionary measure - Based on reasonable prognosis of future behaviour of a person based on his past - Such past conduct may consist of one single act or of a series of acts - Two incidents of 22-12-2006 and 5-1-2007 mentioned in grounds of detention order - Can form a reasonable basis for

*W.P. No. 16935/2007 (Jabalpur)

satisfaction of detaining authority that unless petitioner is detained in custody U/s 3 of Act - He is likely to repeat similar activities in future which will in danger public order. (Para 14)

Cases referred :

AIR 1981 SC 870, AIR 1992 SC 687, AIR 1974 SC 1336, (1993) 3 SCC 384, AIR 1976 SC 780, AIR 1974 SC 816

Surendra Singh, for the petitioner

T.S. Ruprah, Addl. Adv. Gen. for the respondents

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :-In this petition under Art. 226 of the Constitution of India, the petitioner has challenged the order dated 10.10.2007 of the Collector, Hoshangabad detaining him under the National Security Act, 1980 (for short 'the Act').

2. The facts as briefly stated in the writ petition are that the petitioner contested election for the post of Councillor, Municipal Council, Itarsi on 24.11.2004 and was declared elected from Ward No.17 securing maximum number of votes. On 18.4.2007, the Collector Hoshangabad issued an order of externment of the petitioner under the M.P. Rajya Suraksha Adhiniyam, 1990 expelling him from Hoshangabad, Harda, Betul, Narsinghpur, Sehore and Raisen Districts for a period of one year on grounds mentioned in the order. The petitioner challenged the order of externment before the High Court and the High Court directed the stay of the order of externment. Thereafter, the Police arrested the petitioner under Section 110 of the Code of Criminal Procedure. The petitioner applied for bail and the Sub-Divisional Magistrate, Itarsi granted bail but directed him to furnish a solvent surety of Rs.1 lac. When the solvent surety was furnished and the Sub-Divisional Magistrate, Itarsi accepted the solvent surety and directed for release of the petitioner, an order of detention was passed by the Collector, Hoshangabad on 10.10.2007 and the petitioner was taken into custody in execution of the order of detention on 10.10.2007. Thereafter, the grounds of detention were served on 14.10.2007.

3. Mr. Surendra Singh, learned senior counsel for the petitioner submitted that on two earlier occasions, the petitioner was detained under the National Security Act but the Advisory Board did not approve the detention orders and the petitioner was released. He submitted that on the first occasion when the order of detention was passed, 49 cases were listed in the grounds of detention, but the Advisory Board did not find those cases prejudicial to the maintenance of public order. He further submitted that on the second occasion when the order of detention was passed, in the grounds of detention, 87 cases were listed, but the Advisory Board again did not find the 87 cases listed in the grounds of detention to be prejudicial to the maintenance of public order. He submitted that most of the grounds for

detention of the petitioner under the impugned order dated 10.10.2007 are also repetitions of the grounds on which the two earlier orders were passed. He argued that it will be clear from the grounds of detention served to the petitioner that first 97 cases related to the incidents which have taken place during 26.2.1984 to 19.9.2006, more than one year before the order of detention was issued on 10.10.2007 and submitted that in *Shiv Prasad vs. State of M.P. and another,* AIR 1981 S.C. 870, the Supreme Court has held that grounds of detention must be proximate and not stale and that staleness of the grounds of detention is sufficient to vitiate the order of detention.

4. Mr. Singh next submitted that the cases listed from Serial Nos.98 to 111 in the grounds of detention contain cases under Section 4-A of the Public Gambling Act and most of these cases are ordinary offences which do not affect the public order. He relied on *Victoria Fernandes vs. Lalmal Sewma,* AIR 1992 S.C. 687 in which the Supreme Court has explained the distinction between 'law and order' and 'public order' and has held that while the expression 'law and order' is wider in scope and covers any contravention of law and affects order, 'public order' has a narrow ambit and would be affected only by such contravention which affects the community or public at large. He submitted that in the aforesaid decision, the Supreme Court has held that public order is the even tempo of life taking a country as a whole or even a specified locality and thus if a contravention is in its effect confined to only few individuals directly involved as distinct from the general public it does not affect the public order. He argued that offences under Section 4-A of the Public Gambling Act alleged to have been committed by the petitioner, therefore, may be a contravention of law but do not affect public order inasmuch as it does not threaten the even tempo of the general community. He submitted that in any case, the petitioner has been acquitted by the Court in almost all the cases registered against him under Section 4-A of the Public Gambling Act.

5. Mr. Singh, learned counsel for the petitioner submitted that the incident of 22.12.2006 as narrated against serial No.103 of the grounds of detention is false and concocted as would be evident from the report of the DIG of Police, Hoshangabad area annexed to the writ petition as Annexure.P/14. He submitted that the said report of the DIG of Police shows that the incident appears to be a simple case of incident and as an attempt to murder. Regarding the incident on 5.1.2007 narrated against serial No.105 of the grounds of detention, Mr. Singh submitted that the order sheet of the Judicial Magistrate First Class annexed to the writ petition as Annexure.P/15 contained in the order dated 6.1.2007 and 7.1.2007 would show irregularities that the Police had committed against the accused persons with malafide intention and that the investigation was being conducted in a one sided and partial manner and the accused persons were victims in Police custody. He submitted that therefore, the incident on 5.1.2007 as narrated against serial No.105 of the grounds of detention is also concocted by the Police. He submitted that besides two incidents on 22.12.2006 and 5.1.2007, all other

incidents narrated in serial Nos.98 and 111 have no nexus whatsoever with public order.

6. Mr. T.S. Ruprah, learned Additional Advocate General, on the other hand, sought to sustain the order of detention and submitted that the Supreme Court has held in *Golam Hussain alias Gama vs. Commissioner of Police, Calcutta and others,* AIR 1974 S.C. 1336 that merely because the grounds of detention have been subject to criminal cases which have ended in discharge, it cannot be said that the order of detention is malafide as the basic imperative of proof of reasonable doubt in a criminal case does not apply to an order of detention which has to be based on the subjective satisfaction of the detaining authority. Hence, even if the petitioner has been acquitted in many of the cases listed against him in the grounds of detention, if the detaining authority was satisfied on the basis of materials before him that the detention of the detenu was necessary for the maintenance of public order, the order of detention cannot be interfered by the Court.

7. Mr. Ruprah next submitted that the character of the offence has to be taken into consideration for the purpose of finding out whether the offence allegedly committed by the detenu affects public order. He submitted that against serial No.103 of the grounds of detention, the offence committed by the petitioner on 22.12.2006 has been listed and this would show that the petitioner along with other co-accused persons, sharing common objects and armed with deadly weapons, fired at the complainant Jaspal Singh son of Gurudayal Singh Bhatia in front of the Railway Station at Itarsi on the road which goes towards the Circuit House which was a highly crowded area. He submitted that this was thus a case affecting the even tempo of general community and consequently public order.

8. Mr. Ruprah next submitted that against serial No.105 of the list of cases in the grounds of detention, it is stated that on 5.1.2007, when the petitioner was arrested in Malviyaganj Panja Square by S.I. Pritam Singh Thakur in connection with criminal case registered under Section 307 Indian Penal Code, the petitioner with the aid of his companions caught hold of S.I. Pritam Singh Thakur and tried to snatch his service revolver and prevented him from discharging his duties and went out of the police custody and this incident which took place at a public place was sufficient for detaining the petitioner under the Act. He cited the decision in *Kamlabai vs. Commissioner of Police, Nagpur and others,* (1993) 3 S.C.C. 384 in which the Supreme Court has held that catching hold of Sub-Inspector in a public place naturally would create panic in the locality and detention on such a ground has nexus to public order.

9. Mr. Ruprah finally submitted that although the orders of detention passed earlier on two occasions against the petitioner could not be confirmed because of the Advisory Board not approving the orders of detention, the impugned order of detention dated 10.10.2007 has been approved by the Advisory Board and confirmed by the State and, therefore, it is not a fit case in which the High Court should interfere with the order of detention.

10. We have considered the submissions of Mr. Singh, learned counsel for the petitioner and Mr. Ruprah, learned Additional A.G. for the respondents and we find that in the grounds of detention, 111 activities of the petitioner during 1984 to 2007 have been narrated for which the order of detention has been passed under Section 3 of the Act. It is now well settled that stale incidents, which are remote to the date of the order of detention, cannot constitute the basis for passing the order of detention. Hence, the incidents of different years from 1984 to 2006 prior to one year before the date of order of detention, in our considered opinion, were stale incidents which could not constitute the basis for detaining the petitioner. If the aforesaid incidents of the years 1984 to 2006 prior to one year of the order of detention dated 10.10.2007 are excluded, only incidents which have been narrated against serial Nos. 98 to 111 and which contain the incidents which have taken place between 9.11.2006 to 6.10.2007 may be examined by the Court to find out whether on the basis of these incidents the detaining authority could reasonably arrive at a satisfaction that the petitioner must be detained under Section 3 of the Act.

11. In serial No.103 of the grounds of detention, it is alleged that on 22.12.2006, the petitioner along with other co-accused persons sharing common object and armed with deadly weapons fired at the complainant Jaspal Singh with an intention to kill him and to cause damage to his vehicle and on the report of the complainant, Crime No.890 of 2006 under Sections 147, 148, 149, 427 and 307 I.P.C. was registered and the accused persons were arrested and prima-facie case was found and accordingly charge-sheet No.272 of 2007 was prepared and filed in Court. From the report of the DIG of Police, Hoshangabad area annexed to the writ petition as Annexure.P/14, it is clear that this incident took place in front of the Railway Station on the road which goes towards the Circuit House and this is a highly crowded area. Thus, this violent conduct of the petitioner on a public road in a highly crowded area, if true, affects the even tempo of the general community in a specified locality and directly endangers public order. The DIG of Police, Hoshangabad Area in his report however stated that neither Jaspal Singh nor any member of his family had received any injury and has observed that if several persons had gone and 25-30 persons were there from the opposite party, atleast 8 to 10 persons should have suffered injuries and should have been medically examined. Mr. Singh relying on this report of the DIG of Police, Hoshangabad Area, annexed as Annexure.P/14, submitted that the incident of 22.12.2006 should not therefore be believed, particularly when it has not been proved in a court of law. We are unable to accept this submission of Mr. Singh because the High Court while examining the validity of an order of detention is not to examine the truth or otherwise of the allegation mentioned in the grounds of detention. As explained by the Supreme Court in *Narayan Debnath vs. State of West Bengal*, AIR 1976 S.C. 780 :

" .... It is because that the act complained of cannot perhaps

be satisfactorily proved in a court of law or that the witnesses are unwilling to come forward being already terrified by the enormity of the act perpetrated that action some times has to be taken under the act to prevent further commission of offences of similar nature. Besides, it is not the function of the court to examine the truth or otherwise of the allegations mentioned in the grounds. The grounds are assumed by the Court to be true and it is well settled that the scope of enquiry in a case of this nature is very limited."

12. Against serial No.105 of the grounds of detention, it is alleged that on 5.1.2007, the petitioner who was wanted in a criminal case registered under Section 307 I.P.C. was arrested in Malviyaganj Panja Square by S.I. Pritam Singh Thakur but the petitioner with the aid of his companions and with the intention to prevent S.I. Pritam Singh Thakur from discharging his official duties caught hold of him and tried to snatch his service revolver and thereafter ran away from the custody of the Police and S.I. Pritam Singh Thakur lodged a complaint on 5.1.2007 on the basis of which Crime No.06 of 2007 was registered under Sections 147, 332, 323, 353, 341, 506, 224, 225 and 393 I.P.C. and all the accused persons were arrested and charge-sheet was prepared and filed in Case No.563 of 2007 against the petitioner. This act of the petitioner in a public place is yet another act which must have created panic amongst the public and has direct nexus with public order. In *Smt. Kamla Bai vs. Commissioner of Police, Nagpur and others* (supra), the Police Sub-Inspector saw some people gathered near the detenu's table and found that the detenu was selling illicit liquor and he took search of his table and found liquor bottles and was about to take the accused persons and liquor bottles when the detenu and his associates arrived, questioned the Police Sub-Inspector and forcibly removed the liquor bottles from the spot and when the Police Sub-Inspector told them that he was performing his duty, the detenu threatened him that they will finish him if he does not act according to his wishes and caught hold of Police Sub-Inspector and surrounded him. In a challenge being made to the order of detention that the conduct of the detenu was only a display of gundaism and was a stray act and did not affect public order, the Supreme Court held that this was not a stray act affecting only law and order and that the act of holding a Sub-Inspector and threatening him in a public place must have naturally created panic in the locality and hence the ground of detention has nexus with public order.

13. Mr. Singh however submitted that the orders dated 6.1.2007 and 7.1.2007 passed by the Judicial Magistrate First Class, Itarsi in Crime No.6 of 2007 of Police Station Itarsi would show that the incident did not really occur and that the accused persons instead had received injuries and that the Police was acting against the accused persons with malafide and one sided manner. We have read the two orders dated 6.1.2007 and 7.1.2007 passed by the Judicial Magistrate First Class, Itarsi in Crime No.06 of 2007 of Police Station, Itarsi and we do not find that the incident of 5.1.2007 in which the petitioner is alleged to have prevented S.I. Pritam

Singh Thakur to arrest him with the help of the companions and the petitioner has tried to snatch away the service revolver of S.I. Pritam Singh Thakur and to run away from the custody of the Police has been discussed by the Magistrate. In any event, as has been held by the Supreme Court in *Narayan Debnath vs. State of West Bengal* (supra), this Court while examining the validity of the order of detention cannot go into truth or otherwise of a particular ground of detention and has to assume that the ground relating to the incident of 5.1.2007 as mentioned against serial No.105 of the grounds of detention is true.

14. Thus, even if we accept the contention of Mr. Singh that the other grounds mentioned against serial Nos.98 to 111 are not germane to public order, the two incidents of 22.12.2006 and 5.1.2007 mentioned against serial Nos. 103 and 105 respectively of the grounds of detention, in our considered opinion, can form a reasonable basis for the satisfaction of the detaining authority that unless the petitioner is detained in custody under Section 3 of the Act, he is likely to repeat similar activities in future which will endanger public order. The Supreme Court has held in the case of *Debu Mahto vs. State of West Bengal,* AIR 1974 S.C. 816:

> " ..... The order of detention is essentially a precautionary measure and it is based on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. But whatever it be, it must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts so as to warrant his detention. It may be easier to draw such an inference where there is a series of acts evincing a course of conduct but even if there is a single act, such an inference may justifiably be drawn in a given case."

15. We cannot therefore interfere with the order of detention particularly when the same has been confirmed by the State Government after its approval by the Advisory Board. The writ petition is consequently dismissed. Parties to bear their own costs.

Petition dismissed.

I.L.R. [2008] M. P., 803

APPELLATE CIVIL

Before Mr. Justice S.K. Kulshrestha and Mr. Justice A.K. Shrivastava

28 September, 2007*

DEEPENDRA SINGH @ DEEPAK PARIHAR — Appellant

Vs.

SHAKUNTALA PAL & anr. — Respondents

Succession Act (39 of 1925), Section 63 - Execution of unprivileged

*M.A. No. 1596/2006 (Indore)

Wills - Attesting witnesses did not state that the testator of Will had put her signature in their presence and they had put their signatures in presence of testator- Witnesses have simply proved their signatures on Will and signature of testator - Held - Statement cannot be stretched up to the extent in order to hold or infer that the attestation has been proved in terms of Section 63 (c) - Execution of Will not proved since attestation is not proved - Appeal dismissed:

(Paras 14 and 16)

Cases referred :

AIR 1955 SC 363, AIR 2003 SC 761, AIR 2001 MP 250, AIR 1995 SC 2086, AIR 1990 SC 396, AIR 1977 SC 74, AIR 1955 SC 346, 1995 AIR SCW 4631, 1997(2) Vidhi Bhasyar 199, (1997) 3 SCC 546.

M.G. Upadhyaya, for the appellants

A.S. Garg with *Jitendra Verma* for the respondent.

ORDER

The Order of the Court was delivered by **A.K. Shrivastava J.** :-Feeling aggrieved by the impugned judgment duted 31.01.2006 passed by learned Second Addl. District Judge, Mhow, District-Indore in Civil Original case No.1-A/2000 (probate) dismissing the application filed by appellant to obtain probate, this appeal has been filed under section 299 of the Indian Succession Act, 1925 (for brevity 'the Act')

2. An application under section 276 of the Act was filed by the appellant Deependra Singh on the averments that Smt. Chandrakala Pal (hereinafter referred to as testator) wife of Murari Lal Pal executed two Wills dated 26.03.97 and 08.05.97 in his favour. Since, in the earlier Will dated 26.03.97 certain facts could not be mentioned, therefore, for clarification another Will dated 08.05.97 was executed by the testator. According to the appellant. In these two Wills the deceased bequeathed her entire moveable and immoveable property, the description whereof has been mentioned in these two Wilis in favour of the appellants. Apart from the moveable and immoveable property, the testator was having saving account No. 283 in State Bank of Indore, Mhow branch and another saving account No-1952. in Saving Bank Account No. 283 testator was having a sum of Rs. 1,34,034/- and in saving account No.1952 a sum of Rs.4,68,206/- of the testator has been deposited. According to the appellant, this amount is required to be paid to him. The Will dated 26.03.97 is a registered Will, however, another Will dated 08.05.97 is attested by notary. On these premised pleadings in the application filed under section 276 of the Act, the appellant prayed to grant of the probates of the aforesaid two Wills.

3. Ramesh Chandra Pal, who is respondent No.2 here in this appeal submitted objections in the probate proceedings and pleaded in the objections that deceased Smt. Chandrakala Pal did not execute any registered Will dated 20.03.97 or another Will dated 08.05.97 in favour of the appellant. It has also been denied that the

testator bequeathed all her moveable and immoveable properties to the appellant by these-two Wills. Further contention in the objection is that by those two Wills the appellant did not become owner of the moveable and immoveable properties and other assets of the testator. A specific plea has been raised in the objection that the Will is forged and fabricated document. In the special pleas, it has been pleaded by the objector Ramesh Chandra that the signatures on these two Wills are different to each other which itself speaks that those two Wills are manufactured in order to grab the property of the testator. Further, it has also been pleaded that the Will does not contain the signature of the testator and she never executed any Will.

4. In para 8 of the objections, it has been pleaded by the objector that the Will dated 20.03.97 as pleaded by the appellant in his application is not on record though, a copy of the Will dated 26.03.97 has been supplied to the objector. In these facts and circumstances, the applicant be directed to produce the said Will dated 20.03.97. Thus, according to the pleadings of the objector, there appears to be three Wills and since, the Will dated 20.03.97 is not on record, he reserves his right to raise objections in respect of the alleged Will dated 20.03.97.

5. In para 9 of the objections, it has been specifically pleaded that testator was ill for several years prior to her death and she was also admitted in the hospital. As per the best knowledge of the objector, she died in Gokul Hospital at Indore. According to the objector, the testator was not in a position to understand and was not in a position to execute any Will. The testator was unable to move and stand, she was having diseases, the details of which are mentioned in para 10 of the objection and thus, she was not in position, to go to the office of Sub-registrar for getting the Will registered nor she was able to go to the office of the Notary to get another Will notarized. Under these facts and circumstances, both the Wills becomes highly suspicious and doubtful. *Inter alia* it was also pleaded by the objector that cash amount of his father namely Narayan Singh was with the testator and she was not legally entitled to bequeath the said amount of his father. On these premises objections, the prayer was made by respondent No.2 to dismiss the application of probate.

6. The learned Probate Court on the basis of the averments made in the pleadings framed as many as three issues. The parties thereafter led their evidence and also exhibited the documents. The registered Will dated 26.03.97 is Ex. P-2 while another Will dated 08.05.97 notarized by a notary has been placed on record as Ex. P-3. The learned Probate Court after appreciating and marshalling the evidence dismissed the probate application filed by the applicant by the impugned judgment. In this manner, the present appeal has been filed by the appellant assailing the impugned judgment of the Probate Court.

7. It has been contended by Shri M.G. Upadhyaya, learned counsel for the appellant that the two Wills dated 26.03.97 (Ex.P-2) which is a registered Will and another Will dated 08.05.97 which is notarized by the notary are supplement to

each other. The contention of learned counsel is that the Will Ex.P-3 dated 08.05.97 is supplement to the earlier Will dated 26.03.97. The contention of learned counsel is that the attesting witnasses of registered Will Ex.P-2 are Ramesh (PW-2) and Mukesh (not examined). The attesting witnesses of Ex.P-3 dated 08.05.97 are Suraj Bhan (not examined) and Kamlesh Tiwari (PW-3). By inviting our attention to the testimony of Rajesh (PW-2) and Kamlesh Tiwari (PW-3) it has been argued by learned counsel that the attestation of both the Wills is proved from the testimony of these two witnesses. In support of his contention, learned counsel has placed reliance on the decision of the Supreme Court in *Naresh Charan Das Gupta vs. Paresh Charan Das. Gupta and another,* AIR 1955 SC 363. It has been fairly contended by the learned counsel for the appellant that though in the specific terms as envisaged under section 63 (c) of the Act, the witnesses have not given the evidence in regard to the attestation of the Wills, but, if their testimony is considered in proper perspective, it would reveal that they have proved the attestation of the Wills in terms of section 63 (c) of the Act. It has been further argued by Shri Upadhyaya that if in *stricto sensu* the evidence of attesting witnesses is read, it would indicate that the testator has signed the Will in presence of the witnesses and simultaneously the attesting witnesses have also signed the Will in presence of the testator and if that would be the position not only the due attestation of both the Wills is proved, but, indeed both the Wills are proved and, therefore, the learned Probate Court erred in law by holding that the two Wills are not proved. By inviting our attention to the impugned judgment of the Probate Court it has been argued that the Probate Court has held that the testator was not the sole owner of the property left by Shiv Narayan though she was having share in it and, therefore, since she was not having absolute share in the property of Shivnarayan, she was not authorized to bequeath the property through Wills. Assailing this finding of learned Probate Court, learned counsel for appellant by inviting our attention to Section 14 of the Hindu Succession Act, 1956 has contended that since the testator was possessing the property left by Shiv Narayan she became absolute owner of the property up to the extent of her share and under Section 30 of the said Act was authorized to disburse the said property by Will in accordance to the provisions of the Indian Succession Act. Apart from this it has also been argued by learned counsel for the appellant that indeed in the proceedings of probate, the Probate Court should confine itself only in respect to the validity of the Will and nothing else and, therefore, the enquiry about the title of the property should not have been made. On these premised submissions, it has been argued by learned counsel for the appellant that this appeal be allowed by setting aside the impugned judgment passed by the Probate Court and probate of the above said two Wills be granted in favour of appellant.

8. Combating the aforesaid submissions, it has been argued by Shri A.S.Garg, learned senior counsel for respondent No.2 that indeed the aforesaid two Wills are not only forged and suspicious, but, it is also not proved that they bear the signature of the testator. By inviting our attention to the testimony of Rajesh

(PW-2) and Kamlesh Tiwari (PW-3) it has been argued by learned senior counsel that the due attestation of the Will as contemplated under Section 63(c) of the Act is not proved and since the attestation is not proved, the above said two Wills are also not proved. In support of his contention learned counsel has placed heavy reliance on the decision of Supreme Court- *Janki Narayan Bhoir vs. Narayan Namdeo Kadam*. AIR 2003 SC 761. By inviting our attention to theDivision Bench decision of this Court *Kishan Singh Ahluwalia vs. Smt. Sheela Saxena and others*. AIR 2001 MP 250, it has been argued that since the beneficiary to the Will took active participation in getting the Will executed, the Will becomes suspicious. In that regard decision of Supreme Court *Vrindavanibai Sambhaji Mane, vs. Ramchandra Vithal Ganeshkar and others*. AIR 1995 SC 2086 has also been placed reliance. Thus according to learned senior counsel for the respondent, the learned Probate Court did not commit any error in dismissing the application of probate filed on behalf of the appellant and this appeal sans substance and the same be dismissed.

9. Having heard learned counsel for the parties, we are of the considered view that this appeal deserves to be dismissed.

10. Since the appellant has filed application to obtain probate of the above said two Wills Ex.P/2 and Ex.P/3, according to us the entire case of appellant rests on the pivot of the authenticity of the Will and proof of its attestation. The Will Ex.P/2 dated 26/3/1997 is a registered Will said to have been executed by testator Smt. Chandra Kala Pal in favour of the appellant. In this Will the attesting witnesses are Rajesh (PW-2) and Mukesh (not examined). The beneficiary of the Will is appellant Deependra who is son of the sister of the testator. On going through this Will it is gathered that the appellant was taking care of the testator and therefore the testator became merciful to him, and bequeathed the movable and immovable properties mentioned in Ex.P/2 After near about one and half months of the execution of Will Ex.P/2 dated 26.3.1997 another Will is said to have been executed by Smt Chandrakala Pal in favour of appellant in which again it has been mentioned that appellant Deependra is taking care of the testator. In this Will it has been mentioned that she executed a registered Will on 26.3.1997 and apart from these two Wills she has not executed any other Will. On going through the later Will ExP/3 dated 8.5.1997 it is gathered that earlier Will was not cancelled and it is supplement to the earlier will. In the later Will Ex.P/3 dated 8.5.1997 the attesting witnesses are Suraj Bhan (not examined) and Kamlesh Tiwari (PW-3).

11. It is a trite law that if the authenticity of the Will is challenged, no option is left to the propounder and he is obliged not only to prove the Will but a heavy burden lies on him, to prove its due attestation as contemplated under Section 63(c) of the Act. For ready reference it would be appropriate to quote Section 63 of the Act which reads thus :

"63. Execution of unprivileged Wills. -

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnssses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement or his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

12. On bare perusal of above said section, it is as clear like a noon day that the testator should sign or affix his mark in presence of the attesting witnesses and the witnesses shall also sign simultaneously the Will in the presence of the testator. The object of the attestation is for the testator to know that he has ocular evidence of the instrument having been subscribed by the witnesses in so far as the attesting witnesses are concerned the only statutory requisite is that they should have necessary animus attestendi or intention to at least the document. Thus, on bare perusal of Section 63 (c) of the Act we have no scintilla of doubt that the Will must be attested by two or more witnesses each of whom has either seen testator signed or affix his mark to the Will or has received personal knowledge of his signature or mark from testator. Besides this it is also necessary that each of attesting witness should sign the Will in presence of the testator.

13. On the basis of above said enunciation of the law, we shall now examine the evidence of the attesting witnesses. Under Section 68 of the Indian Evidence Act if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Since, the Will is required to be attested at least by two witnesses, it is imperative on the part of the propounder of the Will to examine at least one attesting witness to prove the execution and the attestation of the Will. It is well settled in law that the propounder of the Will is required to prove due attestation of the Will. It is also well settled in law that the propounder

of Will is bound to prove the Will by removing all suspicions, in this context, we may profitably rely the decision of Supreme Court *Kalyan Singh vs. Smt. Chhoti and others,* AIR 1990 SC 396 and Smt. Jaswant Kaur vs. Smt Amrit Kaur and othars AIR 1977 SC 74.

14. The appellant has examined PW-2, Rajesh in order to prove the Will Ex. P/2 dated 26.3.1997. On going through his testimony it is gathered that the testator has signed the Will in his presence. But, still there is a serious lacuna which goes to the root of the matter as he has not at all stated in his entire testimony that he also signed the Will in presence of the testator. Similarly, Kamlesh Tiwari (PW-3) who is one of the attesting witnesses of later Will Ex.P/3 dated 8.5.1997 has been examined by the appellant, but, he has also not stated in his entire testimony that the testator has signed the Will (Ex,P/3) in his presence and he has also signed the Will in presence of the testator. Both these witnesses have simply proved their signature on the Will and the signature of the testator. But, their statement cannot be stretched up to the extent in order to hold or infer that the attestation has been proved in terms of Section 63 (c) of the Act. In the case of *Girja Datt Singh vs. Gangotri Datt Singh,* AIR 1955 SC 346, the Supreme Court has categorically held that it cannot be presumed from the mere signatures of two persons appearing at the foot of the endorsement of registration of a Will that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witness. The Apex Court in para 14 of the said decision has laid down the law of the land that not only the attesting witness to the Will is require to depose that he has seen the testator signing the Will, but, it is also to be proved that they themselves sign the Will in presence of the testator. The Apex Court held that in absence of proof of the due attestation, the Will is not at all proved. In a later decision of *Kashibai w/o Lachiram and another vs. Parwatibai w/o Lachiram and others,* 1995 AIR SCW 4631 the Supreme Court again took the similar view. These two decisions of the Supreme Court were taken note of and were placed reliance by Chief Justice Shri A.K.Mathur (as His Lordship then was) in the case of *Mannudas vs. Govinddas and others.* 1997 (2) Vidhi Bhasvar 199 and categorically held that in absence of proof of due attestation as envisaged under Section 63 (c) of the Act, the Will cannot be said to be proved. The decision of *Major Singh vs. Rattan Singh (Dead) by LRS and others,* (1997) 3 SCC 546 is also relevant on the point of attestation of the Will and how a Will is to be proved.

15. Much emphasis has been putforth by learned counsel for the appellant on the decision of Supreme Court *Naresh Charan Das Gupta* (supra) and has vehemently contended that looking to the mitigating circumstences the due attestation of the Will is required under the law is proved and merely because the deposition of the attesting witnesses is not in terms of the language of Section 63 (c) of the Act it would not mean that the attestation is not proved. We have given our anxious and bestowed consideration to the said decision and we find in para

12 of the said decision that in one sitting execution of the document of Will was done and in that situation it has been held by the Apex Court that the attestation is proved. However, in the present case, the situation is altogether different.

16. We find sufficient force in the submission of Shri Garg, learned senior counsel for respondent that execution of the Will is not at all proved since the attestation is not proved. The decision of Supreme Court *Janki Narayan Bhoir* (supra) placed reliance by the learned senior counsel, governs the field.

17. For the reasons stated hereinabove, we are of the view that the attestation of both the Wills is not proved and therefore both these Wills are not legally proved and if that is the position, according to us, the learned Probate Court did not err in dismissing the application filed by the appellant for the grant of probate.

18. Resultantly, this appeal is found to be bereft of any substance and the same is hereby dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 810
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
7 December, 2007*

M.P. POWER GENERATING COMPANY LTD., JABALPUR .Appellant
Vs.
FLOW MORE PRIVATE LTD. Respondent

A. Contract Act (9 of 1872), Section 8 - Concluded Contract - By conduct - Instance of - Defendant submitted tender for supply of 3 ACW pumps- Offer of defendant accepted by Plaintiff - Letter of Intent was issued however, it was mentioned that detailed order indicating price break up and detailed terms and conditions are being mailed to defendant separately - Held - Acceptance of tender did not constitute concluded contract between parties as detailed terms and conditions price break up was yet to be disclosed by plaintiff.

In the light of the aforesaid principles of law deducible from the decisions we delve upon the correspondence placed on record by the plaintiff. Letter (Ex.P/1) is the letter supplied with the tender. (P/2) letter was written by the defendant to the plaintiff in which it was mentioned that they have quoted the charges as well as the alternatives their price will be found reasonable and that their offer shall be considered favourably for an order. As per telex message (Ex.P/3) dated 24.3.1990 acceptance of the offer was communicated and at the same time it was mentioned in the telex message that "DETAILED ORDER INDICATING THE PRICE BREAK UP AND DETAILED TERMS AND CONDITIONS BEING MAILED SEPARATELY". What is of significance is in the letter dt.

*F.A. No. 31/2002 (Jabalpur)

24.3.1990 that price, detailed terms and conditions were not sent by the plaintiff as yet. Thus, (Ex.P/3) acceptance of the tender did not constitute any concluded contract between the parties as detailed terms and conditions and price break up was yet to be disclosed by the plaintiff to the defendant.

(Para10)

B. Contract Act (9 of 1872), Section 8 - Concluded Contract - No acceptance of detailed offer sent by Plaintiff to the defendant - On the contrary defendant had insisted for certain modifications - Plaintiff failed to communicate acceptance and at no point of time indicated that whether it was ready to accept defendants conditions or not - Plaintiff only insisted on execution of performance bond and agreement - At no point of time it was understood by parties that contract was to be carried out without execution of aforesaid documents - Parties were only negotiating and did not reach *consensus ad idem* necessary for enforceable contract - In absence of concluded contract plaintiff not entitled for extra costs of Rs. 19,35,410 which was incurred by getting the work done by some other agency- Appeal dismissed.

There was no acceptance of detailed offer sent by MPEB made by the contractor at any point of time. On the contrary he had insisted for certain modifications as per letters dt.8/10.9.1990. It is not disputed by the counsel appearing on behalf of the appellant that said letters were received belatedly in the month of October 1990, when said letters were received in the month of October 1990 and it was communicated that the MPEB was going to revert to letters, thereafter MPEB failed to communicate acceptance and at no point of time indicated that whether it was ready to accept by the contractor's conditions or not. On the other hand all throughout MPEB insisted on execution of performance bond and agreement at no point of time it was understood by the parties that the contract was to be carried out without execution of the aforesaid document. As per above quoted terms of the tender penalty for non-execution of performance bond was clearly stipulated and as per that forfeiture of earnest money deposit could have been made, that has been effected by the MPEB. Thus, in the absence of any concluded contract having been brought into existence by the correspondence on record within purview of section 8 of the Contract Act and section 5 of the Sales of Goods Act. We find that the finding recorded by the trial Court to be proper. In our opinion, no concluded and binding contract came in existence, parties were only negotiating and did not reach consensus ad idem necessary for enforceable contract. (Para10)

Cases referred :

AIR 1962 SC 378, AIR 1968 SC 1028, (1996) 6 SCC 385, AIR 1999 SC 504, AIR 2006 SC 2331.

M.L. Jaiswal with *Amit Bajpai*, for the appellant
R.D. Hundikar, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeal had been preferred by the original plaintiff; Madhya Pradesh Electricity Board (MPEB), that has been succeeded by M.P. Power Generating Co.Ltd., Jabalpur during the pendency of the appeal. The Judgment and decree dt. 9.10.2001 passed by the 12th Addl. District Judge, Jabalpur of dismissal of the suit filed for recovery of Rs.19,35,410/- has been assailed in the appeal.

2- The original plaintiff; MPEB filed suit for recovery of aforesaid amount for which it floated tender notice PRG/SGTPS/T-19 for complete Design, Manufacture, Assembly, Testing at Manufacturer's works, Delivery etc. of equipments and accessories given therein and as indicated in respective tender specification contained therein. The tender specification contained in section-I; General Conditions of Contract, Tendering conditions, Soil and climatic conditions at site and site facilities available. Section-II contained General specification etc, Technical specification for Vertical Wet pit pump and Specification for Electric Motors. The specification intended for cover the design, manufacture, for assembly, testing at manufacturer's work, delivery (FOR Project site) properly packed including shop painting, freight, transit insurance, all taxes, duties and other charges as applicable for the group-II of Vertical Wet-pit type Auxiliary Cooling Water pumps (ACW Pumps) with electric motor drives and all accessories as specified in the scope of work and as required for safe and trouble free operation of the pumps to be installed at Sanjay Gandhi Thermal Power Station, Birsinghpur of Madhya Pradesh Electricity Board. Defendant submitted a tender which was opened on 10.3.1989. Revised price bids were also called, they were submitted on 26.12.1989. Plaintiff accepted the offer of the defendant in respect of 3 numbers of ACW pumps of the aforesaid description and not for the Raw Water pumps. The Letter of Intent was issued on 24.3.1990. It was also mentioned in the LOI that the detailed order indicating the price break-up and detailed terms and conditions was being mailed to the defendant separately by the plaintiff. the plaintiff acknowledged the receipt of the letter as per communication dt.14.4.1990. The defendant requested to sent the detailed order at an early date to unable the defendant to proceed in the matter. The plaintiff sent two separate orders on 11.6.1990. The price was worked out by the plaintiff which was to remain firm throughout the tenure of the contract. The plaintiff sent a telex message to the defendant on 4/5.9.1990 for submitting the performance bond and agreement bonds for both the aforesaid orders immediately as per clause -11 and 7 of the orders dated 11.6.1990. No specific reply was sent by the defendant. On 15.10.1990 defendant had written two letters both dated 8/10.9.1990 to the plaintiff. These letters were not received and sent on 8/10.9.1990 by the defendant. The defendant seems to have concocted these letters with ulterior motive. On 17.12.1990 the defendant wrote yet another letter inviting attention of the plaintiff to the letter

dt.8/10.9.1990. These letters were not received by the plaintiff. The defendant vide telegram dated 19.10.1990 requested the plaintiff to confirm the value of the bank guarantee for performance of contract on the contract value of Rs.3,55,670/-. Telex message dt. 30.10.1990 was sent confirming the amount of bank guarantee. Letters dt.8/10.9.1990 were received by the plaintiff just before the transmission of the aforesaid telex message dt. 30.10.1990 only. The plaintiff asked the defendant to come-forward to perform his contractual obligation by issuance of bank guarantee etc. on 16.1.1991. Plaintiff did not receive any affirmative or other reply. Defendant wrote a letter on 17.12.1991, but, without any avail. Ultimately fresh NIT was issued and work was done by some other agency in which extra costs of Rs.19,35,410/- was incurred. Reliance was placed by the plaintiff on clause 29 of the General Condition of Contract for Supply. They submitted that as there was contract entered into between the parties as apparent from the correspondence, it was incumbent upon the defendant to make the supply. There was breach of contract committed by the defendant by not executing the agreement as well as performance guarantee and failure to effect supply. Hence, the suit be decreed.

3- The defendant M/s Flowmore Private Limited in the written statement contended that there was no signed contracted reached between the parties, detailed order was asked, that was sent which was not acceptable to the defendant. Consequently, letters were written on 8/10.9.1990 which were received by the plaintiff. Letter dt.8/10.9.1990 was sent again on being required by the plaintiff. Conditions imposed by the defendant were never accepted by the plaintiff. Thus, no contract came in existence on the basis of communications. There was no negligence or failure of the defendant in observance of their obligation. No contractual obligation arose. Plaintiff was not entitled for decree prayed for.

4- The Trial Court has found that there was no concluded contract reached between the parties, though extra costs of Rs.19,35,450/- was incurred, but, plaintiff was not entitled to recover it from the defendant. Suit has been dismissed. Dissatisfied with the judgment and decree passed the appeal has been preferred.

5- Shri M.L. Jaiswal, learned Sr. counsel appearing with Shri Amit Bajpai has submitted that the tender of the defendant was accepted. Acceptance of offer was communicated on 24.3.1990 which was acknowledged on 14.4.1990. Detailed offer was also sent. The defendant asked for the amount of performance of guarantee/bank guarantee. Correspondence with the consultant was going on with respect to drawing or designing. The concluded contract came into being on the strength of the communications, particularly (P/10, P/11, P/15, P/16,P/17 and P/18. Letters dt.8/10.9.1990 were not dispatched or received at the time when they were purported to have been dispatched. Even in the absence of formal agreement being executed as apparent from correspondence the contract which accepted, plaintiff was entitled for decree prayed for. He has also referred to other communications on record placed by the plaintiff and has referred to various

decisions and clauses of agreement and clause 29 of the General Condition of the contract. He has also submitted that the clause 6 relating to performance bond contained in tendering condition Part-II could not have been construed as against the plaintiff to mean that only earnest money could have been forfeited as concluded contract arose between the parties on the basis of communications. Thus, the judgment and decree passed by the trial Court being illegal deserve to be set aside. the plaintiff's suit be decreed.

6- Shri R.D. Hundikar learned counsel appearing on behalf of the defendant respondent has submitted that it is apparent from the plaint averments as well from the correspondence placed on record by the plaintiff that no contract came into existence as contemplated under section 8 of the Contract Act. At no point of time parties have reached consensus ad idem with respect to contract on particular terms and condition. The communication dated 8/10.9.1990 was timely sent, in fact, it was received, it was again sent on being insisted upon,thereafter also there was no response made by the plaintiff, after its receipt in the month of October. Thereafter also they slept over the variation sought by the defendant in the detailed offer sent by the plaintiff. Thus, the correspondence on record falls short of proving that there was any kind of contract much less concluded one reached between the parties which could be enforced. He has also submitted that in the absence of execution of performance bond and the agreement, tender condition provided for penalty of forfeiture of earnest money deposit. Earnest money deposit was already forfeited, that was the maximum penalty imposable owing to default, if any on the part of the defendant. Thus, the plaintiff could not be said to be entitled for decree of difference of the amount by employing debitable agency on the basis of floating the tender afresh and realizing the difference of costs in the absence of agreement being reached between the parties.

7- The main question for consideration in the appeal is whether there was concluded contract reached between the parties as per the correspondence placed on record by the plaintiff, admittedly no agreement in writing was executed and performance guarantee was also not furnished which was necessary. We deem it appropriate to refer various clauses of the agreement pressed in to service by the counsel appearing on behalf of the parties. Clause 29 has been relied upon by the plaintiff/appellant contained in General Conditions of the Contract. Clause 29 provides steps which can be taken by the plaintiff purchaser, in case of negligence by the contractor to execute the work, clause 29 is quoted below :

"29. NEGLIGENCE

If the Contractor shall neglect to execute the work with the diligence and expedition or shall refuse or neglect to comply with any reasonable orders given to him in writing by the Engineer in connection with the work, or shall contravene the provisions of the contract, the Purchaser may give notice in writing to the Contractor calling upon to make good the failure, neglect or

contravention complained of. Should the Contractor ;fail to comply with such notice within a period considered reasonable by the Purchaser from the date of service thereof, in the case of a failure, neglect or contravention capable of being made good within that time or otherwise within such time as may in the opinion of the Purchaser be reasonably necessary for making it good, then and in such case the Purchaser shall have the opinion and be at liberty to take the work wholly or in part, out of the contractor's hands and may carry on the work envisaged in the contract either by himself or his agents or may re-contract at a reasonable price with any other person or persons to execute the same or any part thereof and provide any other materials, tools, tackle or labour for the purpose of completing the works or any part thereof. In such event the Purchaser shall without being responsible to the Contractor for fair wear and tear of the same, be entitled to seize and take possession and have free use of all materials tools, tackle or other things which may be on the site, for use at any time in connection with the work to the exclusion of any right of the Contractor over the same and the Purchaser shall be entitled to retain and apply any balance sum which may otherwise be then due on the contract by him to the Contractor or such part thereof as may be necessary, to the payment of the cost of execution of such work as aforesaid.

If the cost of executing the work as aforesaid shall exceed the balance due to the Contractor and the Contractor fails to make good the deficit, the said materials, tools, tackle, construction plant or other things, the property of the contractor as may not have been used up in the completion of the works, may be sold by the Purchaser and the proceeds applied towards the payment of such difference and the cost of and incidental to such sale. Any outstanding balance existing after crediting the proceeds of such sale shall be paid by the Contractor on the certificate of the Engineer,but when all expenses, costs and charges incurred in the completion of the work as paid by the Contractor, all such materials, tools, tackle, construction plant or other things not used up in the completion of the works and remaining unsold shall be removed by the Contractor. If the proceeds of the above sale of the Contractor's materials, tools, tackle, construction plant etc. are insufficient to cover the cost of executing the aforesaid work, the balance remaining after crediting the proceeds of such sale shall be recoverable from the Contractor by action of law."

Tender conditions contained in Part-II, clause 4 and 6 relating to Validity of

Tender and Performance Bond respectively have also been relied upon. The aforesaid clauses are quoted below :

"4. VALIDITY OF TENDER

The fact of the submission of a Tender shall be deemed to constitute an agreement between the Tenderers and the customer whereby such tender shall remain open for acceptance by the customer for a period of six (6) months from the date and time on which Tenders are opened, during which period the Tenderer shall not withdraw his offer or amend, impair or derogate there from. The Earnest Money deposited in accordance with the Tender document will be forfeited if the Tenderer withdraws, amends, impairs, or derogates from the Tender in any respect within the said period of six (6) months. Every Tenderer shall be deemed to have agreed as aforesaid in consideration of the Tender being considered by the Board in terms hereof, provided the same has been duly submitted and found to be in order, If the Tenderer is notified in writing at the address given in the Tender within the said period of six (6) months that his Tender has been accepted, he shall be bound by the terms of agreement constituted by his Tender and such acceptance thereof by the Board until a written contract has been executed in place of such agreement.

6. PERFORMANCE BOND

After a Tender is accepted and a satisfactory performance bond [in the amount of ten (10) percent of the Contract Price] is furnished by the successful Tenderer in accordance with clause "Performance Bond" of the General Conditions, the Earnest Money/Tender Bond may be returned in each instance within a period of sixty (60) days to the Tenderer furnishing this bond.

Should the successful Tenderer fail or refuse to execute the contract and to furnish a performance bond satisfactory to the Purchaser within the stipulated period the Tenderer shall be considered to have abandoned the Tender, and the amount of Earnest Money or any other Security delivered with the Tender shall there upon be due to the Purchaser as liquidated damages for such failure or refusal and the Purchaser may thereupon award the contract to any other Tenderer. The term "Successful Tenderer" shall be deemed to include any Tenderer whose proposal is accepted after another Tenderer has previously refused or has been unable to execute the contract or to furnish a satisfactory performance bond."

Clause 4 of the Tender Condition provides that the submission of a tender

shall be deemed to constitute an agreement between the Tenderers and the customer whereby such tender shall remain open for acceptance by the customer for a period of six months. In case of any withdrawal, amendments, impairment or derogation by the Contractor the 'earnest money' deposit in terms of tender documents would be forfeited. Furnishing performance bond is provided in clause 6 of the tendering condition. It was required to be submitted in the amount of 10% of contract price. In case successful tenderer fails or refuses to execute the contract and to furnish the performance bond to the purchaser within the stipulated period the tenderer shall be considered to have abandoned the Tender, and the amount of Earnest Money or any other Security delivered with the Tender shall there upon be due to the Purchaser as liquidated damages for such failure or refusal and the Purchaser may thereupon award the contract to any other Tenderer. It was not the condition that in the event of failure of furnishing performance bond it was open to make fresh bid at the risk and costs of such defaulting contractor, that is precisely also not the submission of Shri M.L. Jaiswal, learned Sr. counsel appearing on behalf of the appellant. What he has submitted that as independent contract came into existence on the basis of correspondence placed on record. The plaintiff's suit should have been decreed by the trial Court as there was concluded contract between the parties.

8. Section 8 of the Contract Act provides performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal. Thus, endeavour has to be made to find out whether there was a proposal and it was accepted on the basis of correspondence in the absence of execution of formal agreement and performance guarantee. Section 7 of the Contract Act provides in order to convert a proposal into a promise the acceptance must be absolute and unqualified, be expressed in some usual and reasonable manner, unless the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but, if he fails to do so, he accepts the acceptance. Thus, it also to be proved that whether there was any acceptance as contemplated u/s 7.

9. Before we dilate further we deem it appropriate to refer to the decisions on the aforesaid aspect cited at bar. Shri M.L. Jaiswal, learned Sr. counsel appearing on behalf of the appellant has relied upon *Jawahar Lal Barman v. The Union of India,* AIR 1962 SC 378 in which the Apex Court has laid down that the acceptance of offer must be absolute and unconditional. According to one of the conditions of contract to which the tender was subject, the failure on the part of the contractor to make the required security deposit constituted a breach of the contract itself and therefore the security deposit was a condition subsequent and not a condition precedent. The letter of acceptance however stated that the offer

was accepted 'subject to your depositing 10 per cent as security' but in the last paragraph it was stated that ' 'the contract was concluded by the acceptance and a formal acceptance of Tender will follow immediately on receipt of Treasury Receipt.' It was held that reading the letter as a whole it amounted to an absolute and unqualified acceptance of the offer or tender made by the appellant and was not intended to make a substantial variation in the contract by making the deposit of security a condition precedent instead of a condition subsequent.

In *Kollipara Sriamulu v. Aswatha Narayna,* AIR 1968 SC 1028 the Apex Court has observed that a mere reference to a future formal contract in an oral agreement will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, eases where the reference to a future contract is made in such terms as to show that the parties did not intended to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. The fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. The Apex Court laid down thus :

> (3) We proceed to consider the next question raised in these appeals, namely whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and so ;such agreement was executed. We do not accept this argument as correct. It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway v. Wharton,* (1857) 6 HLC 238 at p. 263, the fact of a subsequent agreement being prepared may be evidence that the previous negotiation, did not amount to a concluded agreement, but the mere fact that persons

wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In *Von Hatzfeldt-Wildenburg v. Alexander,* (1912) 1 Ch 284 at p. 288 it was stated by Parker, J, as follows :

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.' In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. In *Rossiter v. Miller.* (1878) 3 AC 1124 Lord Cairns said :
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> "If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared; and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract."

In *Currimbhoy, and Co.Ltd. v. Creet,* 60 Ind App 297 = (AIR 1933 PC 29) the Judicial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker, J. in (1912) I Ch 284 was applicable in India. The question in the present appeals is ;whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored: The evidence adduced on behalf of respondent No.1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr. Gokhale is unable to make good his argument on this aspect of the case."

Shri M.L. Jaiswal, learned Sr.counsel appearing on behalf of the appellant has also referred to the decision In *Fair Air Engineers Pvt.Ltd. And another v. N.K. Modi*, (1996) 6 SCC 385 to submit that offer and counter-offer became an integral part of the contract, thus, the offer made must be deemed to have been accepted.

In *M/s Rickmers Verwaltung Gimb H. v. Indian Oil Corporation Ltd.*, AIR 1999 SC 504 the Apex Court has laid down that while deciding the question, whether any agreement can be spelt out from the correspondence between the parties the cardinal principle to remember is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were 'ad idem' to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Apex Court has laid down, thus :

> "12. In this connection the cardinal principle to remember is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that ;an agreement had come into existence between them through correspondence. The Court is required to review what the parties wrote and how they acted from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.
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> 13. From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by

the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between them and no concluded enforceable and binding agreement came into existence between them. Apart from the correspondence relied upon by the learned single Judge of the High Court, the fax messages exchanged between the parties, referred to above, go to show that the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. The learned single Judge of the High Court was, therefore, perfectly justified in holding that Clause 53 of the Charter Party relating to Arbitration had no existence in the eye of law, because no concluded and binding contract ever came into existence between the parties. The finding recorded by the learned single Judge is based on a proper appreciation of evidence on the record and a correct application of the legal principles. We find no merit in this appeal. It fails and is dismissed with costs.".

In *M/s Bhagwati Prasad Pawan Kumar v. Union of India,* AIR 2006 SC 2331 while considering section 8 of the Contract Act, the Apex Court observed that it provides for acceptance by performing conditions of a proposal. An offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The Apex Court has laid down thus :

"19. It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The decisions which we have noticed above also proceed on this principle. Each case must rest on its own facts. The courts must examine the evidence to find out whether in the facts and circumstances of the case the conduct of the "offeree" was such as amounted to an unequivocal acceptance of the offer made. If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. On the other hand if the evidence disclose that the "offeree" had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act."

10. In the light of the aforesaid principles of law deducible from the decisions we delve upon the correspondence placed on record by the plaintiff. Letter (Ex.P/1) is the letter supplied with the tender. (P/2) letter was written by the defendant to the plaintiff in which it was mentioned that they have quoted the charges as well as the alternatives their price will be found reasonable and that their offer shall be considered favourably for an order. As per telex message (Ex.P/3) dated 24.3.1990 acceptance of the offer was communicated and at the same time it was mentioned in the telex message that "DETAILED ORDER INDICATING THE PRICE BREAK UP AND DETAILED TERMS AND CONDITIONS BEING MAILED SEPARATELY". What is of significance is in the letter dt. 24.3.1990 that price, detailed terms and conditions were not sent by the plaintiff as yet. Thus, (Ex.P/3) acceptance of the tender did not constitute any concluded contract between the parties as detailed terms and conditions and price break up was yet to be disclosed by the plaintiff to the defendant. As a matter of fact as details were not sent the defendant wrote a letter (Ex.P/4) dt. 14.4.1990 to send a detailed order at an early date so as to unable the defendant to proceed in the matter. Thereafter two offers (P/5 and P/6) were sent by the plaintiff which contained in paragraph 18 that the agreement could be executed between the parties. Other requisites were also mentioned. The next correspondence is (Ex.P.8) dated 4.9.1990 in which the plaintiff wrote to the defendant that performance guarantee and agreement bond for both the orders were required to be submitted and also the progress report. In case there was failure to submit the performance guarantee and executed agreement by 15th of September, 1990 the 'earnest money' deposit will be encashed. It cannot be inferred from this letter that performance guarantee and executed agreement were not required to be executed. The intention of MPEB was to insure that these documents were executed and in the event of failure to furnish the said documents, forfeiture of the earnest money deposit was contemplated. Thereafter letter dt.15.10.1990 was written by the defendant to the plaintiff that of the letter dt.8/10.9.1990, written confirmation was not received as such appropriate action be taken at the earliest. (Ex.P/9) is letter dt.8/10.9.1990, certain changes were proposed by the defendant in the offer made by the plaintiff. It was insisted by the defendant that if the document of despatch through Bank are retired within 60 days from the date of despatch, all expenses which may be charged by their Bankers from them for delayed retirement of documents including interest charges shall be payable by Board. It was also insisted that in case the commissioning of the equipment is held up for the reasons beyond their control, such as required facilities not provided by Board in time etc., balance payment shall be released within 15 days of the erection of the respective equipment. The said period shall be counted from the date of receipt of technically-commercially clear and firm order/requisite. advance payment subject to 'force majeure'. It is further proposed that all drawings, datas to be furnished by the contractor shall be approved by MPEB/Consultant within one month from the date of submission. With respect to penalty for late delivery to an extent of 1/2% (half percent) per

week or part thereof; subject to a maximum of 5% (five percent) of the nett value of items delayed, was also proposed. It was clearly stated in the latter that the MPEB/purchaser should communicate acceptance of the above changes to the purchase order and sent formal amendment to the purchase order in the respective clauses, as requested above for records. In the meantime steps were being taken by the contractor to furnish bank guarantee required to be furnished as per purchase order. With respect to both the offers some amendments were sought and acceptance was required from the purchaser with respect to other offer also, certain conditions were imposed in the communications dt.8/10.9.1990 (Ex.P/9). Though it is disputed that these letters were received or not in the month of September, however, the controversy is set at rest by communication of purchaser MPEB, (P/11) dated 31.10.1990 in which it has been mentioned that letter dt.8/10.9.1990 has just been received vide along with letter dt.10.10.1990 and purchaser will revert on same shortly. However, the purchaser MPEB failed to revert the letter dt.8/10.9.1990, even if they did not receive letter (P/9) in the month of September, even if they were sent belatedly along with communication dt.10.10.1990 it was received as apparent from letter dt. 31.10.1990. It was incumbent upon the purchaser MPEB to revert back and intimate to the defendant as to condition sought to be changed of the purchase order proposed by it, but, counsel for the appellant has fairly stated that there is nothing on record to indicate the acceptance or rejection of changes in condition as proposed in communication dt.8/10.9.1990 was communicated. What can be gathered from yet another telex (P/13) dated 16.1.1991 of MPEB that performance guarantee, agreement bond and progress report were required to be submitted, thus, the plaintiff very well understood and insisted for execution of performance guarantee, agreement bond, progress report was dependent thereupon, at no point of time the plaintiff waived the the execution of formal agreement or submission of performance guarantee. We find on record letter (P/14) dt. 25.2.1991 of MPEB informing the contractor that no drawings/ documents/ progress report/ performance bonds/agreement bonds/Bank Guarantee for advance payment has been submitted. But, communication was again silent with respect to communication dt.8/10.9.1990 written by the defendant. Letter (P/15) dt.19.2.1991 indicates that certain drawings were sent by contractor to the Chief Engineer, MPEB. MPEB sent telegram (P/16) on 7.3.1991 that drawings were not received by it. Communication dt.5.3.1991 (P/17) indicates that the contractor had sent certain proposals for fitting of ACW Pump motor. Another letter (P/18) dated 22.4.1991 written by the contractor indicates that certain drawings were sent. Acceptance of any of the aforesaid communications has not been placed on record by the MPEB so as to constitute any contract and infer consensus ad idem between the parties. We find on record notice (P/19,P/20). Thereafter fresh NIT was floated on 21.1.1992. There is yet another legal notice (P/24) placed on record and the authority (P/25) to file the suit of Shri P.K. Wakankar. The aforesaid correspondence on record fall short of proving that any concluded contract was reached between the parties. There was no acceptance of detailed offer sent by MPEB made by the contractor at any point of time. On

the contrary he had insisted for certain modifications as per letters dt.8/10.9.1990. It is not disputed by the counsel appearing on behalf of the appellant that said letters were received belatedly in the month of October 1990, when said letters were received in the month of October 1990 and it was communicated that the MPEB was going to revert to letters, thereafter MPEB failed to communicate acceptance and at no point of time indicated that whether it was ready to accept by the contractor's conditions or not. On the other hand all throughout MPEB insisted on execution of performance bond and agreement at no point of time it was understood by the parties that the contract was to be carried out without execution of the aforesaid document. As per above quoted terms of the tender penalty for non-execution of performance bond was clearly stipulated and as per that forfeiture of earnest money deposit could have been made, that has been effected by the MPEB. Thus, in the absence of any concluded contract having been brought into existence by the correspondence on record within purview of section 8 of the Contract Act and section 5 of the Sales of Goods Act. We find that the finding recorded by the trial Court to be proper. In our opinion, no concluded and binding contract came in existence, parties were only negotiating and did not reach *consensus ad idem* necessary for enforceable contract.

11. Resultantly, we find that the appeal sans merit. Same is hereby dismissed. However, we leave the parties to bear their own costs incurred in the appeal.

Appeal. dismissed.

I.L.R. [2008] M. P., 824

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

14 December, 2007*

SHANKAR LAL PANDEY & anr. Appellants

Vs.

TARACHAND KULPARIA & anr. Respondents

A. Specific Relief Act (47 of 1963), Sections 10,12, Contract Act, 1872, Section 55 - Agreement to sell - Time when essence of Contract - Vendor accepting part payment of consideration amount after stipulated period - It amounts to extension of fresh limitation to perform contract - Appellants by receiving such payment waived the right to say that time was essence of contract - Stipulated time was not the essence of contract between parties. (Paras 9 and 14)

B. Specific Relief Act (47 of 1963), Section 16(c) - Readiness and willingness - Oral evidence led by plaintiff regarding his readiness and willingness reliable - Merely in the lack of any documentary evidence it could not be inferred that plaintiff was not ready and willing to perform his part of contract.

(Paras 18 and 19)

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*F.A. No. 522/1996 (Jabalpur)

C. Civil Procedure Code (5 of 1908), Section 96 - Appreciation of Evidence - Findings of Trial Court based on proper appreciation of evidence could not be interfered in appeal in routine manner unless the same appears to be contrary to available record. (Para 20)

D. Transfer of Property Act (4 of 1882), Section 48 - Priority of Rights created by Transfer - Subsequent purchaser resident of same locality - Having knowledge of earlier agreement - Subsequent sale deed executed during subsistence of agreement - It does not give any right to subsequent purchaser over the plaintiff - Subsequent purchaser bound to perform contract by executing sale deed in favour of plaintiff - Appeal dismissed. (Para 25)

Cases referred :

AIR 1967 SC 868, AIR 1999 SC 3804, AIR 2006 SC 151, AIR 1970 SC 546, AIR 1983 SC 114, (1996) 4 SCC 526, 2004 (2) MPLJ 169

Cases distinguished :

(1993) 1 SCC 519, (1997) 3 SCC 1.

Amrit Ruprah & R. Tiwari, for the appellants.

M. Ahmad, for the respondent No.1,

None, for the respondent No.2.

J U D G M E N T

U. C. Maheshwari J.:–This appeal is directed by the appellants/defendants being aggrieved by the judgment and decree dated 8.8.1996 passed by 11th Additional District Judge, Jabalpur in C. O S. No.414-A/94 decreeing the suit of the respondent No.1 for specific performance of the contract.

2. The facts giving rise to this appeal in short are that the respondent No.1 filed a suit for specific performance against the appellants and respondent No.2 contending that the appellant No.1 for himself and on behalf of appellant No.2 as her attorney entered in an agreement in his favour on 25.10.1986 whereby they agreed to sale their house No.921 situated at 19th row Cantt, Jabalpur in consideration of Rs.25,500/- and also received Rs.5,000/- as part of consideration. As per terms on payment of the remaining sum by the respondent No.1 on or before 22.1.1987 the appellants had to execute the registered sale deed. As per further averments the appellant No.1 received the Rs.5,000/- out of remaining consideration on 19.3.1987 subsequent to the aforesaid date agreed for performance of the contract and extended the period up to April 1988. Such house was in possession of respondent No.1 as tenant since 1908 from the time of his forefathers. The endorsement for receiving the sum of Rs.5,000/- on 19.3.1987 was also made by appellant No.1 with his own signature. The Respondent No.1 with remaining sum went to appellant No.1 in April 1988 and requested him to execute the sale deed, on which instead to receive the payment and execute the sale deed appellant assured him saying that he will execute the same after some days along with some other sale deeds. Accordingly, the respondent No.1 remained

ready and willing to perform his part of the contract but the appellants did not perform their part and contrary to it without any intimation to the respondent No.1 sold such house to respondent No.2 and executed registered sale deed on 2.5.1988. The respondent No.2 purchased the same having knowledge of said earlier transaction of respondent No.1. Subsequent to it respondent No.1 gave a notice-dated 21.10.1989 to the appellant No.1 calling him to perform their part of contract by executing the sale deed after taking remaining consideration and shown his readiness and willingness to perform his part of contract. It is also pleaded that respondent No.1 being tenant in such house had a right of preemption to purchase the same. The sale deed executed by the appellants in favour of the respondent No.2 is void. With these pleading the prayer for specific performance is made.

3. In common written statement of the appellants the execution of the aforesaid agreement and receiving the part consideration of Rs.5,000/- on such date and Rs.5,000/- on 19.3.1987 are accepted but it is denied that the agreed time to perform the contract was extended. They remained ready and willing to execute the sale deed on payment of remaining sum by the respondent No.1 within the stipulated period. As per terms of the agreement the respondent No.1 was also bound to pay the rent of accommodation. The respondent No.1 in order to perform his part did not turn up with the remaining sum within the aforesaid period then the same was sold to respondent No.2 by registered sale deed dated 2.5.1988. As the respondent No.1 was also the tenant of appellants in some other premises, which had already, sold to some other person. As per further averments the appellants repeatedly asked the respondent No.1 to get executed the sale deed by performing his part of contract but he failed in it. Accordingly they did not commit any breach on their part. With these pleadings the prayer for dismissal of the suit is made.

4. The respondent No.2 being defendant No.3 in the trial court remained ex-parte.

5. In view of the pleadings of the parties after framing the issues evidence was recorded. On appreciation of the same the suit of the respondent No.1 was decreed for specific performance against the appellants and respondent No.2. On which the defendant No.1 and 2 the vendors have come to this court with this appeal.

6. Smt. Amrit Ruprah, learned counsel for the appellants assailed the impugned judgment and decree saying that the time fixed in the agreement was essence of the contract and the same was never extended at any point of time by any of the appellants and it is undisputed fact on record that remaining consideration was not paid by the respondent No.1 within the stipulated period up to 22.1.1987 in such premises the respondent No.1 failed to perform his part of contract and from such date the suit was filed barred by time. So, firstly suit was liable to be dismissed on this count and secondly in available circumstance it could not be decreed for specific performance. She accepted that subsequent to the date fixed for execution

of the sale deed the appellants accepted the payment of Rs.5,000/- on 19.3.1987 but the same was received on account of rent and not as part of consideration. In alternative she said that even on assuming that such sum was received as part consideration and the period was extended up to April 1988 as pleaded by the respondent No.1 even then in the available circumstance the respondent No.1 did not perform his part of the contract with in aforesaid extended period. She further argued that even after executing the sale deed by the appellants in favour of the respondent No.2 on 2.5.1988 the respondent No.1 did not take any step immediately showing his readiness and willingness to perform his part of contract and after more than one year and five months he gave a notice dated 21.10.1989 to appellant No.1 calling them to execute the sale deed in his favour after receiving the remaining sum. The same was replied stating that respondent No.1 failed to perform his part of the contract even after extending the period, in view of such conduct of the respondent No.1 the decree of specific performance could not be passed against the appellants. But without considering all such aspects under wrong premises the suit has been decreed by the trial court. Such decree is not sustainable. With these submissions she prayed for setting aside the impugned decree and dismissal of the suit by allowing this appeal.

7. In contra Shri Mukhtar Ahmad, learned counsel for respondent No.1 by justifying the findings of the trial court, said that in the matter of transaction of immovable property the time fixed between the parties for performing the contract could not be treated as essence of the contract unless the specific circumstance in this regard is available on record. The same is not proved by the appellants. He further said that in the present case the time was not the essence of the contract. In any case by receiving the part payment on 19.3.1987 subsequent to the stipulated period appellants themselves waved such term of the contract and the same did not remain the essence of it. There is sufficient evidence that on receiving such part payment the time for performance was extended by the appellants. Although as per contention of the respondent the time was extended up to April 1988 but in view of endorsement at the backside of the agreement the same was extended without mentioning any period. In such premises the contract was extended for the period prescribed under the law. In any case before transferring the property to respondent No.2 or any other person the appellants were bound to inform the respondent No.1 regarding cancellation of his agreement. Admittedly no such intimation was given to respondent No.1. According to him the suit was filed within the limitation from the date of the execution of the sale deed by the appellants in favour of the respondent No.2 under violation of the alleged contract. He also argued that the endorsement regarding acceptance of part payment of Rs.5,000/- on 19.3.1987 by the appellant No.1 with his signature is sufficient circumstance to draw inference that by virtue of Section 18 of the Limitation Act the time was extended to perform the contract and fresh limitation was started. Therefore, it could not be inferred that respondent No.1 did not

perform his part within the stipulated time. Besides this he said that in the extended period as pleaded in-plaint, on 25th April 1988 and 30th April 1988 respondent No.1 approached to the appellant No.1 with remaining sum and requested him to receive the remaining sum and to execute the sale deed. The same has been proved by the reliable evidence. According to him the findings of the trial court are based on proper appreciation of evidence and also is in conformity of law. The same do not require any interference at this stage. With these submissions he prayed for dismissal of this appeal.

8. Having heard the learned counsels I have carefully examined the record and also perused the impugned judgment. The following questions require consideration in this appeal.

(a) Whether the time was essence of the contract and what is the effect of receiving the part payment by the appellants after stipulated period mentioned in the agreement.

(b) Whether respondent No.1/plaintiff was ready and willing to perform his part of the contract within stipulated period or/and within the extended period.

(c) Whether the sale deed executed by the appellant in favour of the respondent No.2 on 2.5.1988 is ab-initio void or he is also bound to perform the alleged contract in favour of the respondent No.1.

9. Coming to the question whether the time was the essence of the contract is concerned, as per agreement dated 25.10.1986 (Ex.P.1) the appellants agreed to sale the disputed house to the respondent No.1 in consideration of Rs.25,500/- out of which Rs.5,000/- was taken on the date of the agreement and as per further terms, on payment of remaining sum by the respondent on or before 22.1.1987 the sale deed was to be executed by the appellants in favour of respondent No.1. It is undisputed fact on record that out of remaining sum nothing was paid on or before such stipulated date. But subsequent to such date the appellant No.1 who was also the power of attorney holder of appellant No.2 received the sum of Rs.5,000/- by endorsing the same with his signature at the back side of the agreement on 19.3.1987. Such admission is sufficient circumstance to draw an inference that such payment was received in connection of transaction mentioned in the agreement and by virtue of Section 18 of the Limitation Act, it is not only the acknowledgment of the payment but also the extention of fresh limitation to perform the contract. It is noted that such endorsement was made in writing without fixing any date or period. Therefore in any case it can be inferred that by receiving such payment the appellants waived the right to say that the time was the essence of the contract. Although learned counsel for the appellant have cited various decisions in support of her contention. The same are taken into consideration one by one.

10. In the matter of *Chand Rani (Smt) (Dead) by LRs Vs. Kamal Rani(Smt) (Dead) by LRs* reported in (1993) 1 SCC 519 ten days time stipulated in the agreement was held to be essence of the contract in certain circumstances. In cited case subsequent to the stipulated time the payment of remaining sum was not received by the vendor and such essential terms of limitation was not waived but here by accepting the part payment subsequent to the stipulated date the appellants waived their rights. Hence, such citation is not helping to the appellant.

11. In the matter of *K. S. Vidhyanadam and others Vs. Vairavan* reported in (1997) 3 SCC 1 the period of six months was agreed between the parties for performance of the contract and such period was extended. The alleged agreement was executed on receiving some small amount out of settled consideration and suit was filed after two and half years and the defence of the vendor was the enhancement of the prices of the property. Such peculiar facts are not available in the case at hand either in the pleadings or in the evidence. Hence, it being distinguishable on facts is not helping to the appellants.

12. On the other hand the following decisions the Apex court answered that the time is not always the essence of the contract in the sale of immovable property:

(A) In the matter of *Gomathinayagam Pillai and others, v. Palaniswami Nadar* reported in AIR 1967 SC 868 it was held as under:

> 4. . . . . It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable : it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. .
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> 5. . . . . Fixation of the period within which the contract is to be performed does not make the stipulation as to time of the essence of the contract. It is true that appellants 1 and 2 were badly in

need of money, but they had secured Rs. 3006 from the respondent and had presumably tied over their difficulties at least temporarily. There is no evidence that when the respondent did not advance the full consideration they made other arrangements for securing funds for their immediate needs. Intention to make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to time are not of the essence. In the present case there is no express stiation, and the circumstances are not such as to indeicate that it was the intetion of the parties that time was intended to be of the essence of the contract. It is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the regquisition the contract will be treated as cancelled.

(B) In the matter of *M/s. Arosan Enterprises Ltd., v. Union of India and another* reported in AIR 1999 S. C.3804, it was held as under:

"21. . . . . The contract itself provides reciprocal obligations and in the event of non-fulfilment of some such obligations and which have a direct bearing onto them - strict adherence of the time schedule or question of continuing with the notion of the time being the essence of the contract would not arise. The obligations are mutual and the terms of the agreement are inter-dependent on each other."

24. Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The state of facts and the relevant terms of the Agreement ought to be noticed in its proper perspective so as to assess the intent of the parties. The agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties. In the instant case, the Port of Discharge has not been named neither the Surveyor is appointed - without whose certificate, question of any payment would not arise - can it still be said that time was the essence of the contract, in our view the answer cannot but be a positive 'No'.

(C) In the matter of *Amteshwar Anand v. Virender Mohan Singh and others* reported in AIR 2006 S. C. 151, it was held as under:

"36. The final submission of the appellants was that time for payments under the agreements was of the essence. But the appellants themselves had never understood the agreements in that manner. They had asked for payment much after the dates had expired. As far as KK and Guneeta were concerned, in their application made in 1995 what they had asked for was for payments due in 1993. It was only as alternative that they had pleaded for the decree to be set aside that too on the ground of alleged contempt having been committed by VMS.

13. The aforesaid dictums are applicable to the present circumstances for holding that the time was not the essence of the contract between the parties.

14. In view of the aforesaid discussion and in the lack of any averments in the agreement regarding dire need of money to the appellants and in view of the accepting the part payment by the appellant No:1 after the due date, it is held that the stipulated time in the agreement was not the essence of the contract between the parties. Thus the findings of the trial court in this regard are hereby affirmed.

15. Coming to the question regarding readiness and willingness of respondent No.1 to perform his part of the contract is concerned, on perusing the evidence it appears that during subsisting the contract in the extended period the respondent No.1 was ready and willing to perform his part of the contract to get the sale deed executed in his favour by paying the remaining sum of consideration to the appellants. Plaintiff Tarachand Kulparia (P.W.1) categorically deposed that on 25.4.1988, he accompanied with Jagmohan, Gopal Vyas and Veerendra Pille along with the remaining sum went to the appellant No.1 and requested him to receive the remaining consideration and execute the sale deed, on which he was told by the appellant No.1 that there is time to 30th April 1988 and he has to execute sale deeds of other houses also. Hence, he will execute the same along with such sale deeds. He further stated that on 30.4.1988 again accompanied with Jagmohan and Gopal Vyas he went to the appellant No.1 and made him a request to receive the remaining sum and execute the sale deed on which the appellant told him to wait for a week and assured him to execute the sale deed alongwith the sale deeds of the other houses. Such version of in-chief is remained intact in his entire cross-examination. His version is further supported by the above named witnesses Jagmohan (P.W.2) in paragraphs 3, 5, 8, 9 and 10 of his deposition and Virendra Kumar Pilley (P.W.3) in paragraph 1, 2 in his chief and the same is remained intact in his cross-examination. It is further supported by Gopal Vyas (P.W.4) in paragraph 1 and 2 in his chief, which is not destroyed in cross-examination.

16. On the other hand appellant No.1 Shankar Lal Pandey (D.W.1) by admitting the execution of aforesaid agreement (Ex.P.1) deposed that respondent No.1 did not make the payment of remaining sum up to 22.1.1987 and he never extended the time for performance of the contract. He also stated that plaintiff's witnesses Veerendra Pillai and Gopal Vyas never came to his shop. In cross-examination he

categorically stated that respondent No.1 is residing in such premises from the time of his forefathers. He did not give any notice to the respondent No.1 regarding cancellation of his alleged agreement. In paragraph 3 and 4 he admitted that he received Rs.5,000/- from respondent No.1 on 19.3.1987 but without disclosing any amount of arrears towards the rent of the accommodation said that the same was received in connection of rent but no separate receipt was given to the respondent No.1. In paragraph 5 he admitted that aforesaid witnesses Veerendra Pillai and Jagmohan are the residents of same vicinity where the appellants and respondent No.1 are residing. He also admitted that the sum taken by him from respondent No.1 Rs.10,000/- are still with him and the same was never returned. It was also admitted by him that the house in dispute was sold to respondent No.2 in the month of May 1988. Besides this he stated that he could not say whether the respondent No.1 had sum or not with him while in the written statement it was stated that respondent No.1 did not have the requisite sum to perform his part of the contract. This material inconsistency has come on record between the pleadings and the deposition of appellant No.1. He could not state regarding any inimical relation with the witnesses examined by the respondent No.1 in support of his case.

17. In view of the aforesaid evidence and admission of the appellant No.1 that he received the payment of Rs.5,000/- after the stipulated time on 19.3.1987 gives the sufficient circumstance to draw the inference that appellant No.1 acknowledged the contract as fresh by making endorsement at the back side of the agreement with his signature on 19.3.1987. Although as per pleadings of the parties and the oral evidence available on the record time for performing the contract was extended up to 30.4.1988 and the findings of the trial court in this regard is also based on such evidence, the same do not require any interference at this stage.

18. Although it is undisputed fact on record that the respondent No.1 did not give any notice to the appellant before 30.4.1988 and for more than one and half year after executing the sale deed by the appellants in favour of the respondent No.2. The same was given round about after one and half year on 21.10.1989 (Ex.P.2) to appellant No.1 calling him to perform his part of the contract. The same was replied by Ex.P.3 stating that no time was extended for performance of the contract inspite it after waiting up to the end of April 1988 when respondent No.1 did not turn up to perform his part of contract he executed the sale deed in favour of respondent No.2 on 2.5.1988. Such reply reflects that time was extended for performance of the contract. Considering the circumstance that above mentioned witnesses having no ill-will with the appellants stated on oath that they went to the appellant No.1 with the respondent No.1 where respondent No.1 made him request to receive the remaining part of consideration and to execute the sale deed in his favour, not only once but twice on 25.4.1988 and 30.4.1988, their version could not be discarded on the ground that immediately after 30.4.1988 the notice was not given by the respondent No.1 to the appellants. In the facts and circumstances of the case the version stated by such witnesses appears to be

reliable and findings of the trial court in this regard appears to be on sound appreciation of evidence.

19. The aforesaid circumstances are sufficient to draw the inference that respondent No.1 was ready and willing to perform his part of the contract but his efforts were failed by the appellants. Although in order to show to have the sufficient fund with the respondent No.1 no documentary evidence is put forth on the record but in view of the aforesaid available and reliable oral evidence mere in the lack of any documentary evidence it could not be inferred that respondent No.1 was not ready and willing to perform his part of the contract. Long back such question was considered and answered by the Apex Court in the matter of *Nathulal, v. Phoolchand* reported in AIR 1970 S. C. 546 in which it was held as under:

> 6. Phoolchand could be called upon to pay the balance of the price only after Nathulal performed his part of the contract. Phoolchand had an outstanding arrangement with his Banker to enable him to draw the amount needed by him for payment to Nathulal. To prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction: *Bank of India Ltd. v. Jamsetji A. H. Chinoy and Messrs. Chinoy and Co.*, 77 Ind App 76 at p. 91 = (AIR 1950 PC 90 at p. 96).

20. It is settled proposition of law that the findings of the trial court, which are based on the proper appreciation of the recorded evidence available on the record could not be interfered at the stage of the appeal in routine manner, unless the same appears to be contrary the available evidence. Such proposition is laid by the Apex Court in the matter of *Madhusudan Das v. Smt. Narayani Bai and others* reported in AIR 1983 SC 114 in which it was held as under:

> 8. The question whether the appellant was in fact adopted by Jagannathdas and Premwati has been determined essentially on the basis of oral testimony, and reference has been made to a few documents only in supplementation of the oral evidence. At this stage, it would be right to refer to the general principle that, in an appeal against a trial Court decree, when the appellate Court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the

trial Court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In this connection, reference may usefully be made to *W. C. Macdonald v.. Fred Latimer,* AIR 1929 PC 15, 18 where the Privy Council laid down that when there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial Court's findings as to the truth of the oral evidence, the appellate Court can interfere only on very clear proof of mistake by the trial Court. In *Watt v.. Thomas,* 1947 AC 484, 486 it was observed: "..... ... ... it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given". This was adverted to with approval by the Privy Council in *Sara. Veeraswami v. Talluri Narayya* (deceased), AIR 1949 PC 32 and found favour with this Court in *Sarju Parshad v. Raja Jwaleshwari Pratap Narain Singh,* 1950 SCR 781, 783 : (AIR 1951 SC 120 at p. 121). It seems to us that this approach should be placed. in the forefront in considering whether the High Court proceeded correctly in the evaluation of the evidence before it when deciding to reverse the findings of the trial court. The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact. Our attention has been drawn by the respondents to *The Asiatic Steam Navigation Co. Ltd., v. Sub-Lt. Arbinda Chakravarti,* (1959) Supp 1 SCR 979: (AIR 1959 SC 597) but nothing said therein detracts, in our opinion, from the validity of the proposition enunciated here.

21. Although on behalf of the appellants different decisions of the Apex Court and of this Court are cited in support of the contention that respondent No.1 was neither willing nor ready to perform his part of the contract the same are taken into consideration in following paragraphs.

22. In the matter of *His Holiness Acharya Swami Ganesh Dasji Vs. Sitaram Thapar* reported in (1996) 4 SCC 526, the Apex Court decided such matter considering the dire need of money of vendor for the marriage of his daughter held that time was essence of the contract and in such circumstances it was held

that vendee was not ready and willing to perform his part. But in the present matter either in the agreement or in the pleadings of the appellant neither such need is pleaded nor any evidence was led in this regard. Hence, the cited case is not helping to the appellants.

23. In the matter of *Mohini and others Vs. Vidhyawati Rathore and other* reported in {2004 (2) MPLJ 169} the decree for specific performance was set aside considering the principle laid down by the Apex Court in the matters of *S. Rangaraju Naidu Vs. S. Thiruvarakkarasu* 1995 Supp (2) SCC 680, and in the matter of *His Holiness Acharya Swami Ganesh Dasji* (Supra). In the case of S. Rangaraju Naidu the Apex Court while considering the case of the alleged agreement to sale the immovable property executed between the parties, held that the relief of specific performance is discretionary one. So for this principle is concerned this court does not have any dispute but as per settled proposition such discretion should be exercised in judicial manner and not in arbitrary manner; as held by this court in the aforesaid *"Mohini and others"* (Supra) case in paragraph 14. Hence, the same is also not helping to the appellants.

24. Therefore, it is held that the trial court has not committed any perversity, infirmity or irregularity in holding that the respondent No.1 was ready and willing to perform his part of the contract. Such findings are hereby affirmed and the question is answered accordingly in favour of respondent No.1.

25. Coming to consider the third question regarding the validity of the sale deed executed by the appellants in favour of respondent No.2 during subsisting the aforesaid contract of respondent No.1 is concerned. It is apparent fact on record that respondent No.2 being resident of same vicinity is residing in the house situated nearby the disputed house in which the appellant is residing and he was tenant of the appellant in such house, the same was sold to some other person and respondent No.2 probably became the tenant of the purchaser of such house and as per un-rebutted deposition of respondent No.1 inspite having the knowledge of his agreement the respondent No.2 got executed the sale deed of disputed house in his favour from the appellants. Accordingly, such sale deed is executed during subsisting the agreement (Ex.P.1) of the appellant. Therefore, by virtue of Section 48 of the Transfer of the Property Act the same does not give any right to the respondent No.2 over the respondent No.1. As such on decreeing the suit of respondent No.1 for specific performance the respondent No.2 being subsequent purchaser is also bound to perform the contract by executing the sale deed in favour of the respondent No.1 along with the appellants. In such premises the findings of the trial court in this regard are also affirmed.

26. In view of the aforesaid discussion, I have not found any substance in this appeal. Resultantly by affirming the impugned judgment and decree this appeal is hereby dismissed. The appellants shall bear their own costs of this appeal along with the cost of the respondents. The Counsel fee Rs.2,500/- is quantified.

27. Decree be drawn up accordingly.

28. Appeal is dismissed as indicated above.

Appeal dismissed.

I.L.R. [2008] M. P., 836
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
14 December, 2007*

S.N. BIHARI — Appellant
Vs.
WESTERN COAL FIELD & anr. — Respondents

A. Workmen's Compensation Act (8 of 1923), Section 10 (Proviso) - Notice to claim - Proviso provides that Commissioner may entertain and decide any claim to compensation in any case notwithstanding that notice has not been given - If he is satisfied that the failure so to do give the notice or prefer the claim, was due to sufficient cause - Even in absence of an application by claimant for invoking such discretion it is provided under proviso of Section 10 of the Act - Commissioner ought to have entertain claim by invoking such discretion in favour of claimant to do real justice. (Paras 7 & 10)

B. Workmen's Compensation Act (8 of 1923), Section 10 (1) - Limitation - Claimant sustained occupational disease while he was in service of respondents - Claimant in service even on the date of filing of claim - Claimant had recurring and continuous cause of action - Claim cannot be dismissed as barred by time. (Paras 12 & 16)

Cases referred :

AIR 2005 SC 1638, AIR 1960 Punjab 119, 1987 (1) T.A.C. 420, 1966 ACJ 361

Shobit Aditya, for the appellant
Surbhi Nigam, for the respondents

ORDER

U.C. Maheshwari, J. :–This appeal is preferred under Section 30 (1) of the Workmen Compensation Act 1923, in short "The Act" by the appellant-claimant being aggrieved by the order dated 18.11.04 dismissing his claim under Section 10 of the Act.

1. The appellant-Claimant preferred his claim under Section 10 of the Act contending that he is working as employee of the respondent on the post of Mechanical Fitter in the Coal Mine of respondents at Sarani. On account of working in the coal mine because of its dust he suffered restrictive lung disease an occupational disease whereby he sustained 40% B.B.D. The medical

*M.A. No. 321/05 (Jabalpur)

certificate after his examination was also issued by the doctor posted at Medical College, Bhopal. The appellant's age was 43 years when he sustained the aforesaid disease and his salary was Rs. 3500. Such disease was sustained by the appellant while discharging the duties in the aforesaid coal mining under the employment of the respondent. Thus, they are liable to pay the compensation of it. With these pleadings the claim is preferred for the sum of Rs. 85,000/- alongwith the interest @ 18% p.a.

2. In reply of the respondents by admitting the employment of the appellant with them, it is denied that the appellant sustained such disease because of working in the coal mine by its dust. The assessment of 40% P.P.D. is also denied. The appellant's injury and the disease are denied. They did not aware about any incident causing such disease to the applicant. However, the quantum of the salary mentioned by the appellant is admitted by them. The application of the appellant is baseless and also barred by time. Thus, they are not liable to indemnify any claim to the appellant and prayed for dismissal of the application.

3. In view of the pleadings of the parties as many as five issues were framed and after recording the evidence, on appreciation the trial court by holding that the claim is barred by time and also that the alleged disease was not sustained by the appellant because of working under the employment of the respondent dismissed his claim in toto, on which the appellant has come to this court with this appeal.

4. In pendency of the appeal the appellant also filed an application IA No. 4093/06 seeking permission to produce additional document on record. The same is to be considered in this appeal.

5. Having heard the learned counsel, after perusing the record the following substantial questions of law require consideration in this appeal :-

> (i) Whether the finding of the learned Commissioner holding the claim barred by time is correct in the available circumstances or such finding is sustainable in view of proviso of Section 10 of the Act which empowered the Commissioner to entertain the claim under his discretion even on filing the same barred by the prescribed limitation? If so, has the Commissioner committed error in not invoking such discretion in favour of the appellant.
>
> (ii) Whether the learned Commissioner committed error in dismissing the claim of the appellant without appreciating the admissible available evidence? If so, then it's effect.

6. So far first question regarding limitation is concerned, firstly I would like to reproduce the concerned abstract of Section 10 of the Act which reads as under:-

> 10. Notice to claim :- (1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practical after the happening thereof and unless the claim is preferred before

him within (two years) of the occurrence of the accident or in cause of death within (two years) from the date of death.
Provided .....

[Provided .....

Provided .....

[Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the [entertainment of a claim] -"

(a) If the claim is [preferred] in .....

(b) If the employer [or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed] had knowledge of the accident from any other source at or about the time when it occurred:]"

Provided further that the Commissioner may [entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been [preferred], in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or [prefer] the claim, as the case may be, was due to sufficient cause.

7. It is undisputed fact on record that the appellant being a mechanical fitter was working under the employment of the respondents and his monthly wages was Rs. 3500 and his age was 43 years on the date of filing the claim. According to unrubutted deposition of the appellant he was working under the employment of the respondents even on the date of filing such claim. Such fact is not disputed on behalf of the respondents in any manner. The proviso V it provides that the Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been transferred in due time, if he is satisfied that the failure so to give the notice or prefer the claim as the case may be, was due to sufficient cause.

8. It appears from the impugned order that in view the aforesaid proviso the case has not been considered by the learned Commissioner with proper approach. It is apparent from the record that the Appellant suffered the alleged occupational disease while working under the employment of the respondent.

9. Undisputedly it could be said that the workmen Compensation Act 1923 is enacted for the welfare of the workmen and to do the social justice with them. The law is well settled in this regard. The power vested in some authority by the statute should be invoked judiciously and with justice oriented approach and not otherwise. It appears from the medical evidence on the record that the appellant is sufferer of the occupational disease so called in the name of Pneumoconiosis. It is also called in the name of coal mine disease.

10. Looking to the nature of the disease of the appellant, I am of the considered view that even in the absence of any application by the claimant for invoking such discretion provided under the proviso of Section 10 of the Act the authority like the Commissioner ought to have entertained the claim by invoking such discretion in favour of the appellant to do the real justice with him in which it failed. The procedural rigor could not be tolerated in the way of justice. The procedures are always enacted and made to do justice with the victim or the sufferer. My aforesaid view is based on a decision of the Apex Court in the matter of *Balaji Vs. Virendra Singh and others* reported in AIR 2005 SC, Page 1638 in which it was held as under:-

> 10. In the matter of applicability of the procedural rigours the Constitution Bench of this Court in Sardar Amarjit Singh Kalra v. Pramod Gupta has observed that laws of procedure are meant to regulate effectively, assist and aid the object of substantial and real justice and not to foreclose even an adjudication on the merits of substantial rights of citizen under personal, property and other laws. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as handmaid, make it workable and advance the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law inevitably necessitates it. It follows from the decision by the Constitution Bench that the procedure would not be used to discourage the substantial and effective justice but would be so construed as to advance the cause of justice. The consolidated petition filed on 30-4-2003 by the petitioner would not be taken to be a new petition presented before the Central Registrar to declare it to be barred by limitation on the basis of its date of presentation; it shall have to be read in continuation of the earlier representations which were referred to the Central Registrar for adjudication under the orders of the Delhi High Court.
>
> 11. The matter can be looked from the other angle as well. Sub-section (3) of Section 75 of the 1984 Act authorises the Central Registrar to condone the delay in referring the dispute if the Central Registrar is satisfied that there was a sufficient cause for not referring the dispute within the period of limitation. The requirement of sub-section (3) is the satisfaction of the Central Registrar for sufficient cause, and is not dependent on moving of an application for condonation of delay by the petitioner. Even without there being any application for condonation of delay, if the facts which emerge

in the case are sufficient to satisfy the Central Registrar of the reasonable cause for not referring the dispute within the period of limitation, the Central Registrar can condone the delay in exercise of the powers conferred on him under sub-section (3) of Section 75 of the Act.

11. The aforesaid dictum is applicable to the case at hand for condoning the delay but such aspect was not considered by the trial court while giving finding on the question of limitation.

12. From the above it is apparent that the Appellant even after sustaining the alleged occupational disease was in the service of the respondents even on the date of filing the claim. In such premises he had recurring cause of action and the continuous cause of action to file the claim. Besides this the disease of the appellant was remained in the knowledge of the respondents and its authorities long back from the date of filing the claim. Thus, in view of the aforesaid other proviso the claim could not be defeated on the ground of limitation.

13. Besides above for invoking the discretionary power to condone the delay in filing the claim sufficient cause must be construed liberally. Such question is answered by the Punjab High Court in the matter of *Sarup Singh Sher Singh Vs. Mukund Lal* reported in AIR 1960 PUNJAB 119 (V 47 C 39) in which it was held as under:-

> "(7) In a welfare State which is being progressive industrialized, legislative measures like the Workmen's Compensation Act should be construed in a more liberal sense in favour of the workmen to that deserving workmen to get full and speedy benefit and advantage of these beneficial measures. Such liberal interpretation would accomplish the humane and beneficial purposes of this legislation, the provisions of which are truly responsive to the social and economic needs which have been recognized by our Society and by our Constitution. The rights of workmen deserve to be generously treated while applying the statutory provisions because the procedure under this statute provides a speedier similar, cheaper and more efficient machinery for the determination and payment of compensation to the workmen. Judicial and quasi-judicial officers should therefore not treat matter of procedure so rigidly as to deprive the citizens of the advantages and benefits of this beneficial legislation on unsubstantial and technical grounds. It is of the utmost importance that no construction on provisions relating to procedure should sacrifice the rights of the poor workmen due to technical mistake, omission or inaccuracies. Provisions relating to limitation have, as already noticed also to be construed with a liberal spirit so that, consistently with the language of the statute, if interest of real justice can be promoted such a result should be sought to be

achieved. I have, therefore, no hesitation in holding that the learned Commissioner was clearly wrong in law in finding the appellant's application to be barred by time. That I can determine this question on appeal has not been denied at the Bar, and rightly so, this appeal being a continuation of the original proceedings (see *Union of India V. Hanskumar Kishan Chandra,* AIR 1958 SC 947 at page 952)."

14. Such question is also answered till some extent by this court in the matter of *Lauki Devi and others Vs. Sardar Garlal Singh and others* reported in 1987 (1) T.A.C. 420 in which it was held as under:-

"8. .....

.....

.....

.....Insertion of this provision in the Act sufficiently established the anxiety of the legislature to see that the claim of a bona fide claimant is not defeated. The same intention is obvious from section 10-B of the Act which obliges the employer to report to the Commissioner the circumstances attending death or seriously bodily injury. The Act without doubt is a welfare statute and therefore interpretative process of this Court must bring out the contention of the legislature. The interpretation adopted by this Court in its opinion establishes the efficacy of this welfare legislation and thereby furthers intention of the legislature."

15. On other occasion this question was answered by the High Court of Andhra Pradesh in the matter of *N. Pochaiah & Co. V. Mulle Nagabhushanam* reported in 1966 A.C.J. 361 in which it was held as under:-

"6. The Commissioner accepted the truth of these grounds and condoned the delay. At any rate, grounds (1) and (3) are very plausible. A workman in our country is not so literate and conscious of his rights as to rush to the Labour Commissioner for enforcement of his rights especially when the employer was promising to settle his claim. It may be remembered that the first injury was not a serious one. It was only a loss of index finger of the right-hand. There is also the further fact that he continued to be in service thereafter, till he was the victim of the second accident, which resulted in the loss of the left arm. Even thereafter, he continued under the same employer and he was paid, in spite of his physical disabilities, more wages than what he was getting previously. In those circumstances, it is very probable that he would not have though of starting legal proceedings, implicitly believing that his

employer would also settle his claim. It is only when he was disillusioned that he filed his application under s. 10 of the Act."

16. Therefore, in view of the aforesaid discussion, it is held that the Commissioner has committed grave error in holding that the claim is barred by time and the first question is answered accordingly in favour of the appellant, the findings of the trial court in this regard are hereby set aside. In such premises, the claim of the appellant is held to be entertainable to decide the same on merits.

17. Before giving any finding on the second substantial question of law relating to the merits of the appellant's case, I would like to consider the aforesaid IA No. 4093/06 filed by the appellant.

18. Coming to another question whether the alleged disease was sustained by the Appellant because of working in the coal mine of the respondent, is concerned. After perusing the bed head ticket regarding treatment of the Appellant and the other papers alongwith the different receipts of the hospital and the Summery Certificate Ex. P/1 -C dated 11.4.1989 issued by the authority of Gandhi Medical College, Bhopal, I am of the considered view that the appellant sustained the alleged disease because of inhalation of coal dust due to his occupation hazards. As per aforesaid summery of the Gandhi Medical College, Bhopal the following conclusion was given :-

> In view of the above clinical parameters patient has a stable cardiovascular status. The existing symtoms are due to obstructive and restrictive airway disease partly due to smoking and mainly due to inhalation of coal dust due to his occupation. The disease is likely to increase if he continuous to work in the coal fields. B-Blockers may be with held in view of exiting pulmonary pathology. Alternatively the following treatment is recommended:- Tab. Deriphylline retard 1 BD.
>
> Cap. Cardicap TR 20 mg 1 BD. Tah. Dynaspirin 1 BD
>
> Ta. Isordil 5 mg SOS S/L.

19. Some other papers also prove this version, although such certificate and papers are rebutted by the respondents on the basis of the papers prepared by the hospital of the respondents and also by their Board.

20. It is also stated by the Commissioner that against the order of Medical Board an appeal is provided under the rules but the appellant did not choose to file the same. Resultantly, the decision of the Medical Board has got finality and the same could not be challenged by the appellant by way of the instant claim. In this regard on making the queries to the respondents' counsel she could not apprise me any rules in this regard, hence on account of such opinion or the conclusion of the Medical Board the claim of the appellant could not be defeated. Even otherwise on account of such technicalities a sufferer of occupational disease could not be deprived from his right.

21. So firstly on the basis of available medical evidence, it is held that the appellant suffered the alleged occupational disease during his aforesaid employment and in the course of discharging his duty in the coal mine. Apart the above some additional paper regarding medical examination of the appellant issued by the District Medical Board, Betul on 8.1.06 is filed with the aforesaid IA which was not in existence and available with the appellant on the date of filing the claim or passing the impugned order, i.e. on 18.11.04. Besides this the superannuation order of the appellant dated 31.7.06 is also filed which has come in existence subsequent to the order of the trial court. So I am of the view that the aforesaid certificate of Medical Board requires consideration to decide the quantum of compensation. Hence by allowing the aforesaid IA such documents are taken on record.

22. In view of the aforesaid finding the substantial question no.2 is answered accordingly and in favour of the appellant and with the aforesaid findings the case is remitted back to the trial court with a direction that after extending the opportunity to the parties for amending their pleadings in view of aforesaid additional documents and giving them the opportunity to adduce the evidence in this regard and after hearing their arguments decide the quantum of compensation in accordance with law and procedure. It is expected that the trial court shall conclude such proceeding on or before 30th June 2008 under intimation to this court.

23. There shall be no order as to the cost.

24. The appeal is partly allowed and the case is remanded to the trial court to decide the same in compliance of aforesaid directions.

Appeal partly allowed

I.L.R. [2008] M. P., 843
APPELLATE CIVIL
Before Mr. Justice S.K. Seth
3 January, 2008*

ANIL KUMAR @ OM PRAKASH — Appellant
Vs.
RAMESH CHAND & ors. — Respondents

A. Civil Procedure Code (5 of 1908), Section 100 - Substantial Question of Law - Perverse Finding - What is - Where finding of fact is based on misreading of evidence or suffers from legal infirmity which materially prejudice case of one party - It would be open for Court to set aside such finding and take a different view. (Para 8)

B. Accommodation Control Act, M.P. (41 of 1961), Section 12 (1)(f)- Previous demand for enhanced rent would not destroy the subsequent requirement of the suit shop without taking into consideration the present need - Courts should consider *bonafide* need on institution of suit. (Para 9)

*S.A. No. 106/2004 (Indore)

C. Accommodation Control Act, M.P. (41 of 1961), Section 12 (1)(f)- Combined income of appellant and his wife is sufficient for upkeep - Therefore, need of appellant to start his own business is not genuine - Finding is based upon conjectures and surmises. (Para 9)

Cases referred :

1981 MPRCJ SN 38, (2000) 9 SCC 329, AIR 1963 SC 302, AIR 1999 SC 864, AIR 1974 SC 1596, AIR 2002 SC 827

A.K. Sethi, for the appellant

G.M. Chaphekar, for the respondents

JUDGMENT

S.K. Seth, J. :–This is landlord's appeal against the reversing judgment and decree whereby the eviction decree passed by the trial Court was set aside and the suit was dismissed.

2. Plaintiff/appellant filed the eviction suit against the respondent/tenant seeking his eviction from the non-residential accommodation. It is situated in Neemuch. Plaintiff sought eviction on various grounds covered by Section 12(1) of the M.P. Accommodation Control Act, 1961 (herein after referred to as the 'Act'). Claim was resisted by the appellant/defendant. As usual, tenant denied the grounds urged for eviction. Based upon pleadings, trial Court framed issues and allowed the parties to adduce evidence. Learned trial Judge on appreciation of evidence, decreed the suit under Section 12(1) (b) (c) and (f) of the Act and ordered eviction of the respondent herein. Matter was carried in first appeal by the respondent. Learned District Judge, Neemuch heard the appeal. By the impugned judgment and decree, appeal was allowed and the entire suit for eviction was dismissed. Aggrieved by judgment and decree of the trial Court, plaintiff has now preferred this second appeal. The appeal was admitted for final hearing on the following question of law :-

> "Has the first appellate Court reversed the decree for eviction granted under Section 12 (1) (f) of the M.P. Accommodation Control Act, 1961 on improper and irrelevant ground?"

3. In view of the substantial question of law formulated at the time of admission, learned counsel confined their submission on that point, as a result, we do not have to tackle any other issue.

4. Now the question for our consideration is whether reversal of judgment and decree granted under section 12 (1) f) could be sustained in law.

5. Shri A.K.Sethi, learned senior counsel appearing for the appellant contended that basically two factors affected the reasoning process of the Court below to non-suit the appellant under Section 12 (1) (f) of the Act. According to him, previous demand for enhanced rent made by the landlord, turned out to be fatal and secondly, the composite income of both husband and wife was more than

adequate for the upkeep of the family and therefore, need set out by the plaintiff to start his own business is not genuine. According to learned counsel, the entire approach of the learned lower appellate Court is unsustainable in law and fact, and if allowed to stand, would result in miscarriage of justice. In support of his contentions, he placed reliance on the following decisions, 1981 MPRCJ SN 38- *M/s Bhopal Motors P. Ltd. And ors. Vs. B.P.Saradhy; and* (2000) 9 SCC 329- *Ramjidas and another Vs. Rambabu and another.*

6. On the other hand, Shri G.M.Chaphekar, learned senior counsel appearing for the respondents, while supporting the impugned judgment and decree submitted, that the findings recorded by the Court below are findings of fact and they are not open to interference in second appeal. He further submitted whether finding of fact reached by the courts below is against the weight of evidence is simply a question of appreciation of evidence and does not project any substantial question of law. He further submitted that finding regarding bonafide requirement is a pure question of fact and does give rise to any substantial question of law. Thus, according to him, the question of law formulated at the time of admission is not a substantial question of law, and as such the appeal itself should be dismissed. In support of his contentions Shri Chaphekar placed reliance on three decisions of Supreme Court reported in AIR 1963 SC 302-*V.Ramachandra Ayyar and another Vs. Ramalingam Chettiar;* AIR 1999 SC 864 *Dnyanoba Bhaurao Shemde V. Maroti Bhaurao Marnor,* and AIR 1974 SC 1596 *Mittulal V. Radhelal.*

7. Facts emerging from record and which are no longer in dispute are that respondents are the tenant in suit shop. Appellant is landlord and owner of the suit shop and he has no other reasonably suitable non-residential accommodation of his own in Neemuch. Appellant is not an employee of the Bank but works only as a Pigmy Collection Agent getting commission at the fixed rate on the amount collected and deposited in the Bank. Wife of the appellant is teacher in a school. Plaintiff set up the bonafide need of himself for starting his own grocery business in the suit shop and he has no other shop in his occupation in Neemuch.

8. There is no quarrel with the proposition of law on which Shri Chaphekar has placed reliance and drawn attention of the Court. We are very clear in our mind that jurisdiction under Section 100 of the CPC is now confined to substantial question of law, therefore, a finding of fact is not open to correction even if the appreciation of evidence is erroneous. Now a second appeal could be entertained if such an appeal gives rise to a substantial question of law formulated at the time of admission. However, it is equally true by catena of decisions that when there is no evidence at all or the finding of fact is based on misreading of evidence or suffers from any legal infirmity which materially prejudice the case of one of party such findings are perverse, and it would be open for this court to set aside such a finding and to take a different view See *Neelakantan Vs. Mallika Begum* –AIR 2002 SC 827.

9. Now, we have to examine whether the substantial question of law formulated

at the time of admission falls under which category. After having given our anxious consideration to material on records in the context of substantial question of law, we are inclined to think that the impugned judgment and decree falls under the later category and, therefore, this appeal deserves to be allowed. Previous demand for enhanced rent swayed the lower appellate Court to come to conclusion that past conduct of the appellant would destroy the subsequent requirement of the suit shop without taking into consideration the present need. It is the duty of the Courts to consider the bonafide of the need on the institution of suit. Similarly, the finding of the lower appellate Court that combined income of appellant and his wife is sufficient for the upkeep, therefore, appellant would not start and do the grocery business from the suit shop, to say the least, is based upon conjectures and surmises. There is no evidence to support this finding recorded by the lower appellate Court. These findings recorded by the first appellate Court are based upon misreading of evidence. Having regard to evidence adduced before it, the trial Judge rightly came to conclusion that appellant had established his claim for eviction on the banafide ground, the first appellate Court could not have reversed the said finding without recording sufficient and cogent reasons therefore. If such reversal the judgment and decree passed by the trial Court is allowed to stand then instead of landlord, the Court would become the rationing authorities regarding the need of a landlord and this is impermissible in law and as such findings of the first appellate Court are unsustainable in law and deserves to be set aside.

10. In view of the foregoing discussion, the judgment and decree passed by the Civil Judge is restored and the appeal is hereby allowed. Impugned judgment and decree passed by the learned District Judge Neemuch is hereby set aside without costs through out to be borne by the respondent. Counsel's fee Rs.1000/- if certified.

Appeal allowed.

I.L.R. [2008] M. P., 846
APPELLATE CIVIL
Before Mr. Justice K.S. Chauhan
3 January, 2008*

INDRAMANI PRASAD SHUKLA & ors. Appellants
Vs.
SHAKUNTALA & anr. Respondents

A. Civil Procedure Code (5 of 1908), Section 11 - *Res-Judicata* - Suit filed by plaintiff/appellant for declaration, possession and damages on the ground that will executed in favour of defendant was annulled by subsequent will executed in his favour - Wills executed in favour of plaintiff and defendant already considered in previous suits and dispute was regarding same properties - Will made in favour of defendant was registered whereas will made in favour of plaintiff was

*S.A. No. 409/1998 (Jabalpur)

unregistered - Defendant in settled possession of property and will executed in favour of plaintiff was never acted upon - Judgments passed in previous suits operate as *res-judicata* - Appeal dismissed. (Para 25)

B. Civil Procedure Code (5 of 1908), Order 42 Rule 2, Order 41 Rule 22 - Cross-Objection in Second Appeal - Cross Objection can be maintained only when Substantial Question of Law arises - Respondent not framing any Substantial Question of Law in memo of Cross Objection - No Substantial Question of Law formulated by Court - No need to consider Cross Objection. (Para 33)

Cases referred :

AIR 1965 SC 948, AIR 1999 SC 1823, AIR 1977 SC 63, AIR 1994 Kerala 267

S.P. Mishra, for the appellants

Alok Aradhe with *Siddharth Gulati,* for the respondents

JUDGMENT

K.S. Chauhan, J. :– This second appeal under Section 100 of the Code of Civil Procedure has been preferred being aggrieved by judgment and decree passed on 17.01.1998 by Fifth Additional District Judge, Rewa in Civil Appeal No.37-A/1998, arising out from the judgment and decree passed on 26.06.1993 by Fifth Civil Judge, Class-II, Rewa in Civil Suit No.20A/1993 whereby civil suit for declaration, possession and damages regarding the disputed property situated at Sabji Mandi, Rewa has been dismissed.

2. This appeal was filed on 23.04.1998 which was dismissed on 18.09.1998 by holding that matters stand concluded by finding of fact. No substantial questions of law arise for determination, hence appeal stands dismissed in limine.

3. SLP was filed by appellants and the Hon. Apex Court in Civil Appeal No.2705/2000 set aside the order of this Court and admitted the second appeal No.409/98 on the following substantial questions of law:

> "A. Whether the judgment of the District Judge Rewa passed on 25.01.1951 in Civil Appeal No.271/1951, the Judgment of the Additional District Judge, Rewa passed on 13.09.1952 in C.S.No.33/1952 and the judgment of the Judicial Commissioner, Vindhya Pradesh in F.A.no.93 decided on 04.12.1952 operated res judicata to the present suit?
>
> B. Whether the judgment of the District Judge Rewa passed on 25.01.1951 in Civil Appeal No.271/1951, the judgment of the Additional District Judge Rewa passed on 13.09.1952 in C.S.No.33/1952 and the judgment of the Judicial Commissioner, Vindhya Pradesh in F.A.No.93 decided on 04.12.1952 hold that under the will dated 15.06.1950 Mst.Malkutia had only life interest in the suit property and after her death the suit property has vested on Shyamdas?"

4. Respondent No.1 Smt. Shakuntala filed memorandum of cross objection on 10.08.2007 under Order 41 Rule 22 of the Code of Civil Procedure. Its reply was filed by appellant on 05.09.2007.

5. The appellants' case was that Jagatdev Prasad was uncle of late Shri Shyamdas Shukla. He was the owner of the disputed property situate at Sabji Mandi, Rewa. Rajdulari was his wedded wife but she turned unchaste, therefore, he renounced her and kept Smt. Malkutiya as his wife who remained with him upto 12-13 years. He bequeathed all his movable and immovable properties to her on 26.02.1950 which was registered on 13.03.1950 under coercion and fraud of Smt. Malkutiya. On 15.06.1950 he annulled this will and executed another will in favour of late Shri Shyamdas Shukla to the effect that Malkutiya shall have the right and title to enjoy it during her life time and upon her death Shyamdas Shukla will become the owner of the property. Smt. Malkutiya unauthorisedly executed the registered will in favour of her daughter Smt. Shakuntala ON 18.01.1971. Smt. Malkutiya died in the year 1973. After her death Shyamdas Shukla came to Rewa from village Bansa and informed the tenants of this house that he wants to construct it in new style. When Smt. Shakuntala came to know this fact she persuaded the tenants in 1977 to part with the Pagdi amount of the rent, demolished the old house, started constructing a new house and did not desist in spite of refusal by Shyamdas Shukla. It was also pleaded that Smt. Shakuntala born after 13-14 months of death of Jagatdev, therefore, she was an illegitimate child and had no right, title or interest in the property, therefore, the civil suit was filed for declaration, possession and damage regarding disputed property.

6. Defendant/respondent No.1 Smt. Shakuntala filed written statement denying the plaint allegations mainly contending that partition of the disputed house took place 50 years back to the death of Jagatdev. He had executed a will in favour of her mother Malkutiya without any coercion or fraud. He has never revoked the will dated 13.03.1950. Late Shyamdas never recovered any rent from the tenants. She had spent about Rs.85,000/- in reconstructing the house. In civil suit No.267-A/1950 the will dated 15.06.1950 had been held invalid. In another civil suit filed by Rajdulari the will dated 13.03.1950 has been held valid. There has been the consideration regarding the will of the plaintiffs in civil suit decided by Additional District Judge, Rewa on 13.09.1952 and also in appeal decided by Judicial Commissioner, Vindhya Pradesh. Therefore, this suit was barred by res judicata. It was also pleaded that her mother was absolute owner of the property. She has bequeathed the property to her by registered will dated 18.01.1971 and, therefore, she is the owner of the disputed property, therefore, the plaintiffs are not entitled for any relief.

7. Respondent No.2 Bhanuprasad Shukla also filed the written statement mainly contending that no partition had been made amongst Jagatdeo Prasad and his brother of the ancestral property. The disputed property was ancestral property. Rajdulari was wedded wife w/o Jagatdeo Prasad. Jagatdeo Prasad was not

competent to execute the wills On 15.06.1969 Rajdulari also executed registered will in favour of Bhanuprasad and Annpurna Prasad The prayer was made to dispossess respondent No.1 from the disputed property and handover the possession to him.

8. Trial Court framed the several issues, recorded the evidence of both the parties. After appreciating the evidence, trial Court found that the disputed property was of Jagatdeo. He executed a Will dated 26.02.1950 in favour of Malkutiya which is valid. It was not found proved that he revoked this Will and executed another sale deed in favour of Shyamdas Shukla giving the life interest in this property to Malkutiya and thereafter vesting the property in him. The trial Court also found that the question of the execution of the sale deed in favour of defendant/ respondent No.1 is barred by the doctrine of res judicata and dismissed the suit. Being aggrieved by the judgment and decree passed by the trial Court the present appellants and respondent No.2 preferred the separate appeals before first appellate Court wherein Civil Appeal No.37A/1998 and 38A/1998 were registered and disposed of by the common judgment passed by the appellate Court on 17.01.1998. Both the appeals were dismissed. Appellate Court also confirmed the finding of trial Court that the suit of the plaintiffs was barred by the principle of res judicata. However, gave the finding in favour of the appellants that the subsequent will dated 15.06.1950 revoked the previous will dated 26.02.1950, therefore, there is no legal effect of the will dated 18.01.1971 executed in favour of respondent No.1 by her mother Mulkutiya since the appeal was dismissed on the basis of *res-judicata*, therefore, the present appellants preferred second appeal in this Court.

9. The learned counsel for the appellants Shri S.P.Mishra has submitted that the lower appellate Court held that the last will dated 15.06.1950 in favour of Shyamdas Shukla was valid and earlier will dated 26.02.1950 in favour of Smt. Malkutiya stood revoked in spite of the appeal was dismissed which is perverse. Learned counsel further submitted that the order passed in previous judgment dated 25.01.1951 has now become final and the will in favour of Shyamdas Shukla is valid. Smt. Malkutiya was regarded only as an administrator of the property in the judgment dated 04.12.1952. She was not the owner of the property hence was not competent to bequeath the property by registered will in favour of respondent No.1. Learned counsel further submitted that according to Section 48 of the Rewa Land Revenue and Tenancy Code, 1935 the illegitimate child can not get any right in the property. Shyamdas Shukla being nephew of Jagatdeo Prasad was entitled to inherit his property. The principle of res-judicata was not applicable in the case and both the courts below have incorrectly applied this doctrine.

10. On the other hand, Shri Alok Aradhe, Sr.Advocate with Shri Siddharth Gulati have submitted that the trial Court has given the reasons for accepting the will dated 26.02.1950 as valid whereas the lower appellate Court has given contrary finding to it without any valid reason. Therefore lower appellate Court was not justified in accepting the latter will valid. The memorandum of cross objection has

been filed in this regard to set aside such finding. The learned counsel invited the attention towards the previous litigations regarding the wills and contended that Judicial Commissioner, Vindhya Pradesh has finally accepted the will dated 26.02.1950 valid. This has the effect of res-judicata for this case. Since plaintiffs case has rightly been dismissed by both the Courts below, hence does not call for any interference.

11. Both the parties have adduced oral as well as documentary evidence. Respondent No.1 has filed the copy of judgment Ex.D/1 passed on 31.08.1950 by Munsif Court, Rewa in Civil Suit No.264/1950. The suit was filed by Rajdulari w/o Jagatdeo Prasad against Shyamdas, Janki Prasad, Laxmi Prasad, Bhanu Prasad and Mst. Malkutiya. The suit was for providing maintenance, residential accommodation and also to cancel the sale deed. In this case, it was held that there is no any effect of will dated 15.06.1950 (Ex.D/3) on the will dated 26.02.1950 (Ex.D/1) until cancelled. It was also held that the will dated 13.03.1950 was valid and Rajdulari was not entitled to get any maintenance from the property obtained by way of this will.

12. It is apparent from this judgment that both these wills were considered by the Courts and found the will dated 26.02.1950 which was registered on 13.03.1950 valid and the subsequent will dated 15.06.1950 did not cancel that will.

13. Appellants have produced the copy of judgment passed by District Judge, Rewa in Civil Appeal No.271/1951 decided on 25.01.1951 (Ex.P/4). This appeal was filed only with regard to cancel the wills. Appellate Court held that Jagatdeo Prasad was competent to execute the will but the provisions for maintenance ought to have been kept on the property. In this appeal, it was also held that will Ex.D/1 automatically was revoked by will Ex.D/3 and no action separately was required to be taken.

14. It again goes to show that these wills were considered in this appeal also.

15. Respondent No.1 has filed copy of another judgment Ex.D/5 passed by Additional District Judge, Rewa in Civil Suit No.33/1952 decided on 13.09.1952. This civil suit was also filed by Rajdulari against Malkutiya, Janki Prasad, Laxmi Prasad, Bhanuprasad and Shyamdas for maintenance as well as to declare the sale deed dated 13.03.1950 invalid.

16. In this judgment, it is mentioned that Rajdulari filed a civil suit No.264/1950 which was dismissed. Appeal was also filed but she could not get success. She prayed for withdrawal of that suit before the Court of Judicial Commissioner, Vindhya Pradesh. The permission was granted subjected to payment of costs of all the Courts. Therefore, after getting such permission, she filed the suit for maintenance, cancellation of sale deed dated 13.03.1950 and for recovering possession of house.

17. In this case, it was held that Rajdulari was entitled for maintenance of Rs.20/- per month from the property in possession of respondent No.1. She was also

entitled for arrears of maintenance allowance of Rs.160/- and there will be the charge on the disputed house. It was also held that the will made in favour of Malkutiya is in existence.

18. Being aggrieved by this judgment Malkutiya filed first appeal No.93/1952 which was decided by Judicial Commissioner, Vindhya Pradesh on 04.12.1952 wherein the maintenance amount was reduced from Rs.20/- to Rs.18/8/- per month and it was also mentioned that District Judge has held that will in favour of Malkutiya was properly executed.

19. The learned counsel for the respondent No.1 has submitted that since Rajdulari withdrawn the suit, therefore, the findings in the previous case are wiped out and subsequently in the judgment Ex.D/5 the will in favour of Malkutiya has been found in existence and also held properly executed hence it was the valid will and has not been cancelled or revoked by subsequent will. The contention of the learned counsel of the respondent No.1 appears to be acceptable. Since Shyamdas Shukla was also party in the case, therefore, he ought to have preferred the appeal raising the objection regarding the existence of will and also to revoke the same by subsequent will made in his favour.

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20. From the perusal of the previous judgments, it clearly indicates that not only the matter of maintenance was considered in these cases but the validity of the wills were also considered time to time and ultimately it was found by Ex.D/5 and Ex.D/2 that the will made in favour of Malkutiya is still in existence and properly executed.

21. Section 11 of the Code of Civil Procedure runs as follows:-

> "S.11. *Res Judicata*.- 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.-** The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> **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.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]"

22. In the case of *Isher Singh v. Shrawan Singh and others*, AIR 1965 SC 948 (V 52 C 151), the Apex Court has held that:

"The question whether a matter was directly and substantially in issue in the former suit has to be decided (a) on the pleadings in the former suit, (b) the issues struck therein, and (c) the decision in the suit. Further, it depends upon whether a decision on such an issue will materially affect the decision of the suit."

23. In the case of *Pawan Kumar Gupta v. Rochiram Nagdeo*, AIR 1999 SC 1823, the Apex Court has held that:

"Thus the second legal position is this : If dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as *res judicata* in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit."

24. No doubt the contesting parties in this case were not against each other in the previous cases but they were the co-defendants. The doctrine of res judicata also applies in between the co-defendants. The conditions for its application are as follows:

> "(1) there must be conflict of interest between the defendant concerned;
>
> (2) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims;
>
> (3) the co-defendants must be necessary or proper parties to the suit;
>
> (4) the question between the defendants must have been finally decided inter se between them."

25. The present suit was filed by Shyamdas Shukla on the basis of will dated 15.06.1950 regarding the declaration, possession and damage of the suit property situated at Sabji Mandi, Rewa. The wills made in favour of Malkutiya and Shyamdas Shukla have already been considered in the previous suit and the dispute was also regarding the same property. This was held as far back as in the year 1951 and 1952 that the will executed in favour of Malkutiya was proper then it was incumbent upon Shyamdas Shukla to get it revoked or cancelled. He remained silent upto 1977 and woke up after lapse of 4 years of death of Smt. Malkutiya by instituting the suit. The will made in favour of Malkutiya was registered whereas the paper on which the will in favour of Shyamdas Shukla is made has not been registered. It was never acted upon immediately even after the death of Malkutiya. The original will has also not been produced in the case only photocopy in the form of Ex.P/1 is filed. Malkutiya remained in settled possession of the property until her death and subsequently her daughter Smt. Shakuntala Bai is in the settled possession of the disputed property. Shyamdas Shukla never recovered the rent from the tenants residing in the disputed house. Smt. Shakuntala has reconstructed the house by investing the huge amount. Shyamdas Shukla knowing well the execution of sale deed in favour of Malkutiya and Shakuntala, never tried to get the will cancelled.

26. From the foregoing discussion and keeping in view the evidence available on record, it is manifestly clear that there has already been consideration regarding the validity of wills in the previous judgments and also with regard to the disputed property. Therefore, the judgment passed in the previous suits operate res judicata to this case hence both the Courts below have not committed any illegality in finding this case barred by *res judicata.*

27. Learned counsel for the respondent No.1 has submitted that appellants have not proved the will dated 15.06.1950 by valid evidence. Learned counsel has placed the reliance on the decision rendered by Apex Court in the case of *Beni Chand (since dead) now by L.Rs., v. Smt. Kamla Kunwar and others,* AIR 1977 SC 63, wherein it has been held that:

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> "By attestation is meant the signing of a document to signify that the attestor is a witness to the execution of the document; and by Sec. 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of the document. Where D and two others had signed below the thumb impression of the testatrix and D was examined and his evidence showed that he and the two others saw the testatrix putting her thumb mark on the will by way of execution and that they all signed the will in token of attestation in the presence of the testatrix, after she had affixed her thumb-mark on the will the execution was held proved in terms of Section 63 of Succession Act read with Section 68 of Succession Act read with Section 68 of the Evidence Act."

28. As stated earlier, no original will dated 15.06.1950 has been produced. It has not been held in any of the previous judgments that Malkutiya had only life interest in the suit property and that after her death the suit property has vested on Shyamdas Shukla.

29. Learned counsel for the appellants has submitted that Shyamdas Shukla was nephew of Jagatdeo Prasad and hence he was entitled his property according to Section 48 of Rewa Land Revenue and Tenancy Code, 1935. Learned counsel has further submitted that according to this act no illegal sons or daughters are entitled to the property under this Act.

30. So far as the present case is concerned, there is no question to get the property by way of succession because Jagatdeo Prasad has himself bequeathed his entire property to Malkutiya by registered will which has already been acted upon after his death.

31. Memorandum of cross objection has been filed on behalf of respondent No.1 for assailing the finding of lower appellate Court regarding the validity of the wills. The same has been objected by appellants mainly on the ground that this Court is to consider only the substantial questions which have been framed by Hon. Apex Court and also on the grounds of delay in filing the cross objection.

32. In the case of *Palasseri Velayudhan and another v. Palasseri Ithayi and others*, AIR 1994 Kerala 267, it has been held that:

> "If on the objections raised by the respondent a substantial question of law arises he can maintain a second appeal subject to the conditions embodied in S.100, C.P.C. The provisions of R.22 of O.41 regarding the taking of cross objections by respondent in a first appeal can therefore be made applicable to an appeal from an appellate decree since the provisions in O.41 "so far as may

be" had been made applicable to second appeals also. The phrase "so far as may be" only means that provisions of O.41 are to be made applicable to second appeals subject to the other provisions contained in the Act relating to second appeals. In other words, the applicability of R.22 of O.41 to an appeal against an appellate decree will be subject to the provisions contained in S.100, C.P.C. The position therefore is that a cross objection can be maintained in an appeal against an appellate decree but only if a substantial question of law is raised therein. The stringent conditions embodied in S.100 shall applicable to a cross objection filed in a second appeal. In other words, the cross objection shall precisely state the substantial question of law involved in the cross objection and the cross objection will be admitted only if the High Court is satisfied that the case involves a substantial question of law. On such admission of the cross objections the High Court has to formulate that question and the cross objections shall be heard only on the question so formulated."

33. It is apparent that the respondent No.1 has not framed substantial questions of law in the memo of cross objection as a result thereof no such substantial questions of law was formulated by this Court. Therefore, there is no need to consider the cross objection filed by respondent No.1.

34. After considering the entire aspect of the case, it is manifestly clear that both the Courts below have not committed any illegality in arriving at the conclusion that the suit of the plaintiffs was barred by the doctrine of res judicata, therefore, the appeal deserves to be dismissed.

35. Consequently, the appeal fails and is dismissed accordingly. The cross objection filed by respondent No.1 also dismissed. Parties to bear their own costs. The counsel fee be quantified as per schedule. The decree be drawn up accordingly.

Appeal dismissed.

I.L.R. [2008] M. P., 855
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
8 January, 2008*

RAJKUNWAR BAI & ors. Appellants
Vs.
MURLIDHAR & anr. Respondents

A. Specific Relief Act (47 of 1963), Section 20 - Specific Performance of Contract - Conduct of parties - Agreement to sell entered into in the year 1987 - Substantial Sale Consideration paid in 1987 - Suit for Specific Performance of

*F.A. No. 265/1995 (Indore)

Contract filed in 1990 - Held - There was no justification for waiting for filing of suit for a period of three years. (Para 10)

B. Specific Relief Act (47 of 1963), Section 15 - Who may obtain Specific Performance - Order of Specific Performance can be passed against any party to agreement. (Para 13)

C. Specific Relief Act (47 of 1963), Section 20 - Rights of purchaser against co-owner who is not a party to agreement and no money paid to such co-owner - Agreement to sell entered into by Bapu Singh, one of co-owners - Another co-owner, Rajkunwarbai not a party to agreement - No money paid to Rajkunwarbai - After death of Bapu Singh, she became owner of share of Bapu Singh along with other L.Rs. - Held - Rajkunwarbai was not a party to agreement - Therefore even if Rajkunwarbai became one of the co-owners of the share of Bapu Singh alongwith other L.Rs. - No decree for Specific Performance of Contract can be passed under facts and circumstances of case. (Para 15)

Cases referred :

2007 (4) MPLJ 234, AIR 2002 Kerala 297

T.C. Jain, for the appellants

A.K. Sethi with *Harish Joshi,* for the respondent No.1

S.D. Bohra, G.A. for the respondent No.2

J U D G M E N T

N.K. Mody, J. :–Being aggrieved by the judgment and decree dated 08/08/1995, passed by Ist Additional District Judge, Ratlam in Civil Suit No.2-A/1990, whereby the suit filed by respondent No.1 for specific performance was decreed, the present appeal has been filed.

2. Short facts of the case are that respondent No.1 filed a suit for specific performance on 08/01/1990 against Bapusingh & Rajkunwar Bai, alleging that Bapusingh and Rajkunwarbai were mother and son and were owner of a land bearing No.356, bearing two survey numbers measuring 4.070 hectares situated at village sejafta Tehsil & District Ratlam. It was alleged that deceased Bapusingh entered into an agreement to sale the land of survey No.166/509 measuring 4.050 hectares on 06/01/1987 for a consideration of Rs.27,500/- and towards earnest money respondent No.1 deposited a sum of Rs.14,900/- with Land Development Bank in the account of Bapusingh. It was further alleged that on 09/01/1987 deceased Bapusingh along with respondent No.1 went to Ratlam for executing the agreement to sale wherein it was acknowledged by Bapusingh that he has received Rs.20,000/-, which also includes Rs.14,900/-, which was deposited in his loan account. It was alleged that as per agreement the sale was to be executed within a period of 15 days. Further case of respondent No.1 was that the period of execution of sale deed was extended on 17/01/1987 and a sum of Rs.4,200/- was further paid for depositing in the loan account of Bapusingh in Primary Agricultural Co-operative Credit Committee, Amleta. Further case of respondent

No.1 was that on 20/01/1987, respondent No.1 along with Bapusingh and also along with one witness Bhanwarsingh went to one Kailsh Narayan Thakkar, document writer for getting the draft of the sale deed prepared, at that time it was pointed out by Kailash Narayan Thakkar that the sale deed cannot be executed unless and until the 'Rin Pustika' is brought. It was alleged that since Bapusingh was not possessing the 'Rin Pustika', therefore, the period of the agreement was further extended for a period of one month. It was alleged that on 21/01/1987 further loan of Rs.1400/- was given to Bapusingh by respondent No.1 for getting the documents prepared relating to 'Rin Pustika'. Further case of respondent No.1 was that thereafter repeatedly respondent No.1 asked Bapusingh to execute the sale deed but the sale deed was not executed by Bapusingh by one reason or another. It was further alleged that registered notice was given on 29/06/1987, wherein it was made clear that respondent No.1 is ready and willing to get the sale deed executed after payment of Rs.1,900/-, which is balance amount payable to Bapusingh. It was alleged that sale deed was not executed. On the contrary Bapusingh filed a suit bearing No.162-A/1981, for permanent injunction, wherein a temporary injunction was obtained on 28/09/1987, against which an appeal was filed by the respondent No.1, which was allowed and the temporary injunction granted in favour of Rajkunwarbai was vacated. It was further alleged that since the respondent No.1 has paid the substantial amount and was also ready and willing to pay the balance amount, therefore, a decree of specific performance be passed in favour of respondent No.1 and against Bapusingh and Rajkunwarbai to the effect to execute the sale deed in favour of respondent No.1 on payment of Rs.1,900/-.

3. The suit was contested by the Bapusingh and Rajkunwarbai. After service of summons Bapusingh died and legal representatives were taken on record, who are appellants herein. Rajkunwarbai, who was the mother of Bapusingh and other legal representatives of Bapusingh, who are appellants No.2 to 6 filed the written statement wherein the transaction was denied and it was prayed that the suit be dismissed. After framing of issues and recording of evidence learned Trial Court found that Bapusingh entered into an agreement to sale the suit property and received the consideration hence the suit filed by respondent No.1 was decreed against which the present appeal has been filed.

4. Mr. T.C. Jain, learned counsel for the appellants submit that the judgment and decree passed by learned Trial Court is illegal and deserves to be set aside. Learned counsel submits that learned Trial court came to the conclusion that it was not Bapusingh alone who was owner of property. It was further alleged that Rajkunwarbai, mother of Bapusingh is co-owner of suit property. It is submitted that Rajkunwarbai is not party to the agreement, therefore, even if it is presumed that any agreement was executed by Bapusingh then too no decree of specific performance could have been passed against Rajkunwarbai.

5. Learned counsel further submits that the transaction was a loan transaction

and it was never an agreement to sale the property. Learned counsel submits that to protect the interest of respondent No.1, the agreement was executed. Learned counsel further submits that even if it is found proved that any agreement was executed, then too the respondent No.1 was not entitle for a decree of specific performance.

6. Learned counsel further submits that the learned Court below came to the conclusion that the suit property was undivided Joint Hindu Family Property, inspite of that learned Court below committed error in decreeing the suit.

7. Mr. A.K. Sethi, learned counsel for respondent No.1 submits that undisputedly Smt. Rajkunwarbai was also a co-owner of the suit property but since Bapusingh was 'Karta' of Undivided Joint Hindu Family, therefore, the agreement was executed by Bapusingh only. Learned counsel submits that since Bapusingh entered into an agreement and the property was of Undivided Joint Hindu Family in which Rajkunwar bai was also having share, therefore, Rajkunwarbai was impleaded as party. It is submitted that during pendency of suit Bapusingh died and his legal representatives are taken on record. Thereafter during pendency of appeal Rajkunwarbai also died, legal representatives of Bapusingh were already on record, therefore, name of Rajkunwarbai deleted. Learned counsel submits that even if it is assumed that Rajkunwarbai was not party to the agreement then too, it does not make any difference because ultimately it is appellants who were owners of suit property right from the beginning being legal representatives of Bapusingh. Learned counsel placed reliance on Section 43 of Transfer of Property act, which lays down as under :

> 43. Transfer by unauthorised person who subsequently acquires interest in property transferred – Where a person [frauduently or] erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

8. Mr. Sethi, further placed reliance on Section 13(1)(a) of Specific Relief Act, which lays down as under :

> Section 13.Rights of purchaser or lessee against person with no title or imperfect title. – (1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely :-
>
> (a) If the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest.

9. Learned counsel further submits that ample evidence is on record to show

that it was not a loan transaction, because the amount was taken by deceased Bapusingh for payment of debts. It is submitted that respondent No.1 is in possession of suit property right from the year 1987, i.e. from the date of agreement. It is further submitted that in the facts and circumstances of the case the appellants have no case and appeal deserves to be dismissed.

10. From perusal of the record, it is evident that the agreement was dated 6/1/1987 while the suit was filed on 8/1/1990. Total sale consideration was of Rs.27,500/- out of which a sum of Rs.20,300/- was paid by the respondent to deceased Bapusingh. Since substantial sale consideration was paid by the respondent to deceased Bapusingh in the year 1987 itself, therefore, there was no justification for waiting for filing of the suit for a period of three years.

11. In the matter of *Atul Kumar Jain vs. Shriram alias Radheshyam*, 2007 (4) MPLJ 234, Division Bench of this Court has observed that the Court must consider the circumstances of the case, conduct of the parties and their respective interest under the contract. In that case, Hon'ble Division Bench further observed that the plaintiff was not prompt, active, vigilant and diligent from the very beginning to get the sale deed registered. He slept for the considerable time over his rights and did not prosecute the matter at the earliest opportunity available to him. If actually his rights were being infringed, then he should have immediately rushed to the Court to prevent the seller from executing the sale deed of the disputed property. In the present case also, similar circumstances are existing.

12. Apart from this, undisputedly, Rajkunwar Bai was the owner of the suit property alongwith deceased Bapusingh. Bapusingh was badly in need of money for payment of debts and a sum of Rs.14,900/- which was initially paid by the respondent was deposited in his loan account. Another sum of Rs.4200/- was also deposited in the account of Bapusingh in Primary Agricultural Co-operative Credit Committee, Amleta. That apart, a sum of Rs.1400/- was paid on 21/1/1987 to deceased Bapusingh for getting the documents prepared as Bapusingh was not possessing any document of his title. Thus, the respondent was knowing right from the beginning that it is not Bapusingh alone who is the owner of the suit property and Rajkunwar Bai was also the co-owner. Admittedly, no agreement was executed by Rajkunwar Bai in favour of the respondent.

13. Section 15(1)(a) of the Specific Reliefs Act, 1963 lays down that the order of specific performance can be passed against any party to the agreement.

14. In the matter of *Chenguni Othayoth Thankom vs. Kooloth Balkrishnan Nair*, AIR 2002 Kerala 297, Division Bench of Kerala High Court refused to pass a decree of specific performance where other owners of the property were not included in the agreement.

15. So far as the submission of the learned counsel for the respondent that even if no agreement was executed by Rajkunwar bai then too since she was also a legal representatives of deceased Bapusingh therefore after the death of

Bapusingh respondent is entitled for a decree of specific performance is concerned, it appears that Rajkunwar bai was the co-owner of the suit property alongwith Bapusingh. After the death of Bapusingh, Rajkunwar Bai also became the owner of the share of Bapusingh alongwith other legal representatives. Since there was no agreement between Rajkunwar Bai and the respondent, therefore, even if Rajkunwar Bai became one of the owner of the share of Bapusingh alongwith other legal representatives, then also, in the facts and circumstances of the case where no amount was paid to Bapusingh except to pay the loan amount, it appears that it is not a case where decree of specific performance be passed in favour of the respondent.

16. In the facts and circumstances of the case, this Court is of the view that the learned trial Court committed an error in granting decree of specific performance against the appellant. Since, it appears that the respondent is in possession of the property and the respondent was parted with money, in the year 1987, therefore, this appeal is allowed in part. Findings of the learned Court below so far as it relates to direction of execution of the sale deed is concerned, is set aside and the appellant is directed to pay a sum of Rs.20,300/- to the respondent alongwith interest at the rate of six percent per annum from the date of agreement provided respondent hand over the possession to the appellants within a period of three months failing which respondent shall not be entitled to any interest.

17. With the aforesaid modification the appeal stands disposed of. Parties shall bear their own costs.

Appeal disposed of.

I.L.R. [2008] M. P., 860
APPELLATE CIVIL
Before Mr. Justice S.K. Seth
15 January, 2008*

AHMED KHAN — Appellant
Vs.
SHER KHAN & ors. — Respondents

Motor Vehicles Act (59 of 1988), Section 166, Employees State Insurance Act, 1948, Section 53 - 1948 Act is piece of welfare measurement and it does not debar victim of a road accident to ask for compensation under law of torts - Claimant had already received lump sum amount of compensation and is getting monthly disability pension from ESI as per provision of Section 53 of 1948 Act - On this ground his claim petition under Motor Vehicles Act cannot be rejected. (Paras 3 & 4)

Cases referred :

1994 ACJ 579, 2007 ACJ 420

*M.A. No. 95/1999 (Indore)

Anjali Jamkhedkar, for the appellant
None, for the respondent No.1 & 2,
Anil Goyal, for the respondent No.3
A. Verma, for the respondent No.4

ORDER

S.K. SETH, J. :–This is claimant's appeal under Section 173 of the Motor Vehicles Act 1988. By the impugned Award, the claim petition filed by the claimant has been dismissed by the Tribunal in view of provision contained in Section 53 of the Employees State Insurance Act 1948 (for short 1948 Act) Tribunal found and held that the respondent Sirajkhan as also appellant were equally responsible for causing the accident. This finding is not under challenge. It is not disputed that on the fateful day, offending vehicle was insured with National Insurance Company Limited. Tribunal, however dismissed the claim petition in view of Section 53 of the 1948 Act only on the ground that the appellant had already received the lump sum amount of compensation and is getting monthly disability pension at the rate of Rs.1300.82 from the E.S.I. and as such, he is not entitled to compensation under Motor Vehicle Act, 1988; Hence this appeal.

2. We have heard learned counsel for appellant and learned counsel for the Insurance Company and M.P.S.R.T.C..

3. After having heard rival submission, in our opinion the appeal deserves to be allowed. The moot question is whether the appellant is entitled the compensation under the Law of Torts? Learned counsel for appellant placed reliance on a decision of this Court in the case of *M.P. State Road Transport Corporation Vs. Pravin Kumar Bhatnagar* – 1994 ACJ 579 and submitted that respondents can not take the plea that the appellant is not entitled to compensation under the Motor Vehicle Act, 1988. It is pertinent to point out that Section 53 of 1948 Act creates bar only against receiving the compensation for the employment injury. Section 53 came up for consideration of this Court in case of *M.P.State Road Transport Corporation* (supra) and it was held that the claimant could recover the compensation from the owner/driver and insurer of the offending vehicle involved in the road accident. The decision of this Court supra was later on approved by the Supreme Court in a subsequent decision. The Tribunal dismissed the claim petition only on this technical ground without assessing the amount of compensation. Shri Goyal, counsel for the insurance company is not right in contending that it was a case of composite negligence. As stated herein above, the Tribunal has found that it was a case of contributory negligence. In case of composite negligence the amount of compensation can be recovered from any of the joint tort-feasors. The accident occurred on account of collision between two vehicles and the Tribunal has rightly held that it was a case of contributory negligence.

4. Considering evidence and over all facts, circumstances, disability and permanent pension which has been sanctioned in favour of the appellant, we proceed to decide and assess the amount of compensation instead of remanding

the case back. From the evidence available on record it is clear that it was a case of collision between the two vehicles; one being driven by the appellant and driver of the other vehicle was Resp.2 Sirajkhan. Later vehicle was covered under the insurance policy. Besides the monthly disability pension, the appellant has also got lump-sum amount as he had sustained fracture in tibia and fibula in the lower region of the body. Learned counsel for Resp.3 submitted that Section 168 of the 1988 Act speaks about payment of just amount of compensation which the appellant under the E.S.I.Act has already received. We are afraid that such a contention could not be acceded to because 1948 Act is a piece of welfare measurement and, it does not debar victim of a road accident to ask for compensation under the Law of Torts. It does not exempt the insurance company from the claim of a third party. If contention of learned counsel for Resp.3, Insurance Company is accepted, then that would amount to putting a premium on the mis-conduct committed by the driver of the offending vehicle responsible for causing the accident. This is exactly what has been held by the learned Single Judge of Rajsthan High court as reported in 2007 ACJ 420 – *Oriental Insurance Company Ltd. Vs. Mohan Kanwar & ors.* We are in respectful agreement with the view taken by the Rajsthan High Court.

5. As a result we hold that in the present case Resp. 1 to 3 being owner, driver and insurer of the offending vehicle, can not escape from their liability to avoid payment of compensation under the Law of Torts.

6. The next question that arises is what would be the amount of compensation which the appellant is entitled to recover. It is not in dispute that the Resp.No.1, on the fateful day, was the owner of the offending vehicle, driven by Resp.2 and insured with Resp.3. The Tribunal has found that it was a case of contributory negligence of the appellant and Resp.2, driver of the offending truck. Therefore, negligence has been apportioned in equal measure. Although learned counsel for appellant tried to assail this finding but we are not impressed with the contention advanced in that regard and find that the Tribunal has rightly held that the appellant as well as Resp.2 were equally responsible for causing the accident and thus, contributed towards accident. Learned counsel for appellant submitted that because of injuries and permanent nature of disability suffered by the appellant, he can not drive any vehicle. As a result he was given a table work which he continued to do till he attained the age of retirement. It was also pointed out that for a month he remained in hospital in Indore and Mandsaur for treatment of the injuries sustained by him. It was also contended that the said absence has been regularized by the employer as leave without pay (LWP) and no wages were paid to the appellant for this absence of 713 days. Because of the non-payment of salary on account of LWP as aforesaid, the appellant has also not received bonus. Therefore, the appellant is entitled to receive just amount of compensation from respondents.

7. We find that the action of Resp.4 to treat the absence period as LWP was incorrect and illegal. Appellant is entitled to wages but not to bonus for the said

period because the bonus is attached and linked to the quantum of the work done by an employee under the establishment of M.P.S.R.T.C. In the facts and circumstances of the case, we hold that the appellant is entitled on all pecuniary and non-pecuniary heads Rs.1,00,000/- (one lakh) as compensation. However, in view of the finding of contributory negligence, the appellant would be entitled to receive from respondents jointly and severally a sum of Rs.50,000/- (fifty thousand) only, together with interest at the rate of 9% from today. We further direct that employer, M.P.S.R.T.C. (Resp. No.4) shall pay the wages for the period during which appellant was absent from duty on account of his hospitalization. Said amount shall be calculated and paid to the appellant within one months from today; failing which it would also carry interest at the rate of 9% from the date of this order till it is actually paid to the appellant.

8. In the result, this appeal is allowed in part to the extent indicated herein above. There shall be no order as to costs.

Appeal allowed in part

I.L.R. [2008] M. P., 863
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
31 January, 2008*

NEW INDIA INSURANCE CO. LTD. Appellant
Vs.
SURESH CHAND SANKLA & ors. Respondents

Motor Vehicles Act (59 of 1988), Section 170 - Owner (Respondent no.2) was driving offending vehicle, filed his written statement and affidavit but did not turn up for cross examination - Appellant filed application U/s 170 of Act seeking permission to contest claim on all grounds - Application dismissed without assigning any cogent reason and award passed by Tribunal - Held - Dismissal of application U/s 170 was without justification - As final award was passed within 6 weeks of order of dismissal of application - Appellant well within its right to challenge the order in appeal - Matter remanded back to Tribunal to allow Appellant to contest claim on all grounds which are available to Owner and Driver - Appeal allowed. (Paras 16 & 17)

Cases referred :

2007 ACJ 1177, II 2006 ACC 306, 2006 ACJ 678, 2007 ACJ 797, IV 2007 ACC 208, 2007 ACJ 889, 2006 ACJ 1336, 2006 ACJ 1889, AIR 2001 MP 116.

C.P. Singh, for the appellant
Sameer Aathwale, for the respondent No.1

O R D E R

N.K. Mody, J. :–Being aggrieved by the award dated 03.01.2004 passed

*M.A. No. 1430/04 (Indore)

by Member, MACT Neemuch in Claim Case No.132/02 whereby claim case filed by respondent No.1 on account of injuries sustained by him in a motor accident was allowed and a sum of Rs.2,02,500/- was awarded along with interest @ 9% per annum, the present appeal has been filed.

2. Short facts of the case are that respondent No.1 filed a claim petition alleging that on 17.4.2002 respondent No.1 was travelling in a Matador which was owned by respondent No.2 and insured with appellant. It was alleged that owner of the offending vehicle who is respondent No.2 himself was driving the vehicle which met with an accident because of rash and negligent driving in which respondent No.1 sustained injuries. In the claim case it was alleged that because of injuries there is a permanent disability for which respondent No.2 and appellants are liable for payment of compensation. The claim case was contested by respondent No.2 as well along with the appellant.

3. After framing of issues and recording of evidence, learned tribunal allowed the claim case filed by respondent No.1 and awarded a sum of Rs.2,02,500/- break up of which is as under:

towards permanent disability	Rs.1,00,000/-
towards medical expenses	Rs. 50,000/-
towards loss of income	Rs. 50,000/-
towards pain and suffering	Rs. 2,500/-
Total	Rs.2,02,500/-

4. Learned counsel for the appellant submits that the amount awarded is exorbitantly on higher side. Learned Counsel further submits that learned tribunal committed error in refusing the permission under section 170 of the Motor Vehicles Act by order dated 13.11.03 whereby the application filed by appellant under Section 170 of the Act was dismissed. Learned counsel submits that respondent No.2 submitted written statement and also submitted affidavit in evidence but thereafter did not appear for cross-examination. It is submitted that inspite of order passed by the learned tribunal for calling respondent No.2 by issuance of warrant, respondent No.2 did not appear. It is submitted that in the facts and circumstances of the case, appellant ought to have been given an opportunity to defend the case on quantum. It is submitted that whether the permission has wrongly been refused by the learned tribunal can always be examined, in an appeal filed before this Court and appellant Insurance Company can always challenge the award on quantum. For this contention reliance is placed on a decision reported in *United India v/s Jyotsnaben Sudhirbhai Patel and Ors.* 2003 ACJ 2107 wherein in a case where the driver and owner failed to contest the proceedings and Insurance Company sought permission under Section 170 of the Act to contest proceeding was allowed by the learned tribunal by passing a cryptic order stating prayer granted but did not record reasons and awarded compensation and in appeal filed by Insurance Company on grounds other than enumerated under Secion 149(2)

of the Act dismissed by High Court as not maintainable, because order of the tribunal was not a reasoned order; the Hon'ble Apex Court held that Insurance company should not suffer prejudice simply by the fact that tribunal had not recorded the reasons. It was further held that Insurance Company was justified in contesting the proceeding before the tribunal on the ground other than those enumerated under Section 149(2) of the Act as permitted by it. It was further argued that Insurance Company can be legitimately considered as "person aggrieved" within the meaning of Section 173 and remanded the case to the High Court for hearing and disposal on merits.

5. Reliance was further placed on a decision of Divisional Bench of this Court in the matter of *Oriental Insurance Company V/s Manisha Chaturvedi* 2007 ACJ 1177 wherein owner and driver proceeded exparte and tribunal rejected the prayer of Insurance Company for order under Section 170 of the Act without justification and without assigning any reason, it was held that the appeal filed by the Insurance Company challenging the quantum of compensation is maintainable. Reliance was also placed on a decision of Karnataka High Court in the matter of *New India Assurance Company v/s Shankar and Ors.* II 2006) ACC 306 wherein in a case where condition incorporated in policy reserving right of insurer to raise defence available to insured, was held that appeal filed by insurer is maintainable even in absence of permission under Section 170.

6. Reliance was also placed on a decision of Andhra Pradesh High Court in the matter of *Md.Rasheed V/s Susheela Agrawal and others* 2006 ACJ 678 wherein Insurance Company had not taken permission of the tribunal under section 170 in appeal an objection was raised to the effect that Insurance Company should confine itself to the defence open to it under section 149(2) and it cannot challenge the finding on negligence, ti was held that since appellate court found that findings of tribunal regarding negligence without any supporting evidence on record, therefore appellate court can interfere with the finding on negligence.

7. Reliance was also placed on the decision of *United India Insurance Co.Ltd. v/s Gorla Bondamma and ors.* Reported in 2007 ACJ 797 wherein Insurance Company pleaded that insured is not contesting the claim effectively and seriously before the tribunal and sought permission to contest it on all grounds, it was held that claimants have no say in a petition under section 170. It was further held that claimants opposing the petition prima facie is a ground to presume collusion between insured and claimants. It was further held that the tribunal was not justified in refusing to grant permission to Insurance Company under Section 170.

8. In the matter of *Oriental Insurance Company V/s Diva Shankar Rai @ Pappu IV* 2007 ACC 208 Patna High Court held that in exceptional cases appellate Court can interfere in judgment of tribunal when tribunal has applied wrong principle of law or has awarded excessive award of compensation.

9. Reliance was also placed on a decision of Kerala High Court in the matter of *Oriental Insurance Company V/s Narayan* as reported in 2007 ACJ 889 wherein application was filed under Section 170 before the tribunal but no order was passed by the tribunal on the said application and also the Insurance Company was also allowed to cross examine the claimant on disputed facts and Insurance Company filed the appeal it was held that omission to pass a specific order will not be fatal and the Insurance Company's right of appeal dangles on the decision of the tribunal on the application under Section 170 and the case was remanded to the tribunal for disposing the application under Section 170.

10. Learned counsel for appellant submits that since respondent No.2 was not possessing valid driving licence therefore, right of recovery ought to have given to appellant.

11. Reliance was placed on a decision in the matter of *National Insurance Company v/s Kusum Rai* 2006 ACJ 1336 wherein the Hon'ble Supreme Court in a case where the driver had licence to drive light motor vehicle but he was driving a jeep which was being plied as a taxi, a commercial vehicle, it was held that driver did not possess a valid licence to drive a commercial vehicle; Insurance Company may recover the amount paid from the owner by initiating proceedings before the executing Court.

12. So far as quantum is concerned, learned counsel submits that permanent disability was 10% as per medical certificate but it is not clear from the evidence that 10% permanent disability was of the whole body or of a particular limb. In the circumstances, award of Rs. 1 lac on account of permanent disability is on higher side. Learned counsel further submits that on account of medical expenses respondent No.1 has submitted bills of Rs. 22168/- which are Ex. P/17 to P/36 while Learned tribunal awarded Rs. 50000/- which is excessive. Learned counsel further submits that on account of loss of income learned tribunal awarded the amount of Rs.50000/- which is on higher side.

13. Mr. Sameer Aathwale, learned counsel for respondent No.1 submits that so far as right of recovery is concerned, it is not the case of the appellant that respondent No.2 was not having endorsement to drive transport vehicle. It is submitted that in the facts and circumstances of the case learned tribunal has rightly held appellant liable for payment of compensation. Learned counsel submits that appellant has not adduced any evidence to prove that respondent No.2 was not possessing any driving licence. Learned counsel for respondent No.1 submits that appeal itself is not maintainable. It is submitted that application under Section 170 of the Motor Vehicles Act, was filed by appellant on 30th Sept.2003, while claim petition was filed by respondent No.1 on 9.11.02 and written statement was filed by appellant on 14.2.2003. Learned counsel submits that application was filed by appellant at the fag end of the trial on 30th Sept.03, which was dismissed by learned tribunal vide order dated 13.11.03. Learned counsel submits that since no permission was granted to the appellant, therefore, appellant is not entitled to

challenge the quantum. For this contention reliance is placed on a decision of this Court in the matter of *United India v/s Kamla Raghuwanshi and Ors.* 2006 ACJ 1889, wherein a Division Bench of this Court has held as under:

> In case where Insurance Company sought permission of the tribunal under Section 170 which was refused by the tribunal, the Insurance Company filed appeal challenging quantum of compensation awarded and prayed that permission under Section 170 may also be granted. It was held that appellate Court cannot grant permission under Section 170 of the Act.

14. Learned counsel further submits that under section 173 of the Act appeal can be filed only by the aggrieved persons against award subject to Provision of Sub-sec. 20 of the Act. For this contention reliance is placed on a decision of this Court in the matter of *New India Insurance Company Ltd. v/s Smt. Rafeeka Sultana;* reported in 2001 MP 116, wherein this Court has held as under:

> "Section 173 has to be read alongwith Ss.149(2) and 170. Their operation is not confined to trial stage. It continues and in case, the insurer has obtained order from the Claims Tribunal at the trial stage, only then he can assail the award on all available grounds before the appellate Court otherwise limited defences under S.149(2) are available to it. Reading of S.173 with other two provisions would demonstrate that "any person aggrieved by an award" is not same thing as "person interested". Former has restricted meaning than the later. The claimant can be aggrieved by the award, if it is less or his claim petition is rejected. The insurer, insured and driver may be aggrieved where claim is allowed and responsibility fixed for payment of compensation. But they can appeal after satisfying the conditions mentioned in Section 173 of the Act and in case of Insurance Company, further restriction is that it cannot challenge the award except on grounds mentioned in S.149(2) of the Act unless reasoned order from the Claims Tribunal for taking up other defences is obtained during the trial stage."

15. As per Section 170 of the Motor Vehicles Act, the Claims tribunal has to satisfy and grant permission to the insurer if there is collusion between the claimant and against whom the claim is made or the person against whom the claim is made has failed to contest the claim. It is also the duty of the learned Tribunal to pass a reasoned order.

16. In the present case, claim petition was filed on 9.11.2002 and final award was passed on 3.1.2004 i.e. Within a period of 14 months. Written statement was filed by the appellant on 14.2.2003 and the application under Section 170 of the Motor Vehicles Act was filed on 30.09.2003. Since respondent No.2 who was also driving at the relevant time did not appear for cross-examination in spite of filing the affidavit and also did not appear in spite of issuance of warrant, there

was no justification on the part of the learned Tribunal to dismiss the application filed by the appellant under Section 170 of the Motor vehicles Act on 13.11.2003. Since final award was passed within a period of six weeks of passing of the order dated 13.11.2003, therefore,d the appellant was witbin its right to challenge the order dated 13.11.2003 in appeal whereby the permission was refused. Keeping in view the law laid down in the matter of *United India v/s Jyostsnaben* (Supra), appellant Insurance Company cannot be allowed to suffer prejudicial simply because of the fact that the Tribunal has refused the permission without assigning any cogent reason.

17. Thus, this appeal stands allowed. Impugned award as also the order dated 13.11.2003 whereby application filed by the appellant under Section 170 of the Motor Vehicles Act was dismissed and the case is remanded back to the learned Tribunal to allow the appellant Insurance Company to defend the case on all the grounds which are available to the owner and driver and, after recording of the evidence, if any, decide the claim petition afresh. Parties are directed to remain present before the learned Tribunal on 20th February, 2008.

Appeal allowed.

I.L.R. [2008] M. P., 868
APPELLATE CIVIL
Before Mr. Justice S.K. Seth
1 February, 2008*

MADAN LAL — Appellant
Vs.
VINOD KUMAR & ors. — Respondents

A. Hindu Adoptions and Maintenance Act (78 of 1956), Section 10 - Person who may be adopted - Appellant had already crossed age of 15 years and was married at the time of adoption - No pleading to the effect that there was any custom or usage permitting adoption of married boy or a boy of more than 15 years of age - Appellant failed to prove custom or usage - Necessary requirements of Section 10 for valid adoption not complied with. (Para 6)

B. Hindu Adoptions and Maintenance Act (78 of 1956), Section 16 - Registration of Adoption Deed - Presumption - Presumption would arise only when general conditions as laid down in Section 10 of Act are fulfilled. (Para 7)

V.K. Jain, for the appellant

ORDER

S.K. Seth, J. :–This is plaintiff's second appeal. He has lost in the trial Court as well as in the lower appellate Court.

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*S.A. No. 158/2007 (Indore)

2. Plaintiff/appellant filed a suit for declaration and permanent injunction on allegations that he constituted a co-parcenary with Jagram (Original defendant No.7 in the suit and it is a mystery how his name has disappeared from cause title of lower appellate Court and Memo of this second appeal). According to plaint allegations, said Jagram, with consent of his wife, by an unregistered document (Ex.P5) adopted appellant on 18.11.1970 after performing religious rituals and as per custom. Subsequently, a registered deed of adoption was executed on 16.1.1998 (Ex.P.1). Further case of the appellant was that Jagram, without any legal necessity and partition between the plaintiff and himself, could not have sold to defendant No.1 to 6 suit property more particularly described in paragraph 2 and 3 of the plaint. Thus, plaintiff sought a declaration that the sales affected by Jagram were not binding upon him and as he continued to cultivate the suit land, therefore he also sought relief of permanent injunction not to interfere with his possession over the suit land.

3. Defendant No.1 to 6 in their written statement denied the plaint allegations including the adoption and deed of adoption. Jagram in his separate written statement denied the adoption and joint ownership of the suit properties with plaintiff. Said written statement is dated 27.8.1997. Based upon pleadings, trial Court framed issues. Initially, trial Court, while deciding preliminary issue, returned the plaint for want of pecuniary jurisdiction, however, in appeal that order was set aside and case was remanded back for trial. Thereafter, parties led evidence. Upon appreciation of evidence, trial Court found that the so called adoption was not proved. It was also found that on the date of the so called adoption, plaintiff had crossed the prescribed age of 15 years and he has married. Trial court held that Ex.P.1 had no evidentiary value, as it did not bear the signature of plaintiff's natural father, more over it was executed and registered after Jagram had filed his written statement denying adoption. So far as Ex.P.5 is concerned, trial Court found that it was written on plain piece of paper and as such it was a useless piece of paper for want of registration and other reliable and cogent evidence to establish contrary custom or usage. On these findings, trial Court non-suited the plaintiff. Matter was carried in appeal by the plaintiff. As stated, the appeal was also dismissed by the impugned judgment and decree. Hence, this second appeal by the plaintiff.

4. Shri V.K.Jain, learned counsel for the appellant was heard at length on the question of admission. Learned counsel for the appellant strongly attacked the judgment and decree passed by the trial Court as well as by the lower appellate court. He submitted that plaintiff lawfully went in adoption to Jagram and Court below have erred in law in holding that no adoption was proved. In this connection, he referred to Ex.P-1 and Ex.P-5.

5. After having heard Shri Jain, and going through record of Courts below, we find that there is no merit and substance in this appeal. It is lo longer in dispute

that on the date of adoption, appellant had not only crossed the prescribed age limit but was also a married person.

6. Section 5 (1) of Act says :

> "No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter and any adoption made in contravention of the said provisions shall be void."

6. Section 10 of the Hindu Adoptions and Maintenance Act prescribes four conditions for a valid adoption. There is no dispute in respect of the first two conditions in the present case. The conditions (iii) and (iv) prescribe that person to be adopted should not be a married one and must not have completed the age of 15 years unless there is a custom or usage applicable to the parties permitting such adoptions. It is, therefore, clear that the first two conditions accept no exceptions while the subsequent conditions are subject to a contrary rule prevalent in the community by reason of a custom or usage. It is on the basis of this exception to conditions (iii) and (iv) that the plaintiff claims a valid and legal adoption inasmuch as, he had crossed the maximum age of 15 years and was also married at the time of this adoption. Section 3 of the said Act prescribes as to what is required to make an act or conduct amounting to custom or usage. According to it, it must be a rule, which has obtained the force of law because of its open, continuous and uniform observation for a long time and such a rule should not be uncertain, unreasonable or opposed to any public policy. It is to be considered in the case at hand as to whether the plaintiff proves by sufficient evidence on record that there was a custom or usage in his community permitting the adoption of a married boy of more than 15 years in age and whether such a custom or usage was observed openly, continuously and uniformly thereby gaining the force of law. It is pertinent to note that such a case of custom or usage in the community and the adoption in pursuance of such a custom is conspicuously absent. It is not pleaded in the suit that there was any such custom or usage in his community providing exceptions to conditions (iii) and (iv) of S.10 of the Act nor there is any whisper that the adoption of the plaintiff was made in conformity and in pursuance of such a custom or usage. It is material to note that what is averred in the plaint by the plaintiff is not that there was any such custom or usage but the adoption of the plaintiff by Jagram was performed as per customary ceremonies. The scheme of the Act is not to make a child of 15 years of age or above fit to be taken in adoption. Exception was made in favour of a custom to the contrary. The exceptions provided to conditions (iii) and (iv) of S.10 of the Act are not, therefore, sufficiently carved out in the case at hand and as such, the bar prescribed by these two conditions in respect of the marriage and age of the person to be adopted would come in the way of the present plaintiff. Both the Courts below were, therefore, justified and right in holding that the plaintiff failed to prove any custom as alleged and as such, the necessary requirements of S.10 for a valid adoption were not complied with.

7. It was next contended that in view of registered deed of adoption, Section 16 would come to the rescue of the appellant. We see no force in this submission too. Section 16 of the Act reads as follows: "Whenever any document registered under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved". The implication of S.16 of the Act is : It there is any document purporting to record an adoption made and it is signed by the person giving and the person taking the child in adoption, and that document is registered under any law for the time being in force and it is produced before any Court, the Court shall presume that the adoption has been made in compliance with the provisions of the Act, unless and until it is disproved. When S.16 speaks about compliance with the provisions of the Act, it has reference to the general requirements under the Act with regard to a valid adoption. The general requirement has been laid down in S.10. Cl.(iii) and (iv) thereof sets down the requirement regarding the marriage and age of the person to be adopted as fifteen years. If the conditions as per S.16 are satisfied, then there could be a presumption as to the satisfaction of the requirement of the age being fifteen years. But when the admitted position is that the age of person adopted was over fifteen years and he was married too, then it could only come under the exception, and the validity of such adoption could be upheld only when the custom or usage applicable to parties permitting the adoption of a person over the age of fifteen years is proved and established. The simple reason is, with regard to an exception, there could not be a presumption, legal or otherwise. Exception is a departure from the normal and general requirements. An exception takes out the case from the purview of general requirements. An exception must be proved and it cannot be presumed. When an exception is engrafted in the main part of the provision to the effect that on satisfaction of certain conditions, the general requirements need not be invoked, the onus in regard to such exceptional conditions is on the person who pleads them. An exception must be strictly construed. The presumption under S.16 does not cover the case of an exception to the general requirements of the provisions of the Act. That is how, S.16 must be construed. Otherwise, it will lead to anomalous results, e.g. even if there is no satisfaction of the general requirements, Court will be called upon to presume the exception. This could not be the intendment of the legal presumption under S.16. There must be plea and proof of the exception under custom or usage spoken to in Cl.(iii) and (iv) of S.10. Unless that is made out, there could not be a presumption of such custom or usage. Even by a bare reading of S.16, it is not possible to spell out a theory that is dispenses with pleading and proof in the case of an exception under S.10 (iii) and (iv) of the Act. Accordingly, we find that courts below have rightly non-suited the plaintiff. With the result, this Second Appeal fails and is hereby dismissed summarily as it does not give rise to

any question of law much less substantial question of law. Appellant shall bear the costs of respondents throughout.

Appeal dismissed.

I.L.R. [2008] M. P., 872
APPELLATE CIVIL
Before Smt. Justice Sushma Shrivastava
20 February, 2008*

GHASITIBAI — Appellant
Vs.
RAMGOPAL SINGH & ors. — Respondents

A. Registration Act (16 of 1908), Sections 17(b), 49 - Admissibility of Unregistered relinquishment deed - Unregistered relinquishment deed in respect of immovable property is inadmissible in evidence - Admission in unregistered document which amounted to declaration of title in the property could not be used in evidence. (Para 11)

B. Evidence Act (1 of 1872), Sections 33, 138 - Cross Examination of witness - Witness could not be cross examined not solely due to any inaction or lapse on the part of defendants - Subsequently, witness became incapable of giving evidence - Examination in chief of witness could not be read in evidence. (Para 13)

C. Evidence Act (1 of 1872), Section 67 - Exhibit of document- Mere marking a document as exhibit does not dispense with its proof. (Para 15)

Cases referred

2001 (2) MPLJ 502, AIR 1960 SC 100, AIR 1954 Nagpur 252, AIR 1974 SC 1723, AIR 1975 Madras 141, AIR 1966 Patna 110, 1973 JLJ 20 (SN), 1979(2) MPWN 109, 1994(1) MPWN 128, 1974 MPLJ 68, AIR 1971 SC 1865, 1993 JLJ 67

M.L. Jaiswal with *K.K. Gautam,* for the appellant
Avinash Zarger, for the respondents no. 1 to 5
None, for the respondent no.6

JUDGMENT

SMT. SUSHMA SHRIVASTAVA, J. :–This is plaintiff's second appeal against the judgment and decree dated 6.4.98 passed by Vth Additional District Judge, Sagar in Civil Appeal No. 1-A/98 arising out of the judgment and decree dated 13.10.97 passed by Second Civil Judge Class-I, Sagar in Civil Suit No. 243-A/94.

2. Brief Facts giving rise to this second appeal are as follows:

Plaintiff/appellant Ghasiti Bai filed a civil suit for declaration and permanent injunction, in the alternative for possession, in respect

*S.A No 507/1998 (Jabalpur)

of the suit land comprising of Khasra no. 292/3, 293/3, 302 and 295/2, total area 18.48 acres and the house built thereon, situated at village Surkhi, District Sagar. According to plaintiff, she is the sole surviving legal heir of her father, Late Pratap Singh, who died in the year 1963 and after his death, she became the owner of all his movable and immovable property. Her father Late Pratap Singh also executed a registered family settlement deed in favour of the plaintiff on 27.3.61, whereby she became the owner of the suit property. Defendants/respondents had no right, title or interest in the suit property, but they threatened to dispossess her; therefore, plaintiff gave them a registered notice not to interfere in her right and possession over the suit property but the defendants/ respondents no.1 to 5 claimed themselves to be the owner of the suit property on the basis of adverse possession. They also got their names mutated in the revenue records in collusion with Patwari. Therefore, plaintiff was constrained to file the suit against defendants before the trial court.

3. Defendants/Respondent no.1 to 5 contested the suit before the trial court and denied all the averments made in the plaint in the written statement filed before the trial court. They contended that their predecessor in interest, Kashi Bai was the daughter of Late Pratap Singh borne to him from his legally wedded wife Sanjli Bai and Kashi Bai was the sole legal representative of Late Pratap Singh. After the death of Pratap Singh, Kashi Bai became the owner of whole property belonging to Late Pratap Singh including the suit property. After death of Kashi Bai in the year 1965, her sons and the wife of her pre-deceased son i.e. defendants no.1 to 5 came to be owner and in possession of all the suit property and since then they are in peaceful possession and their names have also been mutated in the revenue records. It was further contended that after the death of his wedded wife, Pratap Singh developed illicit relations with one Sarju Bai and plaintiff was borne out of illicit relationship of Late Pratap Singh and Sarju Bai. Thus, plaintiff was neither the legitimate child, nor a legal representative of Pratap Singh. As such she had no right or title in the property of Late Pratap Singh. Defendants/respondent no.1 to 5 also denied the execution of any settlement deed by Late Pratap Singh in favour of the plaintiff and contended that such document, if any, was got executed by Sarju Bai, kept of Pratap Singh, taking undue advantage of his old age; such a document was void in the eye of law and plaintiff did not derive any right or title in the suit property. After the death of Kashi Bai Defendants/respondent no.1 to 5 are in continuous, uninterrupted possession of the suit property as owner thereof to the knowledge of plaintiff and her mother and they perfected title on the basis of adverse possession. Thus the right or title of the plaintiff, if any, had come to an end and she was not entitled to any declaration of title or relief of possession or permanent injunction in respect of the suit property.

4. On the above pleadings, the trial court framed various issues and after recording the evidence of both the parties came to hold that the plaintiff was not legitimate daughter of Late Pratap Singh and as such she was not his legal heir and she had no right or title in the property of Pratap Singh. The trial court further held that the registered family settlement deed (Ex.P-1) said to have been executed by Late Pratap Singh in favour of the plaintiff was also not duly proved for want of cross-examination of its attesting witness Sher Singh (PW-2) and plaintiff had not acquired any right or title in the suit property, therefore, dismissed plaintiff's suit by judgment and decree dated 13.10.97 passed in Civil Suit No. 243-A/94.

5. In Civil Appeal preferred by the plaintiff against the aforesaid judgment and decree, the first appellate court affirmed the finding that the family settlement deed (Ex.P-1) was not duly proved and plaintiff did not acquire any right or title in the suit property on the basis of Ex.P-1. The first appellate court also came to hold that the document (Ex.P-1) purporting to be a relinquishment deed executed by Late Kashi Bai was also inadmissible in evidence for want of registration and therefore, it could not be held that Late Kashi Bai had relinquished her right or title in the suit property in favour of the plaintiff by taking movable property like gold and silver and cash from her father. However, the first appellate court, on the basis of evidence on record, came to hold that the plaintiff was the legitimate daughter of Pratap Singh borne from his second wife Sarju Bai and therefore, she had equal right and title in the property alongwith her step sister Kashi Bai, the predecessor in interest of Defendants/respondents no.1 to 5 and therefore, partly allowed the appeal granting the relief of declaration in favour of the plaintiff to the effect that she had equal right in the suit property alongwith Kashibai by the impugned judgment. Plaintiff has, therefore, preferred this Second Appeal.

6. This second appeal was admitted and heard on the following substantial questions of law:-

> 1. Whether the courts below erred in law that Ex.P-5 being unregistered was inadmissible in law ?
>
> 2. Whether the courts below erred in law in rejecting the evidence of attesting witness to Ex.P-1 for want of cross-examination and in holding it as not proved ?

7. Learned Sr. counsel for the appellant/plaintiff submitted that it was not disputed between the parties that Late Pratap Singh was the exclusive owner of the suit property. As such he had right to dispose of his property in the manner he liked and by virtue of family settlement deed (Ex.P-1) Late Pratap Singh had given all his immovable property i.e. suit property to the plaintiff/appellant, which was also fortified from the contents of Ikrarnama (Ex.P-5) executed by Kashi Bai. In face of family settlement deed (Ex.P-1), the question of other daughter of Late Pratap Singh, namely, Kashi Bai getting any right in the suit property did not arise. So the conclusion of the lower appellate court, that both the daughters had

equal right in the suit property, was without any basis, particularly in view of the admission of Kashi Bai made by her by way of Ikrarnama (Ex.P-5), which was duly proved by the plaintiff by her two witnesses, namely, Surat Singh (P.W.-3), who was the brother of Late Pratap Singh and Natthan Singh (P.W.-4). However, the Court below erred in law in holding that Ex.P-5 being unregistered was inadmissible in evidence and that for want of cross-examination of the attesting witness Sher Singh (P.W.-2) family settlement deed (Ex.P-1)was also not proved.

8. Learned counsel for the appellant/plaintiff placing reliance on the decision of this Court in the case of *Bhanwarlal & Ors Vs. Heeralal* reported in MPLJ 2001(2) page 502 submitted that in view of proviso to section 49 of Registration Act even an unregistered document could be read and used as evidence for collateral purpose and thus Ikrarnama (Ex.P-5) executed by Kashibai could be used as an admission by Kashi Bai of the family settlement made by Late Pratap Singh by way of Ex.P-1. He further submitted that, as held by the Apex Court in the case of *Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi & Ors* reported in AIR 1960 Supreme Court Page 100, the admission is best evidence that an opposite party can rely upon, unless it is successfully withdrawn or proved erroneous. Learned Sr. counsel for the appellant/plaintiff also emphasized that the execution of Ex.P-5 was duly proved by the evidence of plaintiff's two witnesses, namely, Surat Singh (PW-3) and Nathan Singh (PW-4).

9. Learned counsel for the appellant/plaintiff further submitted that the courts below gravely erred in holding that uncross-examined testimony of Sher Singh (P.W.-2), an attesting witness to Ex.P-1 could not be read in evidence. Placing reliance on the decision rendered in case of *Dwarkabai Vs. Ukharda Ganpat* reported in AIR 1954 Nagpur page 252, learned counsel for the appellant/plaintiff submitted that if cross-examination of the witnesses of the opposite party was not done due to absence of the pleader, it could not be made a ground of attack. Also placing reliance on a decision of the Apex Court in the case of *Mulkh Raj Sikka Vs. Delhi Administration* reported in AIR 1974 Supreme Court page 1723 learned Sr. counsel for the appellant/plaintiff submitted that if the opportunity to cross-examine the witness was availed of and the cross-examination was reserved, then the evidence of such a witness was admissible under section 33 of the Evidence Act if the witness subsequently became incapable of giving evidence. It was further submitted that uncross-examined testimony of PW-2 Sher Singh was also admissible under section 32 Clause 7 of the Evidence Act, when the witness subsequently became incapable of giving evidence. Reliance was placed on the decisions reported in AIR 1975 Madras page 141 *(A. Rangaswami Pillai Vs. A. Subramania Pillai and others)* and AIR 1966 Patna page 110 *(Satyadeo Prasad Vs. Smt. Chanderjoti Debi & others)* in this behalf. Learned counsel for the appellant/plaintiff also submitted that even otherwise the family settlement deed (Ex.P-1) was proved by the evidence of plaintiff Ghasiti Bai (P.W.-1) herself and its execution was also not specifically denied and thus, the two Courts below erred in holding it as not proved.

10. Learned counsel for the respondents, on the other hand, submitted that Ex.P-5 was a document in the nature of relinquishment deed in respect of immovable property and such a document being unregistered was not admissible in evidence in view of section 49 of Registration Act. Even if it was to be seen for collateral purpose, it could not be read as an evidence of relinquishment of any right of Kashi Bai in immovable property of Late Pratap Singh or conferral of any rights on plaintiff in the suit property. Learned counsel for the respondents placed reliance on a decision of this Court reported in JLJ 1973 short note 20 page 17 *(Phoolbai and others Vs. Kodulal and another)* in this behalf. Learned counsel for the respondents further submitted that Ex.P-5 was a document purported to be executed by Kashi bai and as such contents of Ex.P-5 could not be an admission on the part of her legal heirs i.e. respondents, who were not parties to it. More so Ex.P-5, it was submitted, was not a genuine document, as it was never referred to in the plaint, nor in the notice (Ex.P-2) sent by the plaintiff to the respondents before filing of the suit and was an after thought. Learned counsel for the respondents also submitted that uncross-examined testimony of the attesting witness Sher Singh (P.W.-2) could not be looked into and was not admissible in evidence. Reliance was placed on the various decisions of this Court as reported in 1979 (2) MPWN short note 109 *(Benibai Vs. State of M.P.)*, 1994(1) MPWN short note 128 *(State of M.P. Vs. Khilan Singh)* & 1974 MPLJ short note 68 *(Motilal Vs. Sunder Bai)*. Learned counsel for the respondents, therefore, submitted that the courts below did not err in rejecting the documents Ex.P-1 and Ex.P-5, particularly when the execution of both the documents was in question and not in any way admitted by the respondents.

11. After considering the submissions of both the sides and on going through the record of the case, I am of the opinion that this appeal has no merit. The document (Ex.P-5) said to have been executed by Kashi Bai is an unregistered document. This document (Ex.P-5) on the face of it, as it reads, is in the nature of deed of relinquishment of the right of Kashibai in the immovable property of her father Late Pratap Singh in favour of the appellant/plaintiff in exchange of the movable property taken by Kashi Bai. Such an unregistered document, being a deed of relinquishment in respect of immovable property, is inadmissible in evidence in view of the provisions of Section 17(b) and Section 49 of Registration Act. No doubt, such an unregistered document may be received as an evidence of any collateral transaction not required to be effected by registered instrument. However, the submission of learned counsel for the appellant/plaintiff, that this could be received as an evidence of admission of Kashibai of the contents of family settlement deed (Ex.P-1), has no force. If this document (Ex.P-5) is taken to be an admission of the contents of Ex.P-1, settlement deed said to be executed by Late Pratap Singh in favour of the plaintiff, that would also amount to conferral of right or title on the appellant/plaintiff in the immovable property of her father, which would again be inadmissible in evidence for want of registration of the document. It has also been so held by this Court in the case of *Phoolbai and*

others Vs. Kodulal and others (supra) that an admission in unregistered document, which amounted to declaration of title in the property could not be used in evidence.

12. Moreover, there has been a finding of fact recorded by the lower appellate court that the document (Ex.P-5) was not duly proved by the evidence of its two attesting witnesses, namely, Surat Singh (P.W.-3) and Nathan Singh (P.W.-4), in view of their statements made in the cross-examination that Kashibai had not written any document before them and in view of their denial in cross-examination to the facts contained in Ex.P-5. The lower appellate court also noticed that Ex.P-5 was never referred to in the plaint, nor in the notice (Ex.P-2) sent by the plaintiff to the respondents no.1 to 5 before filing of suit. It is also pertinent to mention that this document (Ex.P-5) was never put to respondent no.1 Ramgopal (D.W.-1) during his cross-examination, who could be the best person to admit or deny the signatures of his mother Kashi Bai on Ex.P-5. Be that as it may, the document (Ex.P-5), being in the nature of a relinquishment deed, was not admissible in evidence for want of registration. The courts below, therefore, did not err in holding that Ex.P-5 was not admissible in evidence for want of registration.

13. As regards the second substantial question of law, it is evident from the record that the testimony of Sher Singh (P.W.-2), an attesting witness to the family settlement deed (Ex.P-1), remained uncross-examined. It is also evident from the commissioner's report on record that this witness (P.W.-2) could not be subsequently cross-examined as he became incapable of giving evidence due to infirmities of the old age. Broadly speaking, an uncross-examined testimony of witness cannot be read in evidence, as the right of cross-examination under section 138 of the Evidence Act is an important right. A perusal of record also reveals that the respondents/defendants had not availed the opportunity of cross-examining this witness on the day when his examination-in-chief was recorded, and that was not due to any fault on the part of respondents. The non cross-examination of this witness (P.W.-2), as the record shows, could not be attributed solely to any inaction or lapse on the part of the respondents or absence of their counsel. Therefore, when the respondents/defendants did not have the opportunity to cross-examine this witness, namely, Sher Singh (P.W.-2), his uncross-examined testimony, when the witness subsequently became incapable of giving the evidence, could not be admitted and read in evidence under section 33 of the Evidence Act in view of proviso attached to section 33 of the Evidence Act. The citations referred to by learned counsel for the appellant/plaintiff in the case of *Dwarkabai Vs. Ukharda Ganpat and Mulkh Raj Sikka Vs. Delhi Administration* (supra) do not render any assistance to the appellant in the facts of the instant case.

14. The submission of the learned counsel for the appellant that uncross-examined testimony of Sher Singh (P.W.-2) could be read under section 32 of Evidence Act also has no merit. The provisions of Section 32 Clause 7 has no application to an uncross-examined testimony of a witness given in a judicial proceedings. The citations referred to by learned counsel for the appellant/plaintiff rendered in the case of *A. Rangaswami Pillai Vs. A. Subramania Pillai and*

others and *Satyadeo Prasad Vs. Smt. Chanderjoti Debi* (supra) have no bearing on the point.

15. The submission of learned counsel for the appellant/plaintiff, that the family settlement deed (Ex.P-1) executed by Late Pratap Singh in favour of the appellant/ plaintiff was proved by the evidence of plaintiff Ghasiti Bai (P.W.-1) herself, has also no merit. As held by the Apex Court in the case of *Sait Tarajee Khimchand and others Vs. Yelamarti Satyam and others* reported in AIR 1971 Supreme Court page 1865, mere marking a document as an exhibit does not dispense with its proof. Here also plaintiff Ghasiti Bai (P.W.-1) nowhere proved the signature of Late Pratap Singh on Ex.P-1, which obviously she could not do, as she was only a minor child of tender years at the time of execution of Ex.P-1, as is revealed from her own evidence. However, she admitted that her mother was also alive at the time of her deposition, but she was not examined to prove the signature or execution of the family settlement deed (Ex.P-1) by Late Pratap Singh. Section 67 of the Evidence Act requires that if a document is alleged to be signed or to have been written wholly or in part by the witness, the signature or the hand writing of so much of the document should be proved to be in his handwriting. Thus, from the evidence of plaintiff/appellant Ghasiti Bai (P.W.-1) the signatures of Late Pratap Singh on Ex.P-1 or execution thereof by him was not legally proved and Ex.P-1 was simply exhibited in her evidence. There was no other legally admissible evidence on record to prove the execution of Ex.P-1.

16. The submission of the learned counsel for the appellant/plaintiff that the finding recorded in para 16 of the impugned judgment that document (Ex.P-1) was not thirty years old, was erroneous, being a finding of fact could not be assailed in the second appeal, although such a finding was not erroneous in view of the fact that the document (Ex.P-1) dated 27.3.61 was tendered in evidence on 21.7 82 by the plaintiff and by that time it was not a thirty years old document. More so, as held by this Court in the case of *Mohinuddin and another Vs. President, Municipal Committee Khargone* reported in 1993 JLJ page 67 the contents of thirty years old document could not be presumed to be true by virtue of presumption attached to such document.

17. Thus, the execution of the document (Ex.P-1) was not proved from the evidence on record. The courts below did not err in rejecting the uncross-examined testimony of P.W.-2 Sher Singh, an attesting witness to Ex.P-1 and in holding it as not proved.

18. In the wake of aforesaid, both the substantial questions of law are answered in negative.

19. In absence of proof of Ex.P-1 & Ex.P-5 the appellant/plaintiff could be not held to be exclusive owner of suit property.

20. Consequently this appeal fails and is dismissed.

Parties to bear their own costs.

Appeal dismissed.

I.L.R. [2008] M. P., 879

APPELLATE CRIMINAL

Before Mr. Justice Abhay Gohil & Mr. Justice A.P. Shrivastava

6 December, 2007*

STATE OF M.P. Appellant

Vs.

BABLOO & ors. Respondents

Penal Code (45 of 1860), Section 376(2)(g) - Gang Rape - Prosecutrix, a blind women identifying the accused persons from their voices - Prosecutrix not accustomed from the voices of respondents - No Identification parade on the ground of voice conducted - She could not identify any person on the basis of their voices in Court - Two parties in village - Prosecutrix brought by one party to implicate the members of other party - False implication of respondents not ruled out - Respondents rightly acquitted by Trial Court - Appeal dismissed.

Case referred : (Para 6)

AIR 1965 SC 712

Mukund Bharadwaj, P.P. for the appellant/State

Arvind Dudawat, for the respondent No.1

M.K. Jain, for the respondents No.2 & 3

JUDGMENT

The Judgment of the Court was delivered by

ABHAY GOHIL J. :-This State appeal is against acquittal of the respondents under Section 376(2)(g) of IPC, read with section 3(2)(v) of the S.C.S.T. (Prevention of Atrocities) Act. The respondents were tried in Special Case No.282/1997 for the offences under section 376 (2)(g) I.P.C. read with section 3(2)(v) of the S.C.S.T.(Prevention of Atrocities) Act and vide judgment dated 10th August, 1998, the respondents were acquitted.

2. As per prosecution story, complainant is a blind lady. She was residing in the house of Rampyari Bai and used to sleep in the cattle house belonging to that lady. She is a poor lady and she used to pull on her life at the mercy of others. Two three days after Diwali, in the year 1997 when she was sleeping in the cattle house, all the co-respondents came there and the respondents had committed rape with the complainant with the help of Rampyari Bai. When she cried Rampyari Bai stopped her and said that if you will cry or will say to anybody, you will be killed and put to fire. However, the complainant on the basis of their voice identified the persons those who had committed rape with her. They were Neelu, Bablu,Manju and Pappu belonging to the same village, as they were talking with Rampyaribai. Rampyaribai did not allow her to go out from the house. Thereafter, the complainant narrated the story to Sarpanch Imrat Singh and Chaukidar and thereafter on 16.11.1997, Chaukidar informed to Police Station, Gulabganj and

*Cr.A. No. 144/1999 (Gwalior)

FIR was lodged. It was also submitted that earlier also during Navratri period all the four respondents had committed rape with her. But as she was threatened by Rampyari Bai, therefore, she did not lodge the report. Thereafter she was referred for medical examination. The slide of vaginal smear was prepared, sealed and referred to chemical examination. The matter was investigated and charge sheet was filed. The Trial court examined as many as eight witnesses and after considering the prosecution evidence found that the prosecution has failed to establish the allegations and charges levelled against the respondents and acquitted them, against which the State has preferred this appeal against acquittal after obtaining leave.

3. We have heard learned counsel for the parties and perused the evidence on record.

4. The trial court found that the testimony of complainant is not at all reliable and not corroborated and supported by any other evidence and found that though the corroboration and support from other evidence is not necessary, but it was considered that the evidence of the complainant should be of a sterling quality, reliable on the face of it and should inspire confidence. It was found that there was a delayed FIR and it is not supported by medical evidence. Though in the undergarments of the prosecutrix and on the slide of the vaginal human smear were found but the smear found on the slide and of the accused persons were not found sufficient for chemical examination. Therefore there is no evidence that they were matched. Nothing was mentioned in the FIR that earlier also at the time of Navratri, the similar incident was repeated by the respondents. Dr. Aparna Tiwari (PW-6) had not found any injury either on the part of body of the complainant or on the private parts. The prosecutrix is a married woman having six children, therefore, it was not possible for the doctor to give any opinion about the sexual intercourse. The trial court also found that this fact was also not mentioned in the F.I.R. or in her 161 statement, Ex. D-3 that any tablet was administered to her in the tea by Rampyari Bai so that she became unconscious for the time being and she could not cry because her mouth was pressed by the respondents.

5. As per prosecution story, Rampyari Bai was the co-accused who was helping the respondents and was threatening the complainant but because she died, therefore, charge sheet was not filed against her. The court found that there are material contradictions and omissions in the statement of the complainant that Rampyari Bai had taken money or Rs.25/- each from the respondents. The trial court also found that the complainant has narrated the incident to Munnibai, Ramkoba, Daulatsingh and two women belonging to the house of Jairam but all those were not cited as witnesses by the prosecution. Only Ramkobai was examined as PW-3, who has not supported the prosecution and deposed that the complainant has not narrated any incident to her and she was declared hostile.

6. On the question of voice identification of these respondents, as the complainant was a blind lady, naturally she was unable to see them and to identify

them, though it was the case of the prosecution that she identified the respondents on the basis of their voice but the trial court found that neither any identification parade on the ground of voice was conducted nor she could identify any person on the basis of their voices in the court. The trial court also found that the complainant was not accustomed from the voices of the respondents as she had not heard their voice earlier before the incident nor there was any occasion to hear their voice, therefore, it was held that in such circumstances it would be very difficult to identify the persons on the basis of their voice as she also could not identify them in the court. Imrat Singh(PW-2) and Bheeka (PW-1), who is the village Chaukidar, have also not supported the prosecution in the same way as it was before the police. It was submitted that in the village there are two parties, one belongs to Keshav Singh and the other belongs to Khilan Singh and Imrat Singh brought the complainant with a view to falsely implicate the members of opposite party. Therefore, the false implication at the behest of Imrat Singh was not ruled out.

7. We have considered this aspect whether the statement of complainant alone is capable to inspire confidence and is reliable and whether the finding of acquittal can be reversed. It is true that in a offence like rape complainant is not accomplished, therefore, it is not necessary that her evidence should be supported or corroborated by other witnesses or by other evidence, but it is also necessary that her statement should inspire confidence and whatever incident she has narrated should be consistent, whether she is really the victim or was acting at the behest of some other person. As the court has held that she may be acting at the behest of Imrat Singh (PW-2), who was having enmity with other party, the false implications cannot be ruled out. She may be a victim but the question is whether the respondents are the same persons who were involved in the commission of crime, there is no conclusive and positive evidence on record. Simply on the basis of evidence of identification on voice, which is also not proved, the finding of acquittal can not be reversed. No doubt, evidence of voice identification is a very weak kind of evidence. Unless there is firm and full proof evidence that a person is conversant with the voice of another person, or having constant touch of that voice or capable to recognize a person on the basis of voice, the same cannot be considered as reliable or a strong piece of evidence. Here, in this case the voice was not known to the complainant and she could not recognize the respondents in the Court.

8. In the matter of voice identification in the case of *Kirpal Singh v. State of Uttar Pradesh* (AIR 1965 SC 712), the Supreme Court has held as under :-

> "The identification of a person by the timbre of his voice depending upon subtle variation in the overtones when the person recognizing is not familiar with the person recognised is risky. But where the accused, the Court further proceeded was known to the witnesses and for more than a fortnight before the date of occurrence he

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had met the accused on several occasions and the witnesses had heard the accused and his brothers calling deceased to come out of the hut, the identification of the accused and his brothers by their voice was not improbable.

9. When there is no evidence that the complainant was familiar with the voice of the respondents and she had heard the voice first time on that day and was not frequently hearing their voices, it will not be proper to place reliance on the aforesaid evidence and to reverse the finding of acquittal.

10. Thus, in such circumstance the finding of acquittal cannot be reversed on that kind of evidence. Therefore, after considering the prosecution evidence on record and looking to various lapses in the prosecution evidence, it appears that the learned Judge has not committed any illegality in acquitting the respondents as there is no clinching, reliable and convincing evidence on record to reverse the finding of acquittal and to convert it into a finding of conviction. There is no eye witness account in the case that the incident was witnessed by anybody on her cries were heard or she left any mark on the body of the respondents which were capable of identifying them.

11. Thus, considering the totality of the facts and circumstances of the case, we are of the view that no case is made out to interfere in this appeal against acquittal. Consequently, the appeal is dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 882
APPELLATE CRIMINAL
Before Mr. Justice Abhay Gohil & Mr. Justice N.K. Mody
11 December, 2007*

MITHILESH — Appellant
Vs.
STATE OF M.P. — Respondent

Penal Code (45 of 1860), Sections 302, 304 Part II - Murder or Culpable Homicide not amounting to murder - Appellant who is nephew of deceased became furious seeing that deceased was providing water to another from his own motor pump - Appellant lost his balance and gave two spade blows to deceased - No enmity between parties - No pre-meditation to commit murder - Spade is a common agricultural weapon and its presence is also not uncommon - Incident took place suddenly - Offence will fall under Section 304 Part II - Appellant already undergone eight years of imprisonment - Jail sentence reduced to already undergone - Appeal partly allowed. (Paras 6 and 7)

Dhirendra Singh, for the appellant
Vivek Khedkar, P.P. for the respondent/State

*Cr.A. No. 42/2000 (Gwalior)

JUDGMENT

The Judgment of the Court was delivered by ABHAY GOHIL, J.:–In this appeal filed under Section 374 Cr.P.C. the appellant has challenged the judgment of conviction under Section 302 IPC, and sentence for life imprisonment with fine of Rs.1000/- passed on 6.1.97 in Sessions Trial No.108/96, by Third Additional Sessions Judge, Bhind.

2. The prosecution story in short is as under:-

On 16.12.95 at about 1.30 p.m. at village Akoda deceased Gambhir Singh was giving water in the field of Bachude Khan. Shivpratap Singh and Tilak Singh, two sons of Gambhir Singh were also sitting near the field. Appellant-Mithilesh, who is also nephew of the deceased, came from village side carrying spade in his hand, hurled abuses at Gambhir Singh and asked him to stop operating pump and at the same time gave two spade blows on his head. Deceased sustained injuries and died on spot. Sons of the deceased also came to save their father and thereafter accused went away from the spot with the spade. Shivpratap Singh lodged FIR, Ex.P/1, at P.S.Umari, where crime was registered, matter was investigated and charge sheet was filed. During trial, as many as 10 witnesses were examined. Dr.A.K.Saxena (PW7) conducted autopsy of the dead body and according to him, the deceased received two lacerated wounds in the head and the deceased died because of excessive bleeding and shock. Trial Court after considering the evidence of the witnesses found the appellant guilty under Section 302 IPC, convicted and sentenced him as aforesaid. Against which the appellant has preferred this appeal.

3. We have heard the learned counsel for the parties and perused the evidence on record.

4. At the outset, learned counsel for the appellant submitted that the incident took place all of sudden. The appellant, who is the nephew of the deceased, became furious seeing that the deceased was providing water to the field of Bachude Khan from his own water pump, lost his balance and gave two spade blows to the deceased. The deceased was his Uncle. It is further submitted that Shivpratap Singh (PW1), who is the son of the deceased, has also admitted in his evidence that the incident took place under heat of sudden provocation, their relations were very cordial and they belong to the same family. Same is the statement of Tilak Singh (PW2), who is the another son of the deceased. Ram Mohan Singh (PW9), who is also the eye-witness, has not supported the prosecution and he was declared hostile. Therefore, it is submitted that the appellant has already suffered jail sentence of more than eight years and looking to the nature of incident and the weapon used in the commission of crime, it cannot be held that there was any premeditation or intention to cause death of the deceased or the blows were also given with intention to cause death of the deceased. Therefore, it was argued that the case will not fall under section 302 and at the most, it may be a case under Section 304 Part II, IPC and submitted that the conviction be altered from Section 302 to

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Section 304 Part II, IPC and the appellant be released on undergone jail sentence. In reply, Shri Vivek Khedkar, learned Public Prosecutor, supported the judgment.

5. After hearing the parties we have also perused the evidence on record. It is true that Shivpratap Singh (PW1) and Tilak Singh (PW2), who are the sons of the deceased, have admitted that there was no enmity between the deceased and accused persons. The deceased was Uncle of the appellant-accused, they belong to the same family and same village and their relations were also cordial. Though there was no partition of land, but there was no enmity between them. The weapon used in the crime was the spade, which is generally being used in the agricultural operations by the agriculturists and is a common agricultural implement, therefore, it was submitted that the presence of spade is also not uncommon in the case and it was not brought on spot with a view to commit such offence. Thus, it cannot be held that the spade is a dangerous weapon. It was further submitted that Akhilesh and Umesh have denied the presence of both the eye witnesses Shivpratap Singh and Tilak Singh on spot at the time of incident and Ram Mohan Singh (PW9) has also admitted that he has not seen the incident. It was also submitted that the aforesaid spade was recovered from the field of mustard, after 25 days of the incident and the prosecution has not proved either the identity of the spade or that the same belongs to the accused.

6. After considering the prosecution evidence, it is clear that there was no enmity between the parties and there is also no evidence on record about the pre-meditation. The incident took place suddenly and two spade blows were given out of some grave anger and provocation. Therefore, the contention of the learned counsel for the appellant appears to be reasonable. It is true that the deceased received two lacerated wounds on the head. Though the injury was found to be severe, but there is no opinion of the doctor that the aforesaid injury was sufficient to cause death in the ordinary course of nature.

7. Thus, after considering the evidence available on record, we are of the view that looking to the nature of the offence and the factual background in which the incident took place, the case will not fall under Section 302 IPC, but it will fall under Section 304 Part II, IPC. Since the appellant has already suffered jail sentence of more than eight years, which also appears to be sufficient and looking to this fact that the deceased and appellant belong to the same family and there was no element of intention to cause death, this appeal is allowed. The conviction of the appellant is altered from Section 302 to Section 304 Part II, IPC and the appellant is released on undergone jail sentence.

8. Consequently, this appeal is allowed. The conviction of the appellant is altered from Section 302 to Section 304 Part II, IPC and the jail sentence is reduced to the sentence already undergone by him. The appellant is on bail, his bail bonds shall stand discharged.

Appeal allowed.

I.L.R. [2008] M. P., 885
APPELLATE CRIMINAL
Before Mr. Justice Abhay Gohil & Mr. Justice N.K. Mody
14 December, 2007*

KAMLESH JAIN — Appellant
Vs.
STATE OF M.P. — Respondent

A. Evidence Act (1 of 1872), Section 32 - Dying Declaration- Deceased suffered 80% 2nd and 3rd degree burn injuries - Looking to serious condition dying declaration recorded by Doctor immediately when she was admitted in Hospital - She survived for five days after incident - No intimation given to police - Dying declaration not recorded by Magistrate though sufficient time was there - No certificate affixed as to fit state of mind or she remained fully conscious - It cannot be held that doctor was satisfied that dying person is making conscious, voluntary and true statement - Dying Declaration not reliable. (Para 12)

B. Penal Code (45 of 1860), Section 302 - Deceased patient of mental illness - Her behaviour was uncommon and unusual - Doctor has not firmly opined that it is a case of Homicidal death - No injuries found on the body of deceased - Dying Declaration recorded prior to F.I.R. - Case history also written subsequent to recording of Dying Declaration - Circumstances raises reasonable doubt about truthfulness of conduct of I.O. and Doctor who had recorded dying declaration - Appellant acquitted - Appeal allowed. (Paras 14 & 16)

Cases referred :

AIR 2001 SC 2124, AIR 2002 SC 2996, AIR 2002 SC 526, AIR 2003 SC 265, AIR 1971 SC 953, (2006) 10 SCC 718, (2006) 9 SCC 240, (2004) 13 SCC 264.

A.K. Jain, for the appellant

M.P.S. Bhadoria, P.P. for the respondent/State

JUDGMENT

The Judgment of the Court was delivered by **Abhay Gohil, J.:**–Convicted appellant has preferred this appeal under Section 374 Cr.P.C. against the judgment of conviction under Section 302 IPC and sentence of life imprisonment with fine of Rs.1000/- and in default of payment of fine further one month S.I. passed in Sessions Trial No.5/92 vide judgment dated 23.12.1999.

2. Prosecution case in brief is that the deceased Ushadevi was married to the appellant. The appellant used to quarrel with her over dowry demand. He has also performed second marriage and is having a son from his second wife. On 28.8.1991 at about 4.00 p.m. deceased was sitting inside the house. The appellant beat her, threw her on the ground and poured kerosene oil on her and set her on fire and

*Cr.A. No. 62/1997 (Gwalior)

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thereafter he ran away. Thereafter Ushadevi went to the police station and lodged FIR at 6.10 p.m. She was then referred to hospital for medical examination, where her dying declaration was recoded by Dr.A.K.Jaiswal (P.W.3) at 5.15 p.m. After seven days Ushadevi died on 4.9.1991. Her post mortem was performed by Dr.V.S.Tomar (P.W.6). Crime was registered, matter was investigated and charge sheet was filed. During trial the appellant abjured his guilt and his defence was that he has been falsely implicated. Deceased was suffering from mental illness and she herself set her on fire. Trial court after considering the evidence of dying declaration convicted the appellant under Section 302 IPC and sentenced as above, against which the appellant has filed this appeal.

3. In appeal we have heard the learned counsel for the parties and perused the evidence on record. Learned counsel for the appellant submitted that there is no eye witness account in the case and conviction is solely based on dying declaration recorded by Dr.A.K.Jaiswal (P.W.3). He argued vehemently on the question that dying declaration is not reliable at all as there is no corroborative evidence. It was submitted that prosecution evidence is doubtful as dying declaration was recorded first at 5.15 p.m., medical report was prepared at 5.30 p.m. and FIR was lodged at 6.10 p.m., from which it appears that FIR was fabricated and the case was concocted against the appellant with a view to falsely implicate him. He has further submitted that the trial court has wrongly discarded the defence version as all the prosecution witnesses as well as the defence witnesses, those who are reputed doctors of government hospital have admitted that the deceased was suffering from mental illness and there was every possibility that she herself might have committed the suicide. There is no medical opinion that it was a case of homicidal burning. In the dying declaration the mental and physical condition of the deceased has not been mentioned. It was not mentioned that whether she was in a fit state of mind to give evidence or not and in the absence of any such certification by doctor, the dying declaration can not be relied upon and also placed reliance on a decision in the case of *Arvind Singh Vs. State of Bihar* (AIR 2001 SC 2124) and also *Ramilaben Hasmukhbhai Khristi Vs. State of Gujarat* (AIR 2002 SC 2996). He also criticized the evidence of Dr.A.K.Jaiswal (P.W.3) and also cited a decision in the case of *Pachdeo Singh Vs. State of Bihar* (AIR 2002 SC 526), and *Chacko Vs. State of Kerala* (AIR 2003 SC 265). It was further vehemently argued that the deceased survived for five days but no attempt was made to get the dying declaration recorded by the executive magistrate and placed reliance on a decision in the case of *Keshav Vs. State of Maharashtra* (AIR 1971 SC 953) and submitted that on the previous occasion also she had attempted to commit suicide. It was argued that no injuries were found on the body of the deceased to suggest that she was subjected to physical assault or was beaten or was thrown on the ground. There is no evidence about the presence of kerosene oil on spot. Appellant has already suffered jail sentence of more than 10 years. The conviction of the appellant is bad in law and based on no evidence, therefore the appellant is liable to be acquitted.

4. In reply learned Public Prosecutor for the respondent supported the judgment of the trial court and submitted that the conviction of the appellant is based on logical evidence. It was argued that the conviction can also be based simply on the basis of dying declaration and there is no scope for any interference in the finding recorded by the trial court. Learned Public Prosecutor placed reliance on the decision in the case of *Heeralal Yadav Vs. State of M.P.* [(2006) 10 SCC 718], *Ravikumar Vs. State of Tamil Nadu* [(2006) 9 SCC 240] and *Narain Singh and another Vs. State of Haryana* [(2004) 13 SCC 264] and submitted that the appeal has no merit and be dismissed.

5. Admittedly, in this case there is no eye witness account and all the prosecution witnesses have not supported the prosecution case. Indrasen (P.W.1), who is the brother of the deceased, was witness of oral dying declaration, but there was omission of this fact in his case diary statement that she was burnt by her husband after pouring kerosene oil and thereafter he shut the doors of the room and went away. Though the trial court found that the evidence was corroborated by dying declaration recorded by Dr.A.K.Jaiswal (P.W.3), but it was criticized very badly on the ground that when the deceased was in a position to give dying declaration to his brother, then why the dying declaration was not recorded by the executive magistrate. Trial court has discarded this argument on the ground that under Section 32 of the Indian Evidence Act, there is no provision that dying declaration should be recorded by the Executive Magistrate only and it was held that it was not necessary. Babulal (P.W.2) was eye witness, who had seen the deceased burning, and at the relevant time he was working as a mason at the house of the accused, but not suported the prosecution and turned hostile. Munir Mohammad (P.W.4) was the witness of spot map (Ex.P/6). Though he has accepted his signature on the spot map, but he has deposed that he had not seen that for what purpose the signatures were obtained on the aforesaid document, and has not supported the prosecution. Ugrasen (P.W.5), who is the neighbour, has also not supported the prosecution and was declared hostile. Meghe (P.W.8), who had also seen the deceased burning, has not supported the prosecution and was declared hostile. Rajkumari (P.W.10), who is also the sister of appellant, has also not supported the prosecution and was declared hostile

6. When there is no ocular or eye witness account in the case and only evidence of dying declaration is available, which was recorded by doctor, but not by Executive Magistrate, the question is whether such evidence of dying declaration recorded by the doctor or by anybody is reliable, trustworthy and conviction can be based thereon.

7. In catena of decisions Supreme Court has enumerated various principles and circumstances in which such an evidence of dying declaration can be held to be reliable and what are the factors which should be considered by the Courts while relying on the dying declarations. In the case of *Arvind Singh Vs. State of Bihar* (AIR 2001 SC 2124), the Supreme Court has held as under :-

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"15. Though the earlier view of this Court in *Ramnath's case (Ram Nath Madhoprasad v. State of Madhya Pradesh*, AIR 1953 SC 420 : (1953 Cri LJ 1772) stands overruled by a five Judges judgment in the case of *Tarachand Damu Sutar v. State of Maharashtra*, AIR 1962 SC 130 : (1962 (1) Cri LJ 196) but there is no denial of the fact that dying declaration ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross examination. The same is the view taken in a case reported in AIR 1976 SC 2199 : (1976 Cri LJ 1718), *Munnu Raja v. State of Madhya Pradesh)*, wherein this Court stated :

"It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross examination. There is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be accepted upon less it is corroborated. Thus Court must not look out for corroboration unless it comes to the conclusion that the dying declaration suffered from any infirmity by reason of which it was necessary to look out for corroboration.

16. In the same year this Court in the case of *K.Ramachandra Reddy v. Public Prosecutor*, AIR 1976 SC 1994 : (1976 Cri LJ 1548) observed :

"The dying declaration is undoubtedly admissible under S.32 and not being a statement on oath so that its truth could be tested by cross- examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either tutoring prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration.

A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of question and answer and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may

suffer from all the infirmities of human memory and human character. In order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties AIR 1958 SC 22 : (1958 Cri LJ 106) Rel on."

8. In the case of *Keshav Vs. State of Maharashtra* (AIR 1971 SC 953), the Supreme Court has held as under :-

"That apart, there was sufficient time for him to have called a Magistrate and although he admits that a Magistrate should be called he did not do so because according to him the injured was in a serious condition. We have already pointed out that the injured died at 2 a.m. There was considerable time, for him to have called a Magistrate. At any rate there is nothing to show that the injured became unconscious immediately or that he made any attempt to call the Magistrate.

9. As cited by the State, in the case of *Ravikumar Vs. State of Tamil Nadu* [(2006) 9 SCC 240] it is held by the Supreme Court that when conviction is based solely upon dying declaration, it should be voluntary and not tutored, prompted or product of imagination. Court should seek medical opinion so as to be satisfied that deceased was in fit mental condition to make the statement and that he had opportunity to identify the accused. Dying declaration was read over and explained by the doctor to deceased who admitted the same to be correct and the Magistrate made an endorsement to that effect, the dying declaration can not be said to be unreliable.

Again in the case of *Narain Singh and another Vs. State of Haryana* [(2004) 13 SCC 264], it was held by the Supreme Court that Section 32 (1) is an exception to heresay rule, the dying declaration like any other evidence has to pass the test of credibility. If found reliable, it can be the basis of conviction. There is also no legal bar in action on a part of the dying declaration.

In the case of *Heeralal Yadav Vs. State of M.P.* [(2006) 10 SCC 718], it is held by the Supreme Court that a conviction can be solely based on the evidence of dying declaration if it inspires confidence. It should be well corroborated with other attending circumstances and if dying declaration is otherwise credit worthy, the conviction can not be reversed.

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10. From the aforesaid decision, it is clear that though there is no bar in basing the conviction solely on the evidence of dying declaration recorded by doctor, but while placing reliance such an evidence should be treated with care and caution as the maker of the statement can not be subjected to any cross examination. It should be supported and corroborated by some other attending circumstances, should inspire confidence, should be credit worthy and should also not suffer from any infirmity. The court has to rule out the possibility of tutoring, prompting and that it is not a product of imagination. The court has to satisfy that the deceased was in a fit state of mind, was fully conscious and capable to give the statement. Therefore, in the case in hand we have to examine the prosecution evidence whether the same fulfills the aforesaid criteria , which has been laid down by the Supreme Court or not.

11. Dr.A.K.Jaiswal (P.W.3), who recorded the dying declaration, has affirmed that dying declaration was recorded at 5.15 p.m. She was fully conscious. She has put her thumb impression. Dying declaration is Ex.P/5, but he has admitted that looking to her serious condition, he himself has taken the dying declaration, though the general condition has not been mentioned in the dying declaration (Ex.P/5) and there is no certificate that she was in a fit state of mind and capable to give dying declaration. He has admitted in the cross examination that he has not informed the police before recording the dying declaration, nor that her condition is serious or arrangement should be made for recording her dying declaration by executive Magistrate.

12. As vehemently argued, it is true that in this case conviction can not be based on this dying declaration (Ex.P/5) for the simple reason that it is not corroborated by any other evidence or by attending circumstances, it does not inspire confidence, no intimation was given to the police and dying declaration was not recorded by the Executive Magistrate, though there was sufficient time and no certificate was affixed thereon that she was under fit state of mind and there is also no certificate in the end of dying declaration that while dying declaration was recorded she remained fully conscious and in a fit state of mind. In the absence of such certificate it can not be held that there is evidence to the effect that doctor was satisfied that the dying man is making a conscious, voluntary and true statement.

13. Dr.V.S.Tomar (P.W.6) had conducted the autopsy of the dead body and was of the view that the deceased had received 70-80% burn injuries. The burn injuries were of second and third degree and she died because of the complications of burn injuries. The cause of death was the cardio respiratory failure. He was unable to give any opinion that whether after receiving burn injuries she was in a position to speak or not. Doctor had deposed that there is hardly any person who can survive after 80% burn injuries. He was also unable to give any opinion about the cause of death, whether it was suicidal, homicidal or accidental. Doctor has also not given any opinion whether after receiving the burn injuries she was fully

conscious and was in a position to give any statement or not during all the seven days, while she remained hospitalized. In such circumstances it can not be held that she remained conscious or was capable to give statement or is a case of homicidal death. To corroborate the other attending circumstances, doctors' evidence and opinion is very material.

14. Maharaj Singh (D.W.3), Head Constable was examined to prove the Marg Intimation Report (Ex.D/4), which was referred by Dr.Prabhat Shrivastava to police station, in which it has been mentioned that the deceased himself set her on fire. Dr.Mrs.S.K.Malhotra (D.W.1), who was working as psychiatric and Superintendent of Mental Hospital, Gwalior, had examined and treated the deceased on 6.11.1989, two years before the incident. Her prescription is Ex.D/2. She had found her a case of mental illness and it was deposed that she was suffering from mental illness for last 5-6 years, deceased was not in a position to speak well. She was a slow witted lady. Doctor has also explained the mental condition of such types of persons that they may go anywhere without informing anybody, they may ease in the clothes, their behaviour may be uncommon, even they may also commit suicide and her condition was abnormal. Doctor has also replied that there is no technique in the medical science for any kind of positive test for the mental illness but she has affirmatively answered that the deceased was suffering from mental illness and was abnormal. Dr.J.P.Gupta (D.W.2), who was working as Assistant Surgeon at the Community Health Centre, Bhind, had also examined and found that she was suffering from mental illness, has also elaborately explained the condition and had also referred her to mental hospital Gwalior. He has admitted that such types of patients are harmful and their behaviour is always uncommon and they may do anything and may also commit suicide. It appears that the learned trial court has wrongly discarded the aforesaid evidence of two government doctors on the ground that regular treatment papers were not submitted and she was only shown once to the doctor during ten years matrimonial period. But we are of the view that on such a ground expert evidence can not be discarded as the same appears to be genuine. Both the doctors had seen her two years before this incident, therefore their evidence also can not be held doubtful. More so this evidence is supported by prosecution witnesses as all the prosecution witnesses P.W.2, P.W.5, P.W.8 and P.W.10 have also admitted in their cross examination that the deceased was suffering from mental illness but their evidence was also discarded on the ground that they were declared hostile and they have not supported the prosecution, which is also not logical. As a matter of principle, if the evidence of hostile witness is reliable, the same can be considered and reliance can be placed thereon.

15. I.O. B.S.Chauhan (P.W.9) has admitted that he has not given any application to the Magistrate for recording her statement. He had also not requested the doctor for recording the dying declaration of the deceased. He has also recorded the statement of the deceased under Section 161 Cr.P.C. but neither any permission

from the doctor nor any certificate of the doctor was obtained about the fact that she was mentally fit to give statement. Therefore, it is clear that the dying declaration recorded by the doctor is not away from infirmities and can not be considered as a full proof evidence and this has raised a suspicion. It is also true that no attempt was made to get the dying declaration recorded by the Executive Magistrate. There is no bar that doctor can not record dying declaration, but what is necessary is the certification and satisfaction of the doctor, which he has to explain. In the Ex.P/5, the doctor has not stated that he was satisfied, his conduct should have a documentary bearing. When the I.O. recorded her case diary statement, he has also not obtained the doctor's permission nor took the certificate from the doctor that she is in a fit state of mind to give statement to the police. I.O. has admitted that he does not remember whether he had informed the parents of the deceased or not. He has also admitted that he had not referred the clothes of the deceased including the kerosene oil cane for chemical examination. Therefore, it is also not corroborated that kerosene oil was used in the crime and prosecution has also failed to prove this fact. He was also examined on the question of time whether the FIR was recorded first or the deceased was referred for medical examination. I.O. has stated that FIR was lodged first by the deceased, thereafter he was referred for medical examination, but he could not give the proper explanation about the opposite timings given on the documents. He has also denied this fact that in this case the investigation was done by the SDO (P) or under his supervision as required under the law. It was also pointed out that there are lapses in the investigation. If there is clinching evidence available on record, those lapses in the investigation would not be fatal for the prosecution, but when there is no corroborative evidence then certainly in that case one has to look for all these mandatory compliance and their non compliance may be fatal.

16. In the aforesaid factual background, the evidence of two doctors - Dr.Mrs.S.K.Malhotra (D.W.1) and Dr.J.P.Gupta (D.W.2) appears to be more irrelevant in comparison to the uncorroborated evidence of dying declaration of the deceased, which is full of aforesaid infirmities. If the deceased was a patient of mental illness and his behaviour was uncommon and unusual, then this possibility can not be ruled out that she might have committed suicide or it may be a case of accidental death. Doctor has also not firmly opined that it is a case of homicidal death. It was the prosecution case that she was beaten, but doctor has not found any injury on the body of the deceased. Time shown by the prosecution about taking of the dying declaration prior to the FIR has also raised a reasonable doubt about the truthfulness of the conduct of the investigating officer and doctor, who had recorded the dying declaration. It is normal procedure of the hospital that whenever the patient will come to the hospital for treatment his case history shall be written first then she will be given some treatment and only thereafter her dying declaration shall be recorded, but in this case as per the prosecution case firstly the dying declaration was recorded at 5.15 p.m. and thereafter the case history was prepared at 5.30 p.m. and thereafter FIR was written on 6.10 p.m.,

but the prosecution case is other way round. Thus there is no conformity in the prosecution case and documentary evidence on record, which has also to be held as fatal.

17. Considering the over all circumstances, we are of the view that in the facts and circumstances of the case the dying declaration suffers from infirmities and is not supported or corroborated by some other attending circumstances. Therefore it does not inspire confidence as has also not ruled out other possibilities and doubts, thus can not be said to be credit worthy and sufficient to affirm the conviction of the appellant.

18. In view of the aforesaid discussion, the finding of guilt recorded by the trial court can not be said to be proper and based on proper appreciation of evidence. Thus, we are of the view that the prosecution has failed to prove the allegations and charges by producing evidence beyond reasonable doubt. According to us, the defence version appears to be more probable in comparison to the prosecution evidence. The prosecution evidence also does not inspire confidence and there is no firm evidence on record that she was in fit state of mind to give dying declaration or the appellant alone has committed the offence, therefore he is entitled for benefit of doubt.

19. Thus, in view of the foregoing discussion, we allow this appeal, set aside the conviction. The appellant is acquitted from the charges. He be released forthwith if not required in any other offence.

Appeal allowed.

I.L.R. [2008] M. P., 893
APPELLATE CRIMINAL
Before Mr. Justice K.S. Chauhan
3 January, 2008*

BHAIRON SINGH — Appellant
Vs.
STATE OF M.P. — Respondent

A. Penal Code (45 of 1860), Section 498-A - Cruelty - Wife died by drowning in well - Appellant used to beat and harass his wife for securing his job through her brothers, to get sale deed of a house and Rs. 1 lakh - What has happened on day of incident is within knowledge of husband and wife - Wife is no more - No women will end her life without intolerable miseries, troubles, tortures and harassments - Death of wife not reported to authorities or brothers of deceased - Earlier report of harassment was not made to avoid further harassment - Appellant rightly convicted under Section 498-A of I.P.C. - Appeal dismissed. (Para 23)

B. Dowry Prohibition Act (28 of 1961), Section 3 - Dowry - Dowry is a demand for property or valuable security having an inextricable nexus with

*Cr.A. No. 605/1993 (Jabalpur)

marriage - No dowry was settled at the time of marriage - Question of abatement of giving dowry does not arise - Appellant cannot be convicted under Section 3.

Cases referred : (Paras 28 and 31)

1995 AIHC 273, 1984(2) REC Cr.R. 239

Cases distinguished :

1987(1) Crimes 76, 1990 CrLJ 407, 1992 DMC 127, 2006 DMC 240, 2006 DMC 747, 1992 CrLJ 1017, 1999 (1) MPLJ 157, 1999(1) MPLJ 423, AIR 2001 SC 3020

S.C. Datt with *G.P. Patel*, for the appellant

Pankaj Dixit, Panel Lawyer for the State/respondent.

JUDGMENT

K.S. Chauhan, J. :–This criminal appeal has been preferred under Section 374(2) of Cr.P.C. being aggrieved by the judgment finding and sentence dated 25-06-1993 passed by Additional Sessions Judge Khurai in Sessions Trial No.84/92 whereby the appellant has been convicted under section 498-A of IPC and Section 3 of Dowry Prohibition Act, 1961, and sentenced to R.I. for 3 years with a fine of Rs. 5000/- in default R.I. for 6 months and R.I. for 5 years with a fine of Rs.15,000/- in default further R.I. for 1 year respectively. Both the sentences are directed to run concurrently.

2. The prosecution case in brief is that on 9.10.1990 at about 11.00 a.m. Ghooman Kotwar of village Pyasi intimated P.S. Khurai that Anjana Rani wife of Bhairon Kurmi died by falling in a well. Marg intimation No. 56/90 was registered and enquiry made. Panchnama of her dead body was prepared. Body was sent for post mortem examination which was conducted on 10.10.1990 at 11.30 a.m. Autopsy Surgeon opined her death due to asphyxia due to drowning within 3 to 48 hours from the time of examination.

On 11.10.1990 Krishna Murari brother of deceased submitted an application before S.P.Sagar mentioning therein that his sister was married with Bhairaon prior to 6 years of occurrence. Dowry was given at the time of marriage. After 3 years of marriage, Gauna ceremony was performed in which 10 Tolas gold, 1 kg silver, 1 gold Mohar and Rs.5,000/- cash with other articles were given. After 1 year her husband started beating and causing harassment. He used to say to manage for his job through her brothers or get transferred the house of Ganj Basoda in his name or to provide Rs.1 lac so that he can start his business at Ganj Basoda. If these things will not be done, then she will be subjected to harassment. His sister also told him that her husband used to give severe beating by filling clothes in her mouth in the night and as a result thereof sometimes she used to become unconscious. This fact was brought into notice of appellant's father who insured not to repeat such things. Thereafter, she was sent to her in-laws house where she was residing. On 10.10.1990, he came to Khurai to his in-law's house where he came to know that his sister has died and her dead body has been cremated. No any information was given to him regarding the death of his sister.

He suspected that after killing his sister by appellant dead body has been thrown into a well.

After inquiry first information report Ex. P-9 was registered on 22.3.91 at 16.00 at P.S. Khurai wherein Crime No. 126/91 u/s 306, 304-B and 498-A of I.P.C and 3 / 4 of Dowry Prohibition Act, 1961 was registered. The statements u/s 161 of Cr.P.C were recorded. After completing investigation, charge sheet was filed in the court of J.M.F.C., Khurai wherein Cr. Case No. 88/92 was registered and the case was committed to Sessions Court on 25.2.92.

3. The appellant was charged u/s 304-B, 306 and 498-A of I.P.C. and u/s 3 of Dowry Prohibition Act, 1961 that he on 9.10.1990 at village Pyasi caused dowry death of Ranjana Rani-his wife, subjected her to cruelty and harassment in connection with demand of dowry; she committed suicide by falling in a well and he abetted for commission of such suicide; that prior to this incident, he subjected her to cruelty and demanded dowry from her.

4. The appellant abjured the guilt and claimed to be tried mainly contending that he has never demanded dowry nor harassed her since she was not conceiving the child therefore she used to remain unhappy. He is innocent and has been falsely implicated in this case.

5. The prosecution examined as many as 7 witnesses and the defence examined only 3 witnesses. After appreciating the evidence, trial court acquitted the appellant from the charges under section 304-B and 306 of IPC but convicted under section 498-A of IPC and Section 3 of the Dowry Prohibition Act, 1961 and sentenced thereunder as stated in para No.1 of the judgment. Being aggrieved by the judgment, finding and sentence, the appellant has preferred this appeal under Section 374(2) of Cr.P.C. on the grounds mentioned in the memo of appeal.

6. The learned counsel for the appellant has submitted that the trial court has not appreciated the evidence in proper perspective. All the essential ingredients to prove offence under section 498-A IPC and Section 3 of Dowry Prohibition Act have not been made out. The marriage was performed prior to 10 years back and no dowry was settled at the time of marriage. There is no evidence to prove the demand of dowry. No report was lodged regarding harassment to deceased prior to this incident. She used to remain unhappy because she was not conceiving the child. The statement of Krishna Murari and Vrindavan were recorded after 5 months. The evidence of the prosecution is not dependable. Hence no conviction can be based on such evidence. The trial Court has committed an illegality in convicting the appellant. The finding being erroneous deserves to be set aside and the appellant is entitled for acquittal.

7. On the other hand, Shri Pankaj Dixit, P.L., appearing for State/respondent has supported the judgment finding and sentence passed by trial court and has submitted that wife of appellant met with an unnatural death. The statements

of Krishna Murari and Vrindavan have been recorded immediately after recording first information report, therefore, no delay has been made in recording their statements. There is evidence of cruelty and harassment and the trial Curt has rightly convicted and sentenced the appellant therefore it does not call for any interference.

8. The main point for consideration in this appeal is that whether the trial court has committed any illegality in convicting and sentencing the appellant under Section 498A IPC and section 3 of Dowry Prohibition Act, 1961.

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

10. There are several names of deceased such as Ranjanarani, Anjanarani, Raju, Raj Kumar and Raj Kumari. Therefore, she will be referred to in the judgment as deceased Ranjana.

11. Ghooman (PW-1) Kotwar of village Pyasi intimated on 9.10.1990 at P.S. Khurai regarding death of Ranjana by falling in a well. Marg intimation (Ex.P-1) was recorded by M.P. Rajoriya (PW-6). He prepared Panchnama of dead body (Ex.P-2) and sent her dead body for post mortem examination vide Ex.P/5. Dr. Sunil Kumar Pandya (PW-3) conducted post mortem examination and found her death due to asphyxia due to drowning in well within 3 to 48 hours of examination. He submitted post mortem report (Ex.P-6). From the evidence adduced in this behalf it is established that Ranjana died by falling in a well. Thus, she has met with an unnatural death in her matrimonial house. Lalaram Shakya (PW-7) has clearly stated that well is quite visible and there is no possibility to fall accidentally. Therefore, her death cannot be regarded as an accidental.

12. No doubt, she was married with the appellant prior to 7 years, therefore, the presumption under section 113-A and 113-B have not been attracted and the trial Court has given its benefit to the appellant by acquitting him from the charges under section 304-B and 306 of IPC.

13. The main point for consideration is that whether she was subjected to cruelty by her husband during her life time?

14. Krishna Murari (PW-5) is the brother of deceased who has stated that the marriage of deceased was performed in the year 1982 and Gauna ceremony was performed after 3 years. 10 Tolas gold, 1 kg silver, cash of Rs.5000/- were given in this ceremony. When she returned from her in-laws house after 1 year she looked very lean and thin. He asked the reason, she stated that appellant used to beat her by saying that he is literate therefore manage for his job through her brothers or to get sale deed executed of the house situated at Ganj Basoda in his name and also to provide Rs. 1 lakh otherwise he will keep her in this condition. She also apprised him that he used to beat her in night after filling clothes in her mouth thereby she used to become unconscious. On this he stated not to send her to her matrimonial house but she wanted to go there therefore when her father-in-law came there to bring her back in matrimonial house, he was apprised about

this fact who assured that there will not be any trouble. Therefore, he sent her sister in the month of Asadh and she expired in the month of Kartik. No intimation regarding death of his sister was given by appellant or his family members. He came to know about her death at Khurai when he came to his in-laws house. Then he submitted an application Ex.P-7 to S.P. Sagar.

15. In cross-examination, he has admitted that this fact is not mentioned in Ex.P/7 that he prevented his sister not to go in in-laws house because she is harassed there. He has denied the suggestive questions put to him that no demand for dowry was made or her sister was not harassed.

16. Vrindawan (PW-4) is also brother of deceased. He has corroborated the statement of his brother Krishna Murari (PW-5) mainly contending that appellant used to harass his sister saying that she should secure his job through her brothers, manage to get sale deed of the house at Ganj Basoda registered in his name and provide Rs.1 lakh for him. He has also stated that appellant used to beat her sister by filling clothes in her mouth. The report was not made to avoid further harassment. Though dowry was not settled but the same was given according to the capacity. At the time of Gauna ceremony 10 tolas gold, 1 kg silver and Rs.5,000/- were given.

17. In cross-examination, this witness has stated that he tried to secure job but could not. He admitted that appellant is well-to-do person. He looks after the agricultural land of his father. Regarding harassment he has deposed that prior to 6-7 months of this incident his sister told him that her husband used to harass her. Prior to 4-5 months of this incident, his brother Krishna Murari had gone to bring her sister but appellant did not send her. However, he has admitted that he did not receive any information from her sister that she is in trouble. He has also stated that no information regarding death of his sister was sent by appellant or his family members. Some contradictions and omissions have been brought from his police statement Ex.D-2. Omission is regarding causing Marpeet by appellant after filing the clothes in the mouth of his sister and contradiction is that his sister did not tell him that appellant used to harass her because she was not conceiving child.

18. Evidence of both brothers of deceased is similar on the same point that Gauna ceremony was performed after 3 years of marriage. Cash and ornaments were given in dowry at Gauna ceremony. After returning from her in-laws house she apprised them regarding harassment and causing of marpeet by her husband for securing the job for him or to get registered the sale deed of the house at Ganj Basoda in his name and to provide him Rs.1 lakh for him. The report regarding harassment was not lodged prior to this incident to avoid further harassment, humiliation and torture to be given to his sister. Inspite of some contradictions and omissions, their evidence is not shattered on material point hence can be relied upon.

19. The appellant has also adduced evidence to show that no harassment was

done to his wife deceased Ranjana. Bala Prasasd (DW-1), Suraj Singh (DW-2), has given the evidence in this regard. Hanumat Singh (DW-3) has also given some evidence in this regard. However, their evidence is not acceptable merely because Ranjana was not under any obligation to apprise them regarding her miseries and troubles. Had she been done so, the appellant would have subjected her to further harassment and trouble. Therefore their evidence is not acceptable and the trial Court has rightly discarded their evidence.

20. The learned counsel for the appellant has submitted that all the ingredients required to prove the offence under section 498-A of IPC has not been proved. He has placed reliance on the following decisions:-

(1) *Balbir Singh v. State of Punjab I*-1987(1) Crimes 76- In this case, it has been held that it is not all and every type of cruelty by husband or his relatives which is sought to be covered by Section 498-A. On the other hand, the scope of the section has been limited to the particular type of cruelty referred in the two sub-clauses of the Explanation.

(2) *Smt. Sarla Prabhakar Waghmare v. State of Maharashtra* -1990 CrLJ 407. In this case, it has been held that it is not every harassment or every type of cruelty that would attract Section 498-A- It must be established that beating and harassment was with a view to force wife to commit suicide or to fulfill illegal demands of husband and in-laws.

(3) *Darshan Kumar & Ors. V. State of Haryana*- I-(1992) DMC 127. In this case, it has been held that though it was found that relation between the husband and wife were not cordial but the allegation regarding the demand of dowry were never established and were found to be false on inquiry.

(4) *Prakash Vs. State of Maharashtra -II* (2006) DMC 240. In this case, it has been held the offence punishable U/s 498A of IPC can be made out after it is proved that woman was driven to commit suicide on account of ill treatment and unlawful demand of dowry.

(5) *Pandurang Vs. State of Maharashtra*-II(2006) DMC 747. In this case it has been held that in absence of evidence to show prior to death, she was subjected to never ill treatment to provoke her to commit suicide, it is not possible to hold that the appellant had awaited commission of suicide or instigated by the victim by his ill treatment to end her life.

(6) *Tapan Pal Vs State of West Bengal* -1992 Cr.L.J. 1017. In this case it has been held that there is no cogent legal evidence in support of the charge U/s 498A and the prosecution has hopelessly

failed to prove the same. The order of the conviction as recorded by the court below is based mainly on conjectures, surmises and inadmissible evidence. The evidence adduced by the prosecution consists mainly of the alleged statement made by the deceased regarding her torture by the appellants when she visited her father house on some occasions.

(7) *Annapurna Bai @ Bhuri Vs. State of MP*-1999(2)1985. In this case it has been held that simply reminding for ornaments or traditional did not amount to demand of dowry. Offence U/s 498A must be beyond shadow of doubt.

(8) *Nawal Kishore Vs State of MP* 1999-(1) MPLJ 167. In this case it has been held that vague and general statement can not be relied upon to draw inference of cruelty to the deceased.

(9) *Ramesh Kumar Radheshyam Agrawal Vs. State of MP*-1999(1) MPLJ 423- In this case, it has been held that "Letters written by deceased did not remotely hint of discontent in matrimonial home and did not suggest any complaint against in-laws.- Prosecution evidence regarding demand of dowry or harassment and cruelty meted out to deceased suffered from basic infirmities and discrepancies in connection with said demand-Finding of guilt recorded by trial Court ignoring vital aspects of prosecution not justified.

(10) *Sunil Bajaj v. State of M.P.*, AIR 2001 SC 3020, in this case demand of dowry and subjecting deceased to cruelty was not found proved.

21. The provision of section 498-A of IPC runs as follows: -

"Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."

Explanation.- For the purpose of this section, "cruelty" means -

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security is on account of failure by her or any person related to her to meet such demand."

22. So far as present case is concerned, both the brothers of deceased have adduced evidence that the appellant used to harass their sister and caused Marpeet for securing his job through her brothers, to get the sale deed of the house at Ganj Basoda executed in his name and provide Rs.1 lakh so that he can start some business. Since none of the demands was fulfilled, therefore, the harassment continued. What has happened on the day of incident, has not been brought on record from any side but that thing must be within the knowledge of the husband and wife. Wife has already expired without saying anything but husband did not disclose the fact but it is admitted position that his wife met with an unnatural death in her matrimonial house. The reason that she was not conceiving child and therefore she was unhappy and dissatisfied, cannot be accepted the cause of her death because this was not a proximate situation but persistent one and the evidence has been brought on record that she was not unhappy on account of this reason. She met with an unnatural death is within the knowledge of the appellant. No woman will end her life without intolerable miseries, troubles, tortures and harassments. No evidence has been adduced as to what steps were taken by the appellant after death of his wife in the well whether some search was made or the matter was reported to the concerned authorities. Even the brothers of deceased have given the evidence that no information about death of their sister was given to them. Therefore, the conduct of the appellant prima facie does not appear to be bonafide. No doubt, it is true that no report was made regarding the harassment to deceased during her life time but there is an evidence that the report was not made to avoid further harassment, torture, humiliation and beating moreover her father-in-law was apprised about this fact who assured not to repeat such things in future.

23. Learned counsel for the appellant has submitted that evidence of Krishna Murari and Vrindavan has been recorded after 5 months. Therefore, the reliance should not be placed on their evidence. But the factual situation is that Krishasn Murari submitted an application Ex.P-7 on the 3rd day of the incident narrating the entire facts regarding harassment of his sister but the police registered crime on 22.3.1991 i.e. near about 5 months after the incident. The statements of witnesses have been recorded on the same day, therefore, after recording FIR no delay has been caused in recording the statements of these witnesses under section 161 Cr.P.C. For lethargic attitude of L.R. Shakya (PW-7) S.D.O.P. Khurai in not registering the case in spite of submission of application by Krishna Murari, the fault cannot be found with the evidence of brothers of deceased Ranjana. Therefore, there is no question to disbelieve the statements of these witnesses.

24. This fact has been brought on record that appellant is a prosperous and well-to-do person. There is 100 acres of agricultural land of his father. There is a tractor, one motorcycle and appellant himself looks after the agricultural operations, therefore, there was no need to demand the property and cash from the brothers

of the deceased. But this may not be the criteria because the greedy people are never satisfied with the wealth. However, he wanted not only cash, landed property but also the position of securing the Govt. job. Though it was a different matter whether her brothers were in a position to secure such job for him or not, but actually he wanted these things to be done by or through her brothers.

25. There is ample evidence regarding harassment and unlawful demand of property by appellant from the deceased. Therefore the cited cases are distinguishable on the facts and circumstances of this case. All ingredients required to prove the offence under section 498-A of the IPC have been established by prosecution and the trial Court has not committed any illegality in holding him guilty under section 498-A of the IPC. Such finding being based on evidence is hereby affirmed.

26. Now the point for consideration is that whether offence under Section 3 of Dowry Prohibition Act, 1961 has been proved or not?

27. Section 3 of Dowry Prohibition Act runs as follows:-

> "(1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable [with imprisonment for a term which shall not be less than [five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more."
>
> Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than [five years],
>
> [(2) Nothing in sub-section (1) shall apply to, or in relation to,-
>
> (a) Presents, which are given at the time of a marriage to the bride (without any demand having in that behalf):
>
> Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;
>
> (b) Presents, which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf):
>
> Provided that such presents are entered in a list maintained in accordance with the rules made under this Act:
>
> Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is no excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given]."

28. In the case of *Arjun Dhondiba Kamble v. State of Maharashtra,* 1995

AIHC 273, it has been held that "Dowry" in the sense of the expression contemplated by Dowry Prohibition Act is a demand for property of valuable security having an inextricable nexus with the marriage, i.e., it is a consideration from the side of the bride's parents or relatives to the groom or his parents and / or guardian of the agreement to wed the bride-to-be. But where the demand for property or valuable security has no connection with the consideration for the marriage, it will not amount to a demand for dowry.

29. In *Satvir Singh v. State of Punjab,* AIR 2001 SC 2828,it has been held that the word "dowry" should be any property or valuable given or agreed to be given in connection with the marriage. The customary payments in connection with birth of child or other ceremonies are not involved within ambit of dowry.

30. In *Nirdosh Kumar v. Padma Rani,* 1984(2) Rec Cr.R.239, it has been held that where the demand was made after the marriage for the purchase of a car, it was held that it did not fall within the definition.

31. So far as the present case is concerned, the evidence has been brought on record that dowry was not settled, therefore, the question of abetment of giving dowry does not arise. Hence all the essential ingredients required to prove the offence under section 3 of the Dowry Prohibition Act, 1961 have not been established. Hence finding of the trial Court regarding guilt of appellant under section 3 of Dowry Prohibition Act is erroneous which deserves to be set aside.

32. The result of the foregoing discussion is that the conviction of the appellant under section 498-A of the IPC is maintained whereas conviction under section 3 of the Dowry Prohibition Act, 1961 is set aside.

33. Learned Counsel for the appellant has submitted that the incident is of 1990, therefore it will not serve any purpose to send appellant back to jail. The contention of the learned counsel is not acceptable because on account of cruelty committed by appellant Ranjana had to end her life. In such cases no leniency is required. Therefore, no interference in sentence passed by the trial Court is called for.

34. On the foregoing discussion, this appeal deserved to be partly allowed.

35. Consequently, the appeal succeeds and is partly allowed. The Conviction and sentence passed under section 3 of the Dowry Prohibition Act, 1961 is hereby set aside. The conviction and sentence passed under section 498-A of IPC is hereby maintained. The appellant is on bail. His bail bonds are cancelled. He be directed to surrender before CJM Sagar on 31.01.2008 to serve out the remaining part of the sentence.

Appeal partly allowed.

I.L.R. [2008] M. P., 903

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi

21 January, 2008*

NAN SINGH & ors. ...Appellants

Vs.

STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 60 - Hearsay Evidence- Dehati Nalishi got proved by its Scribe and not by Complainant - Dehati Nalishi cannot be considered in evidence - Being hit by law of hearsay evidence.

In view of the statement of Kilan(P.W.3) there were three reports, but only one report(Ex-P/2) Dehati Nalishi was filed alongwith the charge-sheet and that too, was not got proved from Kilan(P.W.3). This report has been proved by its scribe Shyamlalsingh Chouhan, A.S.I. (P.W.5). Therefore, this report cannot be considered in evidence being hit by law of hearsay evidence as per provision of Section 60 of the Evidence Act. (Para 7)

B. Penal Code (45 of 1860), Section 302 - Murder - Interested and Partisan Witnesses - Three reports lodged in respect of one incident - Two reports suppressed by Prosecution - Report which was produced was not proved - There is nothing to prove authenticity of statement of interested and partisan witnesses - Difficult to place reliance on testimonies of interested witnesses - Appellants acquitted - Appeal allowed. (Para 8)

Case referred :

AIR 1980 SC 638

R.K. Trivedi, for the appellants

G. Desai, Dy. A.G. for the State

JUDGMENT

The Judgment of the Court was delivered by **S. L. Kochar, J.**:–This appeal has been directed against the impugned judgment dated 09.11.1998, passed by learned II Additional Sessions Judge, Alirajpur, (M.P.) in S.T. No.258/90 whereby convicted the appellants No.1 to 6 under Section 396 of the I.P.C. and sentence to R.I. for life and also appellants No. 2 and 3 under Section 27(6) of the Arms Act and sentence to R.I. for seven years.

2. Briefly stated the prosecution case as unfolded before the Trial Court is that on 24/4/1989, at 8.30 p.m., complainant Kilan((P.W.3), his son Ramsingh(P.W.7) Versingh, daughter deceased Hajari and wife Noorlibai were sitting inside their hut after taking night meal. They overheard sound of firing, because of which, they came out from the hut and saw that the huts of inhabitants of that locality named Jugadiya, Kalia, Kishaniya, Dursingh, Nayakada, Bhangada,

*Cr.A. No. 1424/1998 (Indore)

Kutriya, and Ditaliya Chamar were burning and 8 to 10 persons were coming towards their hut. They had seen in the light of fire those 8 to 10 persons. The complainant Kilan(P.W.3) went inside his hut, suddenly he heard a sound of firing coming from his courtyard. Thereafter, all the accused persons total eight in number, having guns, bows and arrows, forcibly entered inside his hut. The appellant No.1 Nansingh was having bows and arrows as well as burning torch(Mashaal) and was trying to set fire to the hut which was objected by the complainant. At that moment, appellant No.4 Banadiya raised gun to fire, but the barrel of the gun was pushed aside by the complainant, because of which, the bullet did not hit him and hit to the wooden log of the hut. The daughter of complainant Kilan deceased Hajari and wife Noorlibai requested the appellants not to set fire their hut and also not to assault them, at which, appellant No.3 Munatiya demanded Rs.10,000/- for not doing so. Deceased Hajari because of fear gave them a silver ring(Tagli) after taking out from her neck to Munatiya. Appellant Munatiya exhorted appellant Nandla for shooting arrow and Nandla shot an arrow causing injury on the chest of deceased Hajari, who died after sometime on the spot. The appellant Vagoo also shot an arrow causing injury to Ramsingh on his back. Appellant Vestiya fired gun but same did not hit to anybody. After commission of 'loot' with murder, the appellants fled away. On the next day, that is, 25/4/1989, A.S.I. Shyamlalsingh Chouhan(P.W.5) recorded 'Dehati Nalishi'(Ex-P/2) at the instance of complainant Kilan(P.W.3) in village Sumaniyawat. The Investigating Officer prepared the spot map as well as the inquest report of the dead body of deceased Hajari and sent the same for postmortem examination, which was conducted by Dr. K.C. Gupta(P.W.9). The postmortem report is Ex-P/15. The deceased suffered only one injury caused by an arrow shot and one simple contusion. Ramsingh(P.W.7) was also medically examined, his M.L.C. report is (Ex-P/14). He sustained one injury on his back side caused by an arrow shot. Though during the course of investigation, memorandum statements of the accused persons were recorded, but in pursuance thereof, property of the dacoity silver ring(Tagli) was not seized. From the possession of appellant Munatiya, a twelve bore gun without licence and from Vestiya, a muzzle loading gun was seized. On completion of investigation, charge-sheet was filed against the appellants for commission of offence under Sections 436, 396 and 397 of the I.P.C. and also under Section 27 of the Arms Act.

3. The appellants denied the charges and submitted in their defence that they were falsely implicated because of enmity. In cross examination of the eye-witnesses, suggestion was given that on the same day of the incident, "Nathu" a village member was murdered by the complainant party, in which, Desiya son of complainant Kilan was arrested and the accused persons appeared as witness against Desiya, they have concocted a false case against him.

4. During the course of trial, one of the accused named Raila has died. The learned trial Court, while acquitting co-accused Valsingh convicted the appellants six in number as indicated herein-above.

5. We have heard learned counsel for the parties and also perused the entire record carefully.

6. It emerged from the record that conviction of the appellants is based mainly on the testimonies of Kilan(P.W.3), Noorlibai(P.W.4) and Ramsingh(P.W.7), the father, mother and brother of the deceased Hajari.

7. The core question for us to decide is that whether these three eye-witnesses including injured witness Ramsingh(P.W.7) are dependable or not, specially when they are interested and partisan witnesses. These witnesses have admitted about prosecution of Desiya(P.W.2) for commission of murder of Nathu, the person belonging to the group of the appellants and appellants were witnesses in the said case. This incident occurred on the same day in the same village and for investigation of that incident, A.S.I. Shyamlalsingh Chouhan(P.W.5) reached in the village. According to Shyamlalsingh Chouhan (P.W.5) A.S.I., Dehati Nalishi(Ex-P/2) was recorded by him as disclosed to him by complainant eye-witness Kilan(P.W.3), but Kilan has nowhere stated in his statement that he had lodged any report/Dehati Nalishi(Ex-P/2) in the village as stated and proved by Shyamlalsingh, A.S.I.(P.W.5). On the contrary, Kilan(P.W.3) has stated in paragraph 4 of examination-in-chief that in his absence, his wife Noorlibai(P.W.4) lodged the report to police and after lodging report, police party reached in the village to whom he shown the place of incident and spot map was prepared. The further say of this witness is that after preparation of map alongwith wooden log, they went to Outpost Umrali where also police prepared the documents. This witness Kilan(P.W.3) has further stated in his cross examination paragraph 7 that after admitting his injured son Ramsingh(P.W.7), he went to Outpost Umrali and lodged the report of the incident. The further say of this witness is that after lodging report in Umrali Outpost, his son was admitted in the Umrali hospital. He has also specifically stated that after lodging the report in Outpost, his thumb impression was taken, he did not return to his village and remained in the hospital. His this version finds support from M.L.C. report of Ramsingh(P.W.7) Exhibit-P/14 wherein it is mentioned that Ramsingh was brought by Constable Kunwar Singh of Outpost Umrali. The prosecution has not got proved Dehati Nalishi(Ex-P/2) from its author Kilan(P.W.3) and this witness has also nowhere stated that he gave Dehati Nalishi(Ex-P/2) in the village recorded by Shyamlalsingh Chouhan, A.S.I.(P.W.5). The report lodged by this witness in Police Outpost has not been filed alongwith the charge-sheet. The report lodged by Noorlibai, wife of Kilan(P.W.3) as stated by him has also not been filed alongwith the charge-sheet. In view of the statement of Kilan(P.W.3) there were three reports, but only one report(Ex-P/2) Dehati Nalishi was filed alongwith the charge-sheet and that too, was not got proved from Kilan(P.W.3). This report has been proved by its scribe Shyamlalsingh Chouhan, A.S.I. (P.W.5). Therefore, this report cannot be considered in evidence being hit by law of hearsay evidence as per provision of Section 60 of the Evidence Act.

8. It is a clear case of suppression of real report lodged by Kilan(P.W.3) when he reached to the Police Outpost with his injured son Ramsingh(P.W.7) and lodged the report. There is also suppression of report lodged by Noorlibai(P.W.4). This report was recorded in the village as stated by Kilan(P.W.3). Under these situations, it can be easily said that the report, earlier in point of time, was suppressed with an ulterior motive and that could be because the names of the assailants might not be mentioned in those reports or report.

9. The Supreme Court in case of "*Marudanal Augusti V. State of Kerala* (A.I.R. 1980 S.C. 638." has observed while considering the prosecution evidence regarding fabrication of the F.I.R. as under:-

> "The High Court seems to have overlooked the fact that the entire fabric of the prosecution case would collapse if the F.I.R. Is held to be fabricated or brought into existence longs after the occurrence and any number of witnesses could be added without there being anything to check the authenticity of their evidence."

10. In the instant case, it is evident that Dehati Nalishi(Ex-P/2) on the basis of which F.I.R. was recorded in the Police Station was not proved and also not admissible in evidence and it is also established that real report was suppressed. Under these circumstances, there is no other material available on the record to establish the authenticity of the statement of interested and partisan eye-witnesses. The prosecution case is further suffering from major deficiency, that is, from inside the hut no bullets were seized. There is no F.S.L. report regarding any material collected from inside the hut to prove that fires were made inside the hut and same hit to the wooden log or any part of the hut. The prosecution has also not laid any evidence about bullets and seizure of both the guns from appellant Vestiya and Muna @ Munatiya has also not been proved by examination of independent panch witnesses. No reason has been assigned by the prosecution as to why both the panch witnesses were not examined. Under the factual backdrop of this case, we are of the considered view that solitary testimony of the Police Officer cannot be relied upon for seizure of both the guns.

11. Head Constable Mahesh Kumar(P.W.8) has given report(Ex-P/13) regarding condition of the Muzzle Loading gun and his report and statement are disclosing that gun was in working condition, but nowhere it is stated that the seized empty cartridges were used by these seized guns. The second twelve bore gun and empty cartridges said to have been seized from the possession of one of the appellants were not sent for examination by the expert and seized empty cartridges were also not sent to Ballistic Expert or even to Arm Moharir P.W.8 Mahesh Kumar for examination.

12. Under all these circumstances, it would be very difficult to place reliance on the testimonies of interested and partisan eye witnesses for causing of solitary arrow shot injury to deceased Hajari and the trial Court has rightly disbelieved the prosecution case for causing injury to eye-witness Ramsingh(P.W 7).

13. Resultantly, this appeal is allowed. The conviction and sentence of the appellants as imposed by the trial Court are hereby set aside. Appellants No. 1 to 5 are on bail and their bail bonds and surety bonds stands discharged. The learned trial Court is directed to release the appellant No.6 Nanala @ Nandla forthwith, if not required in any other criminal case.

14. Office is directed to send a copy of the judgment to the trial Court immediately alongwith the record.

Appeal allowed.

I.L.R. [2008] M. P., 907
APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi

22 January, 2008*

NASIR & ors. Appellants

Vs.

STATE OF M.P. Respondent

A. Penal Code (45 of 1860), Section 307, Evidence Act, 1872, Section 3 - Conflict between Ocular and Medical Evidence - Where medical evidence did not disclose any kind of injury caused by a particular weapon - It can be inferred that oral evidence regarding assault from particular weapon is not truthful. (Para 11)

B. Evidence Act (1 of 1872), Section 32 - Dying Declaration - Certificate of fitness - Certificate of fitness of deceased by Doctor is not necessary - If evidence on record is satisfying that deceased was in fit condition to give statement. (Para 17)

C. Penal Code (45 of 1860), Sections 307, 302 - Attempt to murder or murder- Appellants convicted under Section 307 of I.P.C. for causing injuries to deceased- Held - When a person has died because of injuries caused by accused, their conviction under Section 307 of I.P.C. would not arise. (Para 19)

D. Penal Code (45 of 1860), Section 34 - Common Intention - Two accused coming on a auto-rickshaw caused 6 stab injuries to deceased on vital parts of body and thereafter fled away on the same auto-rickshaw - Both were sharing common intention and had assaulted deceased in further of common intention - Respondent Nos. 1 & 3 who caused injury by choori convicted under Section 302 r/w Section 34 - Appeal of State partly allowed. (Para 25)

Cases referred :

AIR 2003 SC 3975, AIR 2002 SC 2973, 1993 (99) Cr.L.J. 2886, AIR 1976 SC 951

P.K. Gupta, for the appellants

G. Desai, Dy. A.G. for the respondent/State

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*Cr. A. No. 652/1998 (Indore)

JUDGMENT

The Judgment of the Court was delivered by S. L. KOCHAR, J.:–Since both the aforesaid appeals arising out of one and the same judgment, therefore, they are being decided by this common judgment.

2. The appellants named above have preferred Criminal Appeal No.652/1998 against the judgment dated 30/4/98 passed by the learned IVth Additional Sessions Judge, Dewas in S.T. No.4/96 whereby acquitting all the appellants for the offence punishable under Sections 302, 302/34 of the I.P.C., but convicting them under Section 294 of the I.P.C. and sentencing each of them to suffer simple imprisonment for one month and also convicting appellants Nasir and Shabbir @ Kallu under Section 307 of the I.P.C and appellants Salim and Sardar Bi under Section 307/34 of the I.P.C. and sentencing them each to undergo R.I. for ten years with fine of Rs.1,000/-, in default of payment of fine, to suffer S.I. for two months. The State has filed Criminal Appeal No.1445/98 against the acquittal of the respondents for offence under Section 302/34 of the I.P.C.

3. The prosecution case in nut shell as put forth before the Trial Court is that on 4/6/1995, in the night at 9.20 p.m., complainant Haroon Patel(P.W.1) was standing at a betel shop situated on Subhash Chowk, Dewas. Deceased Shabbir son of Babu Khan and witnesses Abid Hussain(P.W.2) and Dayanand Gupta(P.W.3) were also standing near to Haroon Patel. At that moment, appellant Kallu @ Shabbir, Nasir, Sardarbi @ Addi and Salim reached over there in a auto-rickshaw. All started hurling filthy abuses in the name of mother and sister of deceased Shabbir and also assaulted him by an iron rod(Saria). Appellant Kallu @ Shabbir caused injury by choori. Appellant Salim used lathi. After assaulting deceased Shabbir, son of Babu Khan, all the accused persons fled away from the scene of occurrence. The incident was immediately reported to Kotawali Police, Dewas by P.W.1 Haroon Patel vide Ex-P/1. The deceased was assaulted by the accused persons on account of some earlier quarrel between younger son of Sardarbi and deceased Shabbir. Deceased Shabbir was taken to Government Hospital, Dewas where he was examined by P.W.7 Dr. Suresh Thakur, who issued M.L.C. report (Ex-P/16). Dr. Thakur on written request by concerned police vide Ex-P/17 recorded dying declaration of deceased Ex-P/18. After primary treatment, looking to the serious condition of the deceased, he was immediately referred for further treatment in M.Y. Hospital, Indore and from M.Y. Hospital, he was shifted to Private Hospital, Sheik Hatim where deceased died on 5/6/95 early in the morning at 5.40 a.m. The death was reported at Palasia Police Station, Indore where Merg(Ex-P/16) was registered on 5/6/95 at 6.30 p.m. Ramsingh, S.I.(P.W.12) prepared the inquest report(Ex-P/14) and sent the dead body of the deceased for postmortem examination, which was conducted by Dr. Surendra Dubey(P.W.9) in M.Y. Hospital, Indore. The postmortem report is Ex-P/19. The accused persons were arrested and on their disclosure statement, weapons were seized. During the course of investigation, spot map(Ex-P/15) was got prepared by Patwari and

the police also prepared spot map, that is, Crime Details Form(Ex-P/2). After completion of investigation, charge-sheet was filed against all the four appellants under Sections 302/34 and 294 of the I.P.C.

4. The appellants denied the charges and pleaded false implication. They have not examined any witness in defence whereas prosecution has examined in total thirteen witnesses and adduced twenty three documents to prove its case. The learned Trial Court, while acquitting the appellants from the charge under Section 302/34 of the I.P.C., convicted them under Sections 307, 307/34 and 294 of the I.P.C. and sentenced as mentioned here-in-above.

5. The State has also filed appeal against the a acquittal of the respondents for offence under Section 302/34 of the I.P.C.

6. We have heard the learned counsel for the parties in both the appeals and also perused the entire record of the Trial Court.

7. The conviction of the appellants No.1 Nasir and No.3 Shabbir @ Kallu under Section 307 of the I.P.C. and appellants No.2 Salim and No.4 Sardarbi @ Addi under Section 307/34 of the I.P.C. are based on eye-witnesses account of Haroon Patel(P.W.1), Abid Hussain(P.W.2), Dayanand(P.W.3) and Hanif Mohd.(P.W.5) coupled with medical evidence of Dr. Suresh Thakur(P.W.7) and Dr. Surendra Dubey(P.W.9). The other witnesses were regarding arrest, seizure, inquest as well as for some formal investigation. Seizure of weapon from the possession of the appellants was not very material because prosecution did not file Forensic Science Laboratory report about presence of blood of deceased on those weapons.

8. Learned counsel for the appellants has submitted that specific overt acts of appellants Salim and Sardarbi @ Addi have not been corroborated by the medical evidence. The witnesses have stated that Salim was having lathi and Sardarbi @ Addi used an iron rod(Saria), but not a single injury was found by both the doctors on the person of deceased caused by these weapons. The name of appellant Salim is not mentioned in the F.I.R. Learned counsel has also submitted that the trial Court has incorrectly discarded the Dying Declaration(Ex-P/18) recorded by Dr. Suresh Thakur(P.W.7)and in this Dying Declaration, names of appellants Salim and Sardarbi @ Addi are not mentioned.

9. On the other hand, learned counsel for the State has criticized the impugned judgment on the ground that the learned trial Court have given finding in paragraph 51 that appellants had intention to cause such injuries, which could result into death of the deceased, erred in convicting the appellants under Sections 307 and 307/34 of the I.P.C. The learned Dy. A.G. has also assailed the judgment of the Trial Court regarding discarding the Dying Declaration(Ex-P/18) mainly on the ground that before recording Dying Declaration, doctor has not given certificate of fitness of deceased and also after completion of the Dying Declaration, as well. Learned counsel has also urged that because of the act of the appellants,

deceased has died and death was direct result of their act. The question of punishing the appellants for attempt to commit murder under Section 307 of the I.P.C., would not arise and the learned Trial Court has committed grave illegality on this aspect.

10. On scanning of the statement of all the four eye-witnesses Haroon Patel(P.W.1), Abid Hussain(P.W.2), Dayanand(P.W.3) and Hanif Mohd.(P.W.5), it is crystal clear that they are independentwitnesses having absolutely no interest in deceased. Haroon Patel(P.W.1) lodged the report in the Police Station immediately and, in this report, names of three accused Nasir, Shabbir @ Kallu and Sardarbi @ Addi are mentioned. The name of Salim is not mentioned in the F.I.R. and this witness admitted in paragraphs 7 and 8 of his cross-examination that he was not knowing the name of appellant Salim and he came to know his name after two days and he was knowing this appellant by face, but the fact of knowing of the appellant by face is not mentioned in F.I.R.(Ex-P/1) and for this material omission, he has not given any explanation. Apart from this, though other eye-witnesses right from the beginning have stated that appellants Salim and Sardarbi @ Addi assaulted the deceased by lathi and iron rod(Saria), but the deceased did not suffer even a single injury caused by hard and blunt object like lathi or iron rod.

11. In view of the Supreme Court Judgment rendered in case of *"Thaman Kumar Vs. State of Union Territory of Chandigarh"*,

> "Where there is a conflict between the oral testimony and medical evidence and medical evidence is not at all disclosing any kind of injury caused by a particular weapon, it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful"

12. In the instant case, similar is the situation regarding use of lathi and iron rod for causing injuries to deceased by these two appellants. Therefore, in the considered view of this Court, both these appellants are entitled to get benefit of doubt.

13. There is another circumstance in favour of appellants Salim and Sardarbi @ Addi, that is, their names are not mentioned in the Dying Declaration(Ex-P/18) recorded by Dr. Suresh Thakur(P.W.7). The learned Trial Court incorrectly discarded this Dying Declaration in paragraph 40 of the judgment on the ground that before recording dying declaration, doctor has not given certificate of fitness of the deceased and also after completion of the dying declaration, as well.

14. We have perused the dying declaration as well as the statement of Dr. Suresh Thakur(P.W.7), who has specifically stated that he received letter(Ex-P/17) from the concerned Police Station regarding condition of patient for recording of Dying Declaration and also he was asked to record dying declaration. Dr. Suresh Thakur (P.W.7) proved this letter vide Ex-P/17 on which he gave opinion that patient was in a fit condition to give statement and he was fully conscious.

After giving this certificate on the letter(Ex-P/17) on 4/6/95, at 9.30 p.m. Dr. Thakur(P.W.7) recorded dying declaration on the same date at 9.35 p.m. just after five minutes and completed the dying declaration on 4/6/95 at 9.45 p.m. The dying declaration(Ex-P/18) is also bearing the signature of Shabbir(deceased) son of Babu Khan at B to B part. Doctor Thakur(P.W.7) has also proved his signature on letter(Ex-P/17) at A to A part and on dying declaration(Ex-P/18) at A to A part. In the Court also Dr. Thakur has specifically stated that patient was in a fit condition to give dying declaration and he was fully conscious.

15. The Five Judges Constitution Bench of Supreme Court in the case of Laxman Vs. State of Maharashtra considered the reference on two conflicting judgments rendered by two different three Judges Bench in case of *"Puparambaka Rosamm Vs. State of Andhra Pradesh"* and *"Koli Chsunilal Savji Vs. State of Gujarat"*

In case of *"Paparambaka Rosamma Vs. State of Andhra Pradesh"*, it was held that:

> "In the absence of a medical certification of doctor about fit state of mind of the deceased to make statement, the dying declaration could not be relied upon"

and conflicting view given in case of *"Kohli Chuunilal Savji Vs. State of Gujarat"* wherein it is held that:

> "If the materials on record indicate that the deceased was fully conscious and was capable of making statement, the dying declaration can be relied upon and the same cannot be ignored merely because the doctor had not made the endorsement."

16. Answering this reference the Supreme Court has held in paragraph '5' as under:-

> "The Court also in the aforesaid case relied upon the decision of this Court in *Harjit Kaur v. State of Punjab* wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in *Paparambaka Rosamma v. State of A.P.* (at SCC p. 701, para 8) to the effect that:
>
> "(in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration.)"

has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in *Paparambaka Rosamma V. State of Andhara Pradesh* must be held to be not correctly decided and we affirm the law laid down by this Court in *Koli Chunilal Savji V. State of Gujarat."*

17. In view of the aforesaid declaration of law regarding certificate of fitness of the deceased by the doctor, the Certificate is not necessary if evidence on record is satisfying that the deceased was in a fit condition to give statement. As a matter of fact, in the instant case as discussed here-in-above, there is no dispute that doctor has not given the certificate about the fit condition of the deceased to give statement. On letter(Ex-P/17), the certificate has been given specifically and also proved in the Court by Dr. Suresh Thakur(P.W.7). The learned trial Court has adopted a hypothetical approach that certificate must be on the paper on which statement recorded by the doctor and before recording the statement, certificate must be given and also after completion of statement. In this regard, the learned Trial Court has also failed to understand the legal position enunciated by Apex Court as well as the Hight Court on the question of proof of fitness of deceased at the time of recording of dying declaration.

18. In this view of the matter, we hold that the learned Trial Court has wrongly discarded the dying declaration(Ex-P/18), which is fully admissible as well as reliable. All the eye witnesses specifically stated that appellants Nasir and Shabbir @ Kallu caused the injuries by choori on abdomen. There is no reason for these independent eye-witnesses to implicate falsely appellants Nasir and Shabbir @ Kallu. The version of all the four eye-witnesses regarding causing of injury by choori, a sharp edged weapon to deceased is fully corroborated by medical evidence of Dr. Suresh Thakur(P.W.7) and Autopsy Surgeon Dr. Surendra Dubey(P.W.9).

19. The learned Trial Court in paragraph 51 of the impugned judgment has specifically held after discussion of the medical evidence and eye-witnesses account in foregoing paragraph that appellants were having intention to cause such bodily injuries, which could cause death of the deceased. The learned trial Court after giving this positive finding, erred in convicting two appellants Nasir and Shabbir @ Kallu under Section 307 of the I.P.C. and appellants Salim and Sardarbi @ Addi under Section 307/34 of the I.P.C. When the person has died because of injuries caused by the accused Nasir and Shabbir @ Kallu their conviction under Section 307 of the I.P.C. attempt to commit murder would not arise. Section 307 of the I.P.C. reads as under:-

307. Attempt to murder:- "Whoever does any act with suchintention or knowledge, and under such circumstances that, if he by that act accused death, he would be guilty or murder, shall be punished with imprisonment of wither description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to (imprisonment for life), or to such punishment as is hereinbefore mentioned."

20. The definition of Section 307 of the I.P.C speaks clearly that the person would be liable for attempt to murder only when the victim would not die. An offence under Section 307 of the I.P.C. is a very serious offence and it requires the same very factors to be proved as are needed to prove an offence under Section 302 of the I.P.C. except that in this case the act falls short of the death of the deceased which is necessary under Section 302 of the I.P.C.

21. We may draw analogy that if the person is dead, the author of the injuries by which he died cannot be convicted under Section 307 of the I.P.C. on the basis of the following observations made by Supreme Court in case of "*Jagtar Singh V. State of Punjab* (1993 Vol 99 Cri. Law Journal 2886)"

> "Originally, there were four accused charged for the murder of the victim Kulwant Singh. The present appellant was one of the four accused. He was charged for the offence under Section 302, Penal Code[the 'IPC'] as well as under S.307 read with S.34, I.P.C. The rest three accused were charged for the offence under S.302 read with S.34 as well as under S.307 read with S.34, I.P.C. Since the victim was only Kulwant Singh for whose death the accused were charged under S.302, I.P.C. we have not understood the charge framed by the learned Sessions Judge under S.307, IPC also in connection with the same murder. Nor have we followed the conviction of the present appellant under S.307 read with S.34 in addition to his conviction under S.302 of IPC. It further appears that the High Court has not noticed this anomaly in the convictions and sentences both under S.302 and S.307 read with S.34 of the present appellant."

22. In the case of *Jagtar Singh* (supra), the Supreme Court has also condemned the framing of charge against the accused persons under Section 307 of the I.P.C. when person is dead.

23. The learned Trial Court has also committed error of fact in paragraph 51 of the impugned judgment mentioning that deceased died after twenty four hours of the incident. This is not the correct fact. The deceased sustained injury on 4/6/95 at 9.20 p.m. and died as per Merg Intimation Report(Ex-P/16) on 5/6/95, at 5.40 a.m. within nine hours and not after twenty four hours. This fact has also been mentioned by the learned trial Court in the impugned judgment last line of paragraph

43. Autopsy Surgeon Dr. Surendra Dubey(P.W.9) in his opinion paragraph 9 has specifically stated that deceased died because of shock and haemorrhage due to injuries sustained by him and time of death was within twenty four hours from the date and time of postmortem, that is, 5/6/95 at 12.45 p.m. Dr. Dubey(P.W.9) proved postmortem report(Ex-P/19). He has also opined specifically in paragraph 7 that injuries were ante mortem in nature and caused by hard and sharp object within twenty hours from the death of deceased. Dr. Surendra Dubey(P.W.9) noted three stab injuries on the left side of the abdomen at iliac fossa region. Underneath this injury peritoneum was cut. The second incised wound was on left hypochondriac region. This injury had also caused damage to peritoneum and its tissues. The third incised injury was on epigastric region and it damaged the liver and other major blood vessels. Inside abdomen cavity, blood was present. Injury No.4 was incised wound on right index finger and injury No.5 was also incised wound on right index finger. The statement of all the eye-witnesses regarding causing of injuries to deceased by a sharp edged weapon is fully corroborated by the medical evidence. The death was homicidal in nature.

24. Now we will deal the question of application of Section 34 of the I.P.C. Ordinarily, for common intention of the accused direct evidence is not available and Court has to consider on the basis of the circumstances. In the instant case, in the day time there was a quarrel between the children and in the night time at about 9.20 p.m., when deceased was standing in front of the betel shop in the market, appellants Nasir and Shabbir @ Kallu having choori in their possession reached in an auto-rickshaw. After alighting from auto-rickshaw, they hurled filthy abuse to deceased and, thereafter, wielded a blow by choori causing three serious injuries on vital part of the body, that is, abdomen area and these injuries caused serious damage to the internal organ of the abdomen as discussed herein-above. After causing injuries, they boarded the same auto-rickshaw which was standing and fled away.

25. In the backdrop of these facts, it can be easily discern that both had common intention to commit murder of deceased and in furtherance of the said common intention assaulted the deceased by choori, a dangerous weapon.

26. In the case of *Nachhettar Vs. State of Punjab* (A.I.R. 1976, SC, page 951) paragraph 15, the Supreme Court has observed that when prosecution witnesses have described specific overt acts of the accused for causing injury by a particular weapon but same has not corroborated by the medical evidence on the other hand falsifying the ocular version against those accused, in such situation because of this conflict in medical and ocular evidence accused must be entitled for acquittal and cannot be convicted with the aid of Section 34 of the I.P.C.

27. In view of the foregoing discussion, the Cri.A. No.652/98 filed by the appellants are allowed in part. The conviction and sentence of the appellants No.2 Salim and No.4 Sardarbi @ Addi are hereby set aside. They are on bail. Their bail and surety bonds stand discharged.

28. The Cri.A.No.1445/98 filed by the State against the impugned judgment is also allowed in part. The conviction and sentence against respondents Salim and Sardarbi @ Addi is hereby set aside and against respondents No.1 Nasir and respondents No.3 Shabbir @ Kallu is allowed. Both these respondents are convicted under Section 302 read with Section 34 of the I.P.C. and sentenced to undergo R.I. for life. The trial Court is directed to verify whether both these respondents Nasir and Shabbir @ Kallu are still inside the Jail or released after completion of ten years Jail sentence as imposed by the Trial Court. If it is found that both the respondents Nasir and Shabbir @ Kallu have been released by the Jail authority, the learned trial Court is directed to take suitable action against these respondents for their appearance and, thereafter, remanding to Jail custody for serving out the remainder part of the Jail sentence.

29. Original judgment is retained in Cri.A. No.652/98 and a copy whereof be placed in the record of connected Cri.A. No.1445/98.

Order accordingly.

I.L.R. [2008] M. P., 915

APPELLATE CRIMINAL

Before Mr. Justice S.K. Kulshrestha & Mrs. Justice Manjusha P. Namjoshi

31 January, 2008*

JAMSINGH — Appellant

Vs.

STATE OF M.P. — Respondent

Penal Code (45 of 1860), Sections 302, 304 - Murder or Homicide not amounting to murder - Deceased and his wife returning home when they met with Appellant - Deceased enquired whether his relative has abducted his daughter - Appellant started hurling abuses - Appellant stuck an axe blow over head of deceased - F.I.R. lodged by deceased who died while under treatment - Held - Act of appellant may be without pre-meditation but was not a case of sudden fight in which in heat of passion injury was caused - Act of appellant squarely falls within description of offence punishable under Section 302 - Appeal dismissed. (Para 13)

R.R. Bhatnagar, for the appellant

G. Desai, Dy. A.G. for the respondent/State

J U D G M E N T

The Judgment of the Court was delivered by **S.K. Kulshrestha, J.** :-BY this appeal, the appellant Jamsingh s/o Muniya Tadvi assails the legality and propriety of the conviction and sentence passed by judgment dated 13/11/1998 in Sessions Trial No. 50/1998 by the learned IIIrd Additional Sessions Judge, Khargone, (West Nimar) whereby he has been awarded imprisonment for life under Section 302 of the Indian Penal Code.

*Cr.A. No. 1500/1998 (Indore)

2. The prosecution case, succinctly put, discloses that on 07/11/1997, at about 03.00 O'clock, while deceased Chandarsingh and his wife were returning from the market to their house, the appellant and the acquitted accused met them, each armed with an axe. When the deceased inquired whether their relative had abducted his daughter, the accused started hurling abuses. When the deceased objected, the accused stated that he was trying to be a bully and accusing their relative falsely and unleashed the attack. Jamsingh struck a blow of axe over the head of Chandersingh, co-accused Vesta assaulted him with the handle of the axe and Dashariya assaulted his wife Surbai (PW 11). On report being made, Crime No. 199/97 was registered and the investigation commenced.

3. During investigation samples of blood stained and control earth were taken, the witnesses were examined and their statements were recorded u/S. 161 of the CrPC, accused and the co-accused were arrested and on the basis of the disclosure made, the axes wielded by the accused persons, were seized. Though the deceased was rushed for medical treatment to the Hospital, he succumbed to the injuries on 10/11/1997 while under treatment. The case was thus converted to one u/S. 302 and the body of the deceased was sent for post-mortem examination. During treatment, X-Ray of Chandersingh and Surbai were taken and in the X-Ray Report (Ex.P/9), fracture of parietal was detected. The articles which were seized, were forwarded to the Forensic Science Laboratory and after completion of the investigation, the accused were prosecuted.

4. The accused denied having committed any offence and pleaded that they were innocent and had been falsely implicated. However, on trial, while acquitting co-accused Dashria @ Dashrath s/o Jamsingh and Veslia @ Vesta s/o Jamsingh, the accused was convicted and sentenced as hereinabove stated.

5. Before proceeding to consider the account rendered by the witnesses in this case, it will be advantageous to refer to the injury sustained by the deceased. Deceased was first examined by Dr. J.D.Gupta who gave report Ex.P/2 containing the injuries recorded by him. According to this report, the deceased had received an incised wound from which blood was oozing, measuring 3" x 1" x bone deep on parietal bone. Doctor had advised X-Ray and the Radiologist Dr. D. S. Solanki (PW 5) opined, as per Ex.P/9, that there was fracture of parietal bone. After death of Chanderia, his body was sent for post-mortem examination and as per the report Ex.P/18 of the Autopsy Surgeon, the mode of death was coma as a result of fracture of skull bone with the injury to right parietal bone of brain leading to coma and death. It is, therefore, manifest that an injury over the head of the deceased was caused and on account of the fracture and the impact of the injury, the deceased had died as a result of injury to the brain.

6. To unfold the case of the prosecution, the prosecution examined Surbai (PW 11). Presence of Surbai cannot be doubted as she had also sustained injury as per Ex.P/3. There was a wound measuring 2½" x 1" x bone deep on her left forearm. Surbai has stated that Ramsingh and Jamsingh had each wielded an axe.

The blow landed over the head of the deceased. When she tried to intervene, Jamsingh assaulted her with an axe. She has stated that there was enmity on account of her daughter having been taken away by the relatives of the appellant. She has also stated that her son Raju had also arrived and witnessed the incident. However, she has been duly confronted with her statement u/S. 161 of CrPC, in which she had not disclosed that Raju was also present and further, only Jamsingh was armed with an axe, while Vestia and Dashria did not possess any weapon.

7. The prosecution has also examined Raju (PW 12), son of the deceased, to depose that Jamsingh and other assaulted his father while Dashria shot an arrow at him which struck him in his thigh and Vestia assaulted with a heavy stick over the forehead. The medical report of Jamsingh contradicts the testimony of Raju. As would be seen from the report Ex.P/2, X-Ray (Ex.P/9) and the Post Mortem Report (Ex.P/19), the deceased had sustained a single injury over his head and, therefore, the statement of Raju that Vestia had struck an arrow which had caused injury in the thigh of the deceased, cannot be believed. This witness has further stated that his mother was also injured and when they intervened, the accused persons ran away. The fact that the presence of Raju was artificially introduced at the time of the deposition by Surbai (PW 11) who had been confronted with her statement to the Police with regard to the omission of name of Raju, shows that Raju was not and could not have been, an eye witness.

8. The prosecution has also examined Sonibai (PW 13), wife of Raju (PW 12), who has deposed on the basis of the information given by some woman to her. She has stated that Jamsingh was armed with a heavy stick and she did not see axe in his hand. She has admitted that the incident was watched from a distance. The fact that she had learnt about the incident from some woman who has not been examined, renders her testimony hear-say. Under these circumstances, there is singular testimony of Surbai (PW 11) insofar as the ocular account of the incident is concerned.

9. The FIR (Ex.P/17) was lodged by the deceased. Since during treatment the deceased died, the said FIR can be used as dying declaration. The deceased had given vivid description in the FIR with regard to the assault and had clearly stated that it was Jamsingh who had struck an axe over his head causing the said injury. In view of the testimony of Surbai (PW 11), injured witness, and the FIR lodged by the deceased, the irresistible conclusion is that it was Jamsingh who had caused the injury over the parietal region of the deceased which resulted in a fracture and eventually in his death.

10. Learned counsel for the appellant has submitted that evidence of Surbai (PW 11) should not be believed as she has modulated her statement to artificially introduce the presence of Raju (PW 12) whose testimony has been disbelieved by the trial Court. He has further submitted that the witness Surbai (PW 11), being the wife of the deceased, was an interested witness and, therefore, her testimony also should not be acted upon.

11. While it is true that the witness Surbai (PW 11) has attempted to introduce Raju as a person on the spot, the said statement does not render her entire testimony unworthy as the rule of falsus in uno, falsus in omnibus, does not apply. While it is true that Surbai (PW 11) being wife of the deceased has interest in deposing against the accused persons, but merely on account of being a relative of the deceased, the evidence cannot be discarded. Only caution that is required to be exercised is that such evidence should be subjected to minute scrutiny. Applying the said test, it is clear that not only Surbai (PW 11) has made statement implicating the appellant, the statement is corroborated by the FIR (Ex.P/17) lodged by the deceased and the medical evidence which is fully consistent with the ocular account.

12. Learned counsel has next contended that since the incident was not in contemplation and had occurred suddenly in the heat of passion, the offence, at the most, would fall u/S. 304 of the IPC and will not be an offence of the description which is punishable u/S. 302 thereof. Attention has been invited to Exception 4 to Sec. 300 of the IPC. Exception 4 reads as follows :-

> Exception 4.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

13. In order that an accused can claim advantage of Exception IV, he has to prove that the offence was committed without pre-meditation, in a sudden fight, in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner. As the facts disclose, though the act may have been without pre-meditation, it was not a case of sudden fight in which in the heat of passion, in a sudden quarrel, the injury was caused. Under these circumstances, the act of the accused does not fall within Exception 4.

14. In view of the above discussion, it is clear that the offence committed by the accused falls squarely within the description of an offence of murder punishable u/S. 302 of the IPC. The appeal, therefore, fails and is dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 918
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice Rakesh Saksena
12 February, 2008*

VIJAY GUPTA — Appellant
Vs.
STATE OF M.P. — Respondent

Penal Code (45 of 1860), Section 300 - A sudden quarrel between appellant and his wife (deceased) on spur of moment and in heat of passion,

*Cr. A. No. 2947/1998 (Jabalpur)

without premeditation appellant suddenly dealt one blow of hammer on head of deceased with force - Bones of her skull broken into several pieces and she died - Shows an intention of causing her death or at least causing such bodily injury as was likely to cause her death - Liable to be punished under Part-I of Section 304 I.P.C. (Paras 9,11)

Cases referred :

(2006) 10 SCC 681, AIR 2008 SC 1

Alok Tapiker, for the appellant,
R.S. Patel, Addl. Advocate General, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :-Appellant Vijay Gupta has been convicted under Section 302 of the Indian Penal Code and sentenced to imprisonment for life with fine of Rs.500/-, for causing the murder of his wife Lalitabai, by the impugned judgment dated 30.11.1998 passed in Sessions Trial No.122/1997 by the Sixth Additional Sessions Judge, Jabalpur.

2. According to the prosecution case, on 23.06.1996 at 3:10 a.m., PW-1 Batsiya Bai, mother of appellant, lodged the report at Police Station Hanuman Tal that for last three days an altercation over some domestic matters was going on between her son Vijay and daughter-in-law Lalitabai. A day before the incident, quarrel was pacified. In the night intervening between 22nd and 23rd June, 1996 at about 2:00 a.m., again a hot altercation between them erupted and suddenly, Vijay dealt a blow by hammer on the head of Lalitabai. Lalitabai started squirming and became unconscious. Blood was oozing out from her head, ear and nose. Vijay then ran away from the house. On her raising hue and cry, neighbours Subhash Gupta, Madan Gupta and other persons came to her house to whom she narrated the occurrence. Lalitabai was lying unconscious in the house.

3. On the aforesaid report, Station Officer Girish Bohre (PW-13) reached at the house of Batsiya Bai (PW-1) and sent Lalitabai to the Victoria Hospital, Jabalpur, where she succumbed to injuries. Her dead body was then sent for post mortem examination to the Medical College, Jabalpur. Dr.A.K.Yadu performed the post mortem examination. He found haematoma on the right parieto temporal region of her scalp, measuring 4 x 3 ½ x 1 inches and a swelling red and blue around the eye. On internal examination, he also found blood below the scalp in the right parieto temporal scalp region. There was depressed fracture of lower part of the parietal bone. Size of the fracture was 3 x 1 ½ x ½ inches and bones were in four small irregular pieces. A fracture on the right middle cranial fossa transverse measuring four inch long, was also found. There was subdural haematoma all around the right half of the brain. Brain inside the right temporal region was depressed for one inch below the fracture. In his opinion, the injuries were antemortem in nature and were caused by the hard and blunt object and

death was caused by head injuries, which were homicidal and were sufficient to cause death in ordinary course of nature.

4. During the trial, prosecution, in order to substantiate it's case, examined Batsiya Bai (PW-1), Rakhi (PW-4) and Bablu (PW-10). For corroboration of evidence of the aforesaid witnesses, prosecution further examined Subhash Gupta (PW-2) and Madan Gupta (PW-9), who allegedly reached at the house of appellant soon after the occurrence. Defence of the appellant was that of false implication due to family feud. Halfheartedly it was also suggested by the defence that Lalitabai had died by the accidental fall of the rafter of the thatched roof. Two witnesses Guddan Singh (DW-1) and Kishanlal (DW-2) were also examined in defence. However, relying upon the evidence of Bablu (PW-10), Dr.A.K.Yadu (PW-6) and Girish Bohre (PW-13) Investigating Officer, the Trial Court convicted and sentenced the appellant as aforesaid.

5. The Supreme Court recently in the case of *Trimukh Maroti Kirkan Vs. State of Maharashtra,* (2006) 10 SCC 681, has again approved the well settled principle that when an incriminating circumstance is put to the accused and that accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. In this case the Supreme Court has also held that where a husband is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling house where the husband also normally resided and if the husband does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it was a strong circumstance pointing that he alone was responsible for the commission of crime.

6. In the present case, the appellant has not disputed that the deceased was his wife and they were living together in the same house. He, however, took a defence that he was falsely implicated because of the family feud. He also led the evidence in defence to the effect that in the night of 22nd June, 1996 there had been a programme of "Kirtan" at the house of Guddan Singh (DW-1) and he was present there right from 9:00 p.m. to 4:00 a.m. of 23rd June, 1996 and that somebody had informed them that the roof of "Machan" had fallen on Lalitabai who was sleeping underneath. They all had gone to the house of appellant and had taken out Lalitabai from there. She had suffered injuries on her head. Though these suggestions were given to Bablu (PW-10) in cross-examination, however, no question was put to the Investigating Officer Girish Bohre (PW-13) who had prepared the spot map and had carried out the inquest proceedings. Girish Bohre (PW-13), on the other hand, testified that when he reached at the spot, he found a bloodstained hammer on the spot. He seized a pillow, a towel and a quilt, which were stained with blood. Dr.A.K.Yadu (PW-6) who performed the post mortem examination of the dead body of Lalitabai categorically stated that the injuries

found on her body were possible by the hammer which was sent to him by the Police for examination. He had given his report (Exhibit P/10) in this regard. He also deposed that the injuries were homicidal in nature. In view of the above evidence, we are of the opinion that the explanation given by the appellant is false, especially when he did not give the aforesaid explanation in his statement under Section 313 of the Code of Criminal Procedure.

7. The fact that the appellant was present in his house at the time of occurrence and had caused the death of Lalitabai has been established by the evidence of Bablu (PW-10) who has testified that he was present in the house of Lalitabai who was his sister. According to him, in the fateful night the appellant had dealt a blow with a hammer on the head of his sister, whereupon she had cried "mar dala, mar dala". Thereafter, the appellant had run away. Though this witness happened to be young boy of about 12 years of age, but he stood the test of cross-examination without being deviated in any manner. On careful scanning of his evidence, we are satisfied that his testimony is trustworthy. None of the prosecution witness has deposed that in the night of occurrence this witness was not in the house.

8. Rakhi (PW-4), the daughter of the appellant, did not support the prosecution case. She was declared hostile. However, in cross-examination, in the context of presence of appellant in the night, she admitted that her father had gone out of the house in perplexity. Subhash Gupta (PW-2), though did not support the prosecution at the trial, yet admitted that his house is adjacent to the house of appellant and in the night of incident, he had heard cries "mar diya, mar diya" from the house of appellant. He and several other neighbours had reached at the house of appellant. In these circumstances, we are convinced that the appellant, at the time of occurrence, was present in his house and that Lalitabai had met with a homicidal death in the house. It has been clearly established that it was the appellant only who had caused her death.

9. Though Batsiya Bai (PW-1), mother of appellant, did not support the prosecution case and turned hostile, however, she happened to be the first person who went to Police and lodged the First Information Report (Exhibit P/1) soon after the incident. On perusal of the First Information Report, it emerges that on the night of occurrence there had occurred a sudden quarrel between Lalitabai and appellant, in the course of which, on the spur of the moment and in the heat of passion, without premeditation the appellant suddenly dealt one blow of the hammer on the head of Lalitabai, which resulted into her death.

10. In *Muthu Vs. State,* AIR 2008 SC 1, the Apex Court observed that, no doubt, even in the heat of the moment or fit of anger one should not attack somebody since human beings are different from animals inasmuch as they have the power of self-control. Nevertheless, the fact remains that in the heat of the moment and in a fit of anger people some times do acts which may not have been done after premeditation. Hence the law provides that while those who commit acts in the heat of the moment or fit of anger should also be punished, their punishment

April-08 (Master)

should be lesser than that of premeditated offences. It is for this reason that Exceptions I and 4 have been inserted in Section 300, IPC.

11. In our opinion, Exception 4 of Section 300 of the Indian Penal Code is clearly attracted in the circumstances of the present case and the appellant cannot be convicted for the offence under Section 302 of the Indian Penal Code. However, since, the appellant dealt the blow by the hammer on the head of Lalitabai with a such force that bones of her skull were broken into several pieces, we are of the opinion that the appellant had assaulted Lalitabai with an intention of causing her death or at least causing such bodily injury as was likely to cause her death, making him liable to be punished under Part-I of Section 304 of the Indian Penal Code.

12. For the reasons given above, conviction of the appellant under Section 302 of the Indian Penal Code is altered to Section 304 part-I of the Indian Penal Code and his sentence of life imprisonment with fine of Rs.500/- is substituted by the sentence of 10 years' rigorous imprisonment with fine of Rs.500/-. The period of incarceration in jail which the appellant had already undergone, shall be adjusted in the aforesaid sentence of 10 years. If the appellant has undergone the full sentence of 10 years, he shall be released forthwith if not required in any other case. The judgment of the Court below is modified accordingly.

13. Accordingly, the appeal is partly allowed

Appeal partly allowed.

I.L.R. [2008] M. P., 922
APPELLATE CRIMINAL
Before Mr. Justice S.A. Naqvi
14 February, 2008*

CHIRONJILAL — Appellant
Vs.
STATE OF M. P. — Respondent

Prevention of Corruption Act (49 of 1988) - Section 13(1)(d) - Illegal gratification - Demand of money made by SHO - No demand made by appellant nor party to any agreement - Appellant posted as Head Constable not in a position to show favour or render any service in connection with his official duty - Money accepted by appellant for giving the same to SHO - Where demand of bribe is not proved, accused cannot be convicted - Appeal allowed. (Para 20)

Cases referred :

AIR 2005 SC 6275, 2005(4) MPLJ 93, Cr.A. No. 125/1979, 2008(1) MPHT 174, AIR 1979 SC 1408

Umakant Sharma with *Vikash Jain*, for the appellant
Sudesh Verma, G.A. for the respondent

*Cr.A. No. 1165/1993 (Jabalpur)

April-08 (Master)

JUDGMENT

S.A. NAQVI, J. :–The appellant Chironjilal has preferred the appeal being aggrieved by the impugned judgment dated 25.11.93 passed by the Special Judge and Ist Additional Sessions Judge, Damoh in Special Case No.8/92 whereby the appellant has been convicted under Section 161 IPC read with Section 7 of the Prevention of Corruption Act 1988 (in short the 'Act') and under Section 13 (1) (d) of the Prevention of Corruption Act, 1988 and sentenced to undergo one year R.I. and fine Rs. 1,000/- in default six months RI and two years RI with fine of Rs.2,000/- in default six month R.I. respectively.

2. The admitted facts of the case are that the appellant Chironjilal was Head Constable at Police Station Batiyagarh District Damoh at the relevant point of time; the appellant was working as public servant.

3. The case of prosecution in a nutshell is that in 1983 and 1985-86 Tatu Singh donated his 16 acres land and house to Kunj Bihari (PW-1). But Smt. Bari Bahu wife of Tatu Singh later on objected to it. Kunj Bihari filed case for mutation, Bari Bahu filed objection in that case, she lodged FIR against the Kunj Bihari and his father Keshavram Shukla of theft of ornaments. Kunj Bihari and his father Keshavram Shukla obtained anticipatory bail and they went to Police Station Batiyagarh to file anticipatory bail papers, but they were compelled to remain in Police Station for 24 hours. SHO Vimal Kumar Jain told them that in how many cases they will obtain bail. SHO Vimal Kumar Jain and the appellant Chironjilal demanded illegal gratification of Rs.5,000/- from the complainant, but after negotiation it was settled that complainant shall pay Rs.1500/- to them at the residence of either SHO Vimal Kumar Jain or the appellant Chironjilal. It was settled that complainant shall pay Rs.1500/- on 19.12.86 to SHO Vimal Kumar Jain or Chironjilal. Complainant Kunj Bihari presented an application Ex.P/1 to S.P. Lokayukat, Sagar for arranging a trap. After completing the formalities and preparing the Panchanamas' a trap was arranged.

4. On 19.12.86, Rs.1500/- consisting of Rs.100/- denomination were handed over to Kunj Bihari applying phenolphthalein powder, to hand over the same to the appellant, the number of notes were recorded as per procedure. Kunj Bihari alongwith trap party went to village Batiyagarh, he went to appellant's house alongwith trap party and handed over Rs.1500/- to Chironjilal and indicated the trap party, keeping his hand on his head as directed. The appellant was caught hold by the trap party. He threw notes on the ground and Rs.1500/- were recovered from the spot. The fingers of the appellant were dipped in Sodium Carbonate Solution, which turned pink. Solution was sealed. Seizure memo of the notes and Panchnams were prepared on the spot. The appellant was got arrested. After obtaining sanction to prosecute the appellant, he was charge sheeted under Section 161 IPC read with Section 7 of the Act and under Section 13(1)(d) of the Act in the Court of Special Judge, Damoh.

5. Charges under Section 161 IPC read with Section 7 of the Act and section 13(1)(d) of the Act have been framed. The appellant abjured the guilt; he pleaded innocence and false implication. His defence is that he was on leave from 13.12.86 to 19.12.86. He came back to Batiyagarh on 19.12.86 afternoon. Trap party could not find SHO Vimal Kumar Jain. Consequently, he was falsely implicated.

6. The prosecution examined 19 witnesses and the appellant examined one defence witness.

7. After hearing learned counsel for the parties, perusing the evidence and material on record learned trial Court found the appellant guilty under Section 161 IPC read with Section 7 of the Act and under Section 13(1)(d) of the Act and sentenced him as aforementioned. Being aggrieved by the impugned judgment the appellant has preferred the appeal.

8. I have heard learned counsel for both the parties, perused the impugned judgment, evidence and material on record.

9. It has been vehemently argued by Umakant Sharma learned senior counsel for the appellant that the learned trial Court erred is not considering the fact that case of the prosecution has not been supported by the independent evidence, Kunj Bihari (PW-1) is accomplice and he is not a trustworthy witness. It is proved that demand of illegal gratification was made by SHO Vimal Kumar Jain and in absence of SHO Jain, the amount has been handed over to the appellant for SHO, there was no proposal for demand of illegal gratification by the appellant, and the evidence has not been considered by the learned trial Court in proper way, the appellant has been convicted on conjuncture and surmises. Contrary to that, learned Public Prosecutor supported the impugned judgment and contended that learned trial Court did not commit any error in convicted the appellant and sentencing him as aforementioned.

10. It has been admitted by the learned senior counsel for the appellant that on 19.12.86 the appellant Chironjilal was posted in Police Station Batityagarh as Head Constable and he was a Public Servant. It has not been challenged by learned senior counsel for the appellant that Kunj Bihari gave Rs.1500/- to the appellant and this money has been recovered from the floor of the house of the appellant. This fact is proved by the evidence of Kunj Bihari (PW-1), A.K. Jain (PW-6), Indramani Mishra (PW-9), R. Dwarka Prasad (PW-10), Narayan Prasad (PW-12), M.K. Gautam (PW-18) and M.P. Dubey (PW-19) and also Panchnama Ex. P/2, seizure memo Ex.P/6 and registration of crime Ex.P/11. On going through the evidence of these witnesses it is proved that Kunj Bihari on 19.12.86 presented an application Ex.P/1 for a trap and trap was arranged, currency notes were brought by the complainant, phenolphthalein Powder was applied on those currency notes and handed over to the complainant to give the notes to concern public servant, the number of currency notes were written in Panchnama Ex.P/6 and trap party went to village Batiyagarh and successfully completed the trap and

recovered the money. Other formalities such as hands of the complainant were got washed by Sodium Carbonate, which turned pink were compelted.

11. Learned senior counsel for the appellant contended that prosecution has not proved demand of illegal gratification amount by the appellant Chironjilal from the complainant Kunj Bihari, being head constable the appellant was not capable to do favour to complainant, he was not authorised to release the complainant on anticipatory bail in presence of SHO and no proposal was made by the appellant for illegal gratification to the complainant. The competent officer was SHO Vimal Kumar Jain, who demanded illegal gratification from the complainant to release him on the anticipatory bail; luckily, Vimal Kumar Jain was not present on 19.12.86 on head quarter. Consequently, Kunj Bihari handed over Rs.1500/- to the appellant to give this money to Vimal Kumar Jain. The appellant has been made scap got and falsely implicated.

12. Though, in application Ex.P/1 it has been mentioned that SHO Vimal Kumar Jain and Head Constable the appellant Chironjilal demanded money as illegal gratification from the complainant and it was settled that how, money shall be paid to them, either at the house of SHO Vimal Kumar Jain or at the house of the appellant Chironjilal. But this fact has not been substantiated by the prosecution evidence i.e. the appellant Chironjilal alongwith Vimal Kumar Jain demanded Rs.1500/- as illegal gratification from the complainant. Kunj Bihari (PW-1) in his examination in chief clearly deposed that he alongwith his father went to Police Station, alongwith the appellant where SHO Vimal Kumar Jain met them, and told them that why you obtained anticipatory bail, and in how many cases, you will get bail. He specifically deposed that Vimal Kumar Jain demand Rs.5,000/- as illegal gratification to release them on bail, ultimately, it was settled that complainant shall pay Rs.1500/- to Vimal Kumar Jain as illegal gratification. Consequently, Kunj Bihari was released from the Police Station and he straightway went to S.P. Lakayukat, Sagar and arranged trap. Kunj Bihari in examination chief deposed that it was decided that he will give money to the SHO Vimal Kumar Jain or at the direction of SHO he will give money to the appellant Chironjilal. In para 2 of his cross-examination Kunj Bihari specifically admitted that on the day of trap i.e. 19.12.86 he went alongwith other officers to village Batiyagarh, but he could not meet SHO Vimal Kumar Jain being out of town. It leads to the presumption that the trap initially was arranged for SHO Vimal Kumar Jain, luckily he was not in town, consequently, money was handed over to the appellant Chironjilal for SHO Vimal Kumar Jain, which was in turn to be handed over to SHO Vimal Kumar Jain by the appellant. In para 3 of the cross-examination Kunj Bihari specifically admitted that Sahab (Vimal Kumar Jain) told him to arrange money within 3-4 days but he requested him that he will arrange money within 7-8 days, thereafter, he left the Police Station. He also deposed that he went to Police Station alongwith, order of anticipatory bail and told to Vimal Kumar Jain that he possesses anticipatory bail order; Vimal Kumar Jain reacted that in how many cases you will get bail. In

para 4 of the cross-examination Kunj Bihari specifically deposed that on the date of trap first he searched of SHO Vimal Kumar Jain, but he came to know that SHO Vimal Kumar Jain is out of station, the trap party told him to go and see whether Head Constable (Chironjilal) is there in town or not, if he is in town go his house, he also deposed that he went to appellant's house and for 10-15 minutes there was talk between him and Chironjilal, thereafter he handed over Rs.1500/- to the appellant Chironjilal. The appellant Chironjilal told him that this money is for Sahab i.e. SHO Vimal Kumar Jain and he asked money for himself (Chironjilal) thereafter, trap party rushed and over power him, the appellant again reiterated that currency notes does not belong to him, these notes for Sahab i.e. for SHO Vimal Kumar Jain. The appellant also told that he will give these notes to Sahab (Vimal Kumar Jain. In para 7 of cross-examination Kunj Bihari specifically deposed that the appellant Chironjilal came to him and took him, alongwith his father to Police Station Batiyagarh, on way to the Police Station Kunj Bihari told the appellant that they are having the anticipatory bail orders, then Chironjilal told him that SHO Vimal Kumar Jain has called them. You have to file bail papers and personal bonds in the Police Station. He specifically admitted that no other conversation took place between him and Chironjilal. Keshram (PW-4) father of the complainant Kunj Bihari also deposed that they were called by SHO in Police Station and Kunj Bihari sat with Sahab (SHO) and conversation was going on between them in respect of money. It was agreed to pay Rs.1500/- as illegal gratification to SHO Vimal Kumar Jain. There is no iota of evidence in the statement of Kunj Bihari and Keshram that any point of time the appellant Chironjilal demand money as illegal gratification from Kunj Bihari to release them on bail. A. K. Jain (PW-6) deposed that Chironjilal gave an application to S.P. Lokayukat which was read to him he showed ignorance of the fact that SHO Vimal Kumar Jain demanded money as illegal gratification from Kunj Bihari, he deposed that if the fact of trap of Vimal Kumar Jain would have been in his knowledge he could not have gone with trap party, because he is also Jain. This fact proves that A.K. Jain is interested in SHO Vimal Kumar Jain and he is not stating against him.

13. R. Dwarka Prasad (PW-10) deposed that Kunj Bihari went to house of the appellant and chitchat with him. Kunj Bihari handed over Rs.1500/- to Chironjilal, Chironjilal counted the notes and told to Kunj Bihari that this money is for Sahab, (SHO Vimal Kumar Jain), at this point of time Kunj Bihari put hand on his head and trap party over power the appellant Chironjilal and completed the trap. In para 2 of cross-examination R. Dwarka Prasad specifically admitted that at Sagar he was informed that in Batiyagarh Thanedar (SHO) and Hawaldar (Head Constable) have to be trapped. He also admitted that in Batiyagarh Kunj Bihari (PW-1) asked to complainant to find out whether Thanedar and Hawaldar are in Batiyagarh or not. Narayan (PW-12) deposed that Kunj Bihari came to the office of Lokayukat, Sagar and told that SHO Vimal Kumar Jain is demanding Rs.1500/- and he wants to trap him. In examination inchief Narayan deposed that an enquiry it was revealed that Vimal Kumar Jain is not in town, hence, trap party went to

the appellant's house. Kunj Bihari handed over Rs.1500/- to Chironjilal and told him that give this money to Vimal Kumar Jain, Chironjilal took money in his hand and told Kunj Bihari that he will give this money to Vimal Kumar Jain because this money belongs to Vimal Kumar Jain.

14. There is sufficient evidence on record to prove that SHO Vimal Kumar Jain demanded Rs.1500/- as illegal gratification from Kunj Bihari to release him and his father on bail in compliance of order of anticipatory bail; it was agreed upon that Kunj Bihari shall pay Rs.1500/- to Vimal Kumar Jain either at his house or at the house of appellant Chironjilal. It is also established by evidence of prosecution witnesses that Kunj Bihari handed over Rs.1500/- to Chironjilal for SHO Vimal Kumar Jain, asking him to hand over this money to Vimal Kumar Jain. There is no evidence on record to prove that when conversation of bargaining was going on between Kunj Bihari and SHO Vimal Kumar Jain for illegal gratification, the appellant was present in Police Station and he contributed actively in the bargain. It is of common knowledge that in order of anticipatory is never directed to Head Constable, to release the culprit on bail, in the event of his arrest, always SHO of the Police Station or Investigating Officer is directed to release the culprit on anticipatory bail in the event of arrest, therefore, there was no occasion to demand illegal gratification by the appellant Chironjilal for compliance of the Court's order to release Kunj Bihari or his father on bail. Keshavram did not depose that at any point of time the appellant Chironjilal demanded money as illegal gratification to release them on bail. The only act of the appellant Chironjilal was that incompliance of the order of SHO Vimal Kumar Jain he brought Kunj Bihari and Keshavram to Police Station and handed over them to SHO Vimal Kumar Jain.

15. Though, there is a presumption against the appellant, after receiving illegal gratification, but where accused had rebutted presumption against him by cross-examining, the witnesses and defence story was corroborated by the prosecution witnesses and prosecution could not prove the motive of bribe in the case, the accused would be entitled to acquittal. Where motive of demanding bribe is not proved then accused cannot be convicted for receiving illegal gratification of bribe. A public servant has to either accept or obtain or agree to accept or attempt to obtain from any person of illegal gratification. There is to be an offer and then acceptance of the illegal gratification, otherwise then legal remuneration, coupled with to do official act in favour of the person in consideration of such person to pay the sum the "phrase as a motive or rewarded for" means on the understanding that the bribe is given as consideration of some official act or conduct on the part of the public servant. In law, incapacity of the government servant to show any favour or rendered any service in connection with official duties weakens the case of the prosecution in order to establish an offence under this section. It is necessary to prove that the public servant, accepts or obtains or agrees to accept or attempts to obtain illegal gratification as a motive or reward for doing or forbearing

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to do any official act or for any favour or to favour to any person or for rendering any services or disservice to any person with public servant as such. As I have already observed that there is no evidence and circumstance on record that Chironjilal demand illegal gratification from the Kunj Bihari and he was in a position to favour or rendered any service in connection with his official duty to the appellant. Contrary to that, there is sufficient evidence on record to prove that infact SHO Vimal Kumar Jain demanded illegal gratification from the Kunj Bihari to release him and his father Keshravram on bail and it was not within the knowledge of the appellant that on 19.12.86 complainant shall hand over Rs.1500/- to appellant saying that this money is for SHO Vimal Kumar Jain, and pay as soon as SHO comes back gave money to him. It is proved by the evidence of Naresh Prasad (DW-1) and Rojnamchasaha Ex.D-1 that the appellant was on leave from 13.11.86 to 19.11.86 and on 19.11.86 in the afternoon he came back Batiyagarh. This fact also shows that it was not within the knowledge of the appellant that in between 13.11.86 and 19.11.86 afternoon what conspired between Kunj Bihari and Vimal Kumar Jain SHO.

16. In *State Vs. K. Narasimhachary* 2005 AIR SCC 6275 it has been held by the Hon'ble Apex Court that if by evidence and circumstances demand of bribe is not proved then accused is entitled to acquittal. In *Ramlal Vs. State of M.P.* 2005 (4) MPLJ 93 it has been held by the Single Bench of this Court that if demand of bribe is not proved and accused is not a party to an arrangement between complainant and Sub-Inspector then the appellant cannot be convicted under Section 5(2) of the Act it has been held in para:-

> "PW-11 Chandra Shekhar Shukla, Sub-Inspector has stated that on 5.8.86, report Ex.P/19 of Chain Singh was received from the office of Superintendent of Police. For preliminary enquiry, it was given to the appellant. Report Ex.P/20 in relation to the alleged allegations was submitted by the appellant on 13.8.86. Thereafter, on 15.8.86, Crime NO.265/86 under Section 379, IPC was registered. The crime aforesaid was investigated by him and finally criminal case NO.42/87 arising out of Crime No.265/86 against Prakash, S/o Nathu was filed in the Court of MFC, Sagar. On 15.8.86 only appellant has been with him at the time of investigation of Crime No.265/86. This statement of PW-11 Chandra Shekhar Shukla makes it clear that the appellant submitted report Ex.P/20 on 13.8.86 itself. Thereafter, he was not concerned with the investigation of Crime NO.265/86. The statement of PW-2 Murlidhar is to the effect that Sub-Inspector Shukla investigating the offence arising out of the report Ex.P/19 infact demanded a bribe of Rs.300/-. Since Sub-Inspector shukla was not traceable on 18.8.86, appellant being found near the Chameli Chowk was requested to take the amount for payment to Sub-Inspector Shukla.

PW-2 Murlidhar clearly stated that the appellant declined to do so by saying that he is not concerned at all with alleged arrangement between Sub-Inspector Shukla and Murlidhar.

5. PW-3 Yashwant Kumar Saxena, PW-8 Kedar Prasad Rawat, PW-5 Dwarka Prasad, PW-6 Bhagole Prasad and PW-14 Hari Prasad Choudhary in their cross-examination have admitted that they have not seen Murlidhar (PW-2) actually delivering the currency notes to the appellant. Therefore, statement of PW-2 Murlidhar alone is on the point that the currency notes of the denomination were offered to the appellant for payment to Sub-Inspector Shukla. PW-2 Murlidhar has stated that the appellant declined to do so, however, he kept the currency notes in his hands. The appellant immediately kept those currency notes on the table. Since the currency notes were kept in the hands of appellant, it was quite natural that the hand wash of the appellant turned pink.

In *Smt. Meena Balwant Kemke Vs. State of Maharashtra,* AIR 2000 SC 337 it has been held that the result of the phenolphthalein test should be viewed in the context only that the appellant also come into contact with the currency notes when these were kept in his hands by PW-2 Murlidhar and he pushed it away on the table. The currency notes aforesaid were said to have been recovered from the appellant under the circumstances stated and explained by PW-2 Murlidhar. It is rightly contended that in relation to the alleged recovery of currency notes vide Ex.P/6, no presumption under Section 4 could be drawn against the appellant.

The work presumption it its largest and most comprehensive signification may be defined as in the sence of actual certainly of the truth or falsehood of a act or proposition, an inference affirmative or negative to that truth or false-hood which is drawn by a process of probable reasoning from something which is taken for granted. It is however rarely employed in jurisprudence in this extended sense. Like presumptive evidence, it has there obtained a restricted legal signification, and is used to designate an inference affirmative or dis-affirmative of the existence of some fact.

In the circumstances, as has been held in *Banshi Lal Yadav Vs. State of Bihar,* AIR 1981 SC 1235 the alleged recovery of currency notes by itself will not be sufficient to raise presumption against appellant particularly where as per the statement of PW-2 Murlidhar, the appellant never demanded any amount to settle the case against him.

6. From statement of PW-11 Chandra Shekhar Shukla, it has

become clear that the appellant, Head Constable was not entrusted with the investigation of Crime No.265/86 under Section 379, IPC arising out of report Ex.P/15. The preliminary report Ex.P/20 was already submitted by the appellant on 13.8.86. PW-2 Murlidhar has stated that during the investigation of Crime No.265/86, he was called by the police at Police Station, Moti Nagar, where Sub-Inspector Shukla demanded Rs.300/- to settle the dispute in relation to alleged theft of building material of Chain Sing, Since the raid pary did not find Sub-Inspector anywhere, finally, while moving further, appellant the Head Constable of the Police Station was found near Chameli Chowk. This is the statement of PW-2 Murlidhar that in the hotel he asked the appellant to take the money for payment to the Sub-Inspector Shukla. The appellant did not agree nor accepted the currency notes to do so. The currency notes were kept in his hands by PW-2 Murlidhar.

Similar circumstances in *Sadashiv Mahadeo Yavaluje and Gajanan Shripatrao Salokhe Vs. State of Maharashtra,* AIR 1990 SC 287 it has been held:

"As regards accused No.2 merely because he was entrusted with some money to be passed on to accused NO.1 it could not be held that he was guilty of any one of these offences unless it is established that he was a party to the arrangement and the arrangement arrived at was that the money would be handed over to accused NO.2 to be given over to accused No.1. Apparently accused No.2 was not expected to help the complainant. The assurance to the complainant to settle the matter, according to the prosecution was given by accused No.1 and according to the prosecution own case and the evidence of complainant this arrangement was finally settled at the house of accused NO.1. Admittedly accused No.2 was not there nor it is alleged that he had any knowledge about this settlement. Under these circumstances it could not be held that accused No.2 accepted this amount for any purpose. At best as the complainant told him to pas this money on to accused No.1 he accepted it but on that basis it could not be held that he was sharing the intention with accused No.1 or was acting on his behalf."

Under Section 5(1) (d) a public servant is said to commit the offence of criminal misconduct in the discharge of his duty:-if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. As per the statement of PW-2 Murlidhar. the appellant never demanded the money from

him to settle the case arising out of report Ex.P/19. It is Sub-Inspector Shukla who had insisted him to pay Rs.300/-. There was no arrangement between Sub-Inspector Shukla and the appellant that the amount being given to the appellant shall be paid by him to the Sub-Inspector Shukla. Appellant was not a party to the arrangement between PW-2 Murlidhar and Sub-Inspector Shukla.

17. In Criminal Appeal No.125/1979 *Dinesh Kumar Vs. State of M.P.* judgment delivered on 30.8.79 it has been held by the Single Bench of this Court in para 6:-

"If with the foregoing uncertain evidence particularly when the giver of illegal gratification Badri Prasad (PW-3) does not connect the appellant with either of the crimes charged, we look into the document Ex.D/1, the statement of Chhunna @ Rajendra Kumar recorded by Umashankar Verma (PW-9) during investigation, the doubt about the false implication of the appellant becomes aggravated. It appears, even to may naked eye, that the word "Dixit" has been superimposed. There was some other name underneath it. It the fact of this evidence, it could as well have been that Badri Prasad (PW-3) in point of fact had given the money to the Sub-Inspector Naik who had earlier demanded the money from him. It could be that the said Naik might have, at some point of time after receiving the money from Badri Prasad (PW-3), had passed it on to the appellant who was then in his company either without the appellant's knowledge or even which his knowledge and that is how the money ultimately, Rs.40/- of the amount, came to be seized from the right-hand pocket of the trousers of the appellant, as established by the investigating officer, Umashanker Verma (PW-9) and Moolchand (PW-11). But, from this fact alone it cannot be concluded that it was the appellant who had any reason to demand illegal gratification or it was to him that the gratification had been paid and in any event that was not the charge which he had faced, nor, indeed, was there any charge that he (the appellant) acting in concert with the Sub-Inspector Naik had received that amount as illegal gratification."

18. In *Raj Rajeshwari Nandan Gupta Vs. Special Police Establishment, Lok Ayukat, Gwalior* 2008(1) M.P.H.T. 174 it has been held by the Single Bench of this Court in para 12 & 15 as under:-

"12 The Supreme Court in the case of *Ganga Kumar Shrivastava Vs. State of Bihar,* (2005) 6 SCC 211, in similar facts and circumstances, held that if there was no occasion for demand and acceptance of bribe, the accused cannot be convicted. In this context, Para 22 of the said judgment is very important. In the

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case of *Ganga Kumar* (supra), there was demand of money with respect to restoration of connection of electricity supply which according to the appellant of that case was already restored on 22-6-1985 and if the restoration of electricity connection was already restored on 27-6-1985 there was no occasion for the accused to make demand and to accept bribe thereafter either on 25-6-1985 and 28-6-1985 for the supply of electricity connection. In the present case also, since complainant Kailash Chandra Agrawal (PW-1) has admitted that the assessment order was already passed quite earlier by the appellant on 15-3-1990 and thereafter recovery notice was also issued by the appellant on 19-6-1990 therefore, there was no occasion to the appellant to make demand and to accept the bribe on 11-7-1999, as alleged by the complainant. In the case of *Ganga Ram* (supra), the Supreme Court further held that since the accused of that case initially registered a criminal case against the complainant for theft of electricity, there was probability to implicate the accused falsely by the complainant. In the present case also, it is the defence of the appellant in his statement recorded under Section 313 of Cr.P.C. that on issuing notice of demand, the complainant became annoyed. The defence of the appellant is also corroborated by the evidence of Kailash Chandra Agrawal (PW-1) Para 15 where he has clearly admitted that after passing the order of assessment on 15-3-1990 the appellant also issued notice of demand and therefore, this probability cannot be ruled out that the appellant has been falsely implicated as he also issued demand notice against the complainant to deposit the amount of tax.

15. In a latest decision of Supreme Court in the case of *T. Subramanian Vs. State of T.N.*, (2006) 1 SCC 401, Hon'ble R.V. Ravbeendra, J., spoke for the Bench and held that a trap was arranged, the currency notices were chemically tested and the currency notes were recovered from the accused but merely receipt of currency notes from the accused would not be sufficient to fasten guilt under Section 5 (1) (a) or Section 5 (1) (d) of the Prevention of Corruption Act, 1947. In this contest, it would be apposite to quote Para 12 of the judgment which reads thus: -

"Mere receipts of Rs.200/- by the appellant from P.W.1 on 10-7-1987 (admitted by the appellant) will not be sufficient to fasten guilt under Section 5 (1) (a) or Section 5 (1) (d) of the Act, in the absence of any evidence of demand and acceptance of the amount as illegal gratification. If the amount had been paid as lease rent arrears due to the temple or even if it was not so paid, but the

accused was made to believe that the payment was towards lease rent due to the temple, he cannot be said to have committed any offence. If the reason for receiving the amount is explained and the explanation is probable and reasonable, then the appellant had to be acquitted, as rightly done by the Special Court. In Punjabrao Vs. State of Maharastra the accused, a patwari, was on a campaign to collect loan amounts due to the Government. The complainant therein was admittedly a debtor to the Government. The accused explained that the amount in question was received towards loan. This Court accepted such explanation (though such explanation was not immediately offered as in this case, but was given only in the statement under Section 313) holding thus : - (SCC p.372, Para 3).

"It is too well settled that in a case where the accused offers an explanation for receipt of the alleged amount the question that arises for consideration is whether that explanation can be said to have been established. It is further clear that the accused is not required to establish his defence by proving beyond reasonable doubt as the prosecution, but can establish the same by preponderance of probability."

In the present case, the cash amount of Rs.1,500/-was found in a bag and there is no clinching evidence that the said bag which was lying in the chamber of appellant was of his own. Even if it is held that the cash amount is recovered from the appellant, it would not be sufficient to hold that appellant is guilty of the offence. In this context, the decision of Supreme Court in the case of *T. Subramanian* (supra), may be placed reliance.""

19. It has been held by the Hon'ble Apex Court in *Suraj Mal Vs. The State of (Delhi Administration),* AIR 1979 SCC 1408 that mere recovery money from the accused is not sufficient to hold that he received bribe or illegal gratification.

20. As per above discussion, I am of the view that the prosecution has failed to prove that the appellant Chironjilal Head Constable was, in a capacity, as the public servant to favour or rendered any service in connection with his official duty to the complainant Kunj Bihari as per law. There is no evidence on record to prove that the appellant Chironjilal demand or agreed to accept bribe or illegal gratification from Kunj Bihari and obtained bribe for his own to release on him, after accepting anticipatory bail. The appellant successfully rebutted the presumption raised against him that he demanded bribe from Kunj Bihari, accepted bribe for his own to release Kunj Bihari and his father Keshravram on bail. In peculiar facts and circumstances of the case, the seizure Rs.1500/- from the appellant or from house of the appellant is of no significance and is not sufficient to prove alleged offence against the appellant. The learned trial Court committed

error in holding that the prosecution has proved charges under Section 161 IPC read with Section 7 of the Prevention of Corruption Act and under Section 13 (1) (d) of the Act against the appellant and convicting and sentencing him as aforementioned. The finding arrived by the learned trial Court is illegal and perverse and is not sustainable in law. He has been wrongly convicted of the offence charged and wrongfully punished.

21. Consequently, the appeal is allowed. The impugned judgment of conviction and sentenced passed by the trial Court is set aside. The appellant Chironjilal is acquitted of charges under Section 161 IPC read with Section 7 of the Act and Section 31(1)(d) of the Act. Bail bonds of the appellant shall stands cancelled.

Appeal allowed.

I.L.R. [2008] M. P., 934
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
7 March, 2008*

ASHOK KUMAR JAIN — Appellant
Vs.
STATE OF M.P. — Respondent

A. Penal Code (45 of 1860) - Sections 330, 201/34 - Gun shot injuries - Post mortem or ante mortem - Witness came out of his house after hearing gun shots - He did not notice any blood on or around dead body - Forensic expert has not found any trail of blood on corresponding path or nearby stone, where dead body was lying - Absence of line of blood - Indicative of fact that gun shot injuries are postmortem - Ruled out the probability of defence that deceased was shot at while he was running away. (Para 13)

B. Evidence Act (1 of 1872), Section 3- Appreciation of evidence - Custodial death - Evidence of fellow police personnel - All of them refrained from admitting that injuries were caused by appellants during interrogation of deceased at police station - Their case diary statements indicating active involvement of the appellants - Deviation from their case diary statements did not assume much significance. (Paras 20 & 21)

C. Evidence Act (1 of 1872), Section 3 - Appreciation of evidence - News paper clippings reflecting the press release made by S.P. and the public reaction thereto - However news paper reports, not proved by evidence aliunde by the maker of the corresponding statement, are apparently inadmissible. (Para 24)

D. Evidence Act (1 of 1872), Section 3 - Custodial death - If there is an evidence that a fatal injury was caused during the period when the person was in

*Cr.A. No. 1076/1990 (Jabalpur)

the police custody - Court may presume that police officer having custody of that person, was the author of such an injury. (Para 25)

E. Evidence Act (1 of 1872), Section 3 - *'Falsus in uno falsus in omnibus'* has no application in India - Prosecution witnesses were disbelieved as against co-accused (since acquitted) on ground that their statement were inconsistent on material point - Not sufficient to reject the evidence of these witnesses its entirety - Duty of Court to separate grain from chaff. (Para 26)

Cases referred :

AIR 2005 SC 402, AIR 1988 SC 1274, AIR 1976 SC 989, AIR 1970 SC 27, (1995) 4 SCC 262, AIR 1957 SC 366, (1997) 1 SCC 416, 1 CrLJ 289

S.C. Datt with *G.P. Patel,* for the appellant
Ramesh Shukla, Dy. G.A. for the respondent/State

JUDGMENT

R.C. Mishra, J. :–These appeals are interlinked as preferred against the judgment dated 12.11.1990 passed by the IInd Additional Sessions Judge, Tikamgarh in S.T. No.125/88, whereby each one of the appellants stands convicted under Sections 330 and 201 read with Section 34 of the IPC and sentenced to undergo R.I. for 5 years and 1 year respectively with the direction that the sentences shall run concurrently.

2. The appellants namely Ashok Kumar and Rakesh Kumar (hereinafter referred to as 'A1' to 'A2' respectively) and one Purushottam Das were jointly tried on the charge of murder of Sardar Singh (for short 'Sardar'). In addition, A1 and A2 were charged with the offence under Section 201 read with 34 of the IPC. All the three accused were acquitted of the charge under Section 302 read with 34 of the IPC and ,in absence of any appeal by the State, the order of their acquittal has attained finality.

3. The prosecution story, in short, may be narrated as under :

(i) At the relevant point of time, A1 was posted as Station House Officer at Police Station Mohangarh Distt. Tikamgarh whereas A2 was posted at the same police station as Constable.

(ii) On 03.01.1988 at 5 a.m., on receipt of information that a dacoity had been committed at about 10 in the preceding night in the house of one Jagdish Dangi at village Barethi, a case, as Crime No.1/88, was registered at P.S. Mohangarh for the offences under Sections 395 and 397 of the IPC. Jagdish further revealed that the dacoits, being armed with guns and other deadly weapons, had not only beaten him, his brother Ramesh, their parents Ghayshaym Das & Shribai, grand-mother Rajkunwar but had also taken away his HMT watch and a bicycle as well as Rajkunwar's golden nose-stud and

a pair of silver paijanas (ankle bells). As SHO, A1 himself took up the investigation and immediately proceeded to the spot.

(iii) On 03.01.1988 only at about 8 a.m., A1 inspected the spot and found an iron-rod belonging to Jasrath (PW5) and Kailash (PW19. Accordingly, he brought both of them along with Jagannath, the brother of Jasrath, to the police station for interrogation.

(iv) On 04.01.1988, three other suspects viz. Tunnai @ Amar Singh of village Lohargunwa and Hukum Chand @ Hukma (PW1) and Nathua (PW2) of village Dhana were also rounded up. Amongst them, only Hukma and Nathua admitted their involvement in the dacoity with three others namely Sardar, Pappu @ Kapoor Singh (hereinafter referred to as 'Pappu') and Pratap Singh. Accordingly, on the following day, A1 along with A2, constable Purushottam & other members of the police force and SAF, proceeded to village Madori in search of Sardar.

(v) On 05.01.1988 only at about 9 p.m, A1, at the instance of Hukma and Nathua, apprehended Sardar at his residence only. During interrogation, he was hit by kicks and fists and also struck with butt in presence of Natthu Singh (PW11), Indrapal (PW12), Mardan Singh and Pheran Singh (PW22), Thereafter, he was taken to village Pipra to facilitate search of Pappu and Pratap Singh. As none of them could be traced, the police party along with Sardar returned to the police station.

(vi) On 06.01.1988, A1 along with other members of the police party carried out an intensive search at village Tigoda, where Pappu's in laws were residing, but was not able to trace him or his companion Pratap.

(vii) On 07.01.1988 at about 5 p.m. A1, upon his suggestion for further questioning, permitted A2 to interrogate Sardar thoroughly. However, while doing so, A2 gave beating to Sardar with a danda (staff). A1 also joined the process of third degree interrogation, during which he too dealt multiple blows with danda on the person of Sardar.

(viii) A1 also documented Sardar's memorandum, under Section 27 of the Indian Evidence Act, in presence of panch-witnesses Tunnai @ Amar Singh and Sheelchand Jain(DW2). Immediately thereafter, Sardar began to vomit. Dr. Vidyut Kumar Rai (DW1) was called but Sardar's condition did not improve even after taking the medicine given by him. Leaving Sardar in such a precarious condition, the appellants, along with other members of police and SAF started for Dhana to recover properties from Hukma and

Nathua. Thereafter, condition of Sardar deteriorated further. At about 10 p.m., he started ejecting blood. Although, Dr. Vidyut Kumar administered an injection and gave some other tablets yet, Sardar's condition did not show any improvement. At about 1.30 a.m. when he vomited blood again, Head Constable Karnapal asked constable Rajkumar to inform the doctor who declined to come.

(ix) After recovering the nose-stud and the bicycle stolen in the dacoity at the instance of Hukma and a Dhoti as per information given by Nathua, A1 returned to police station at about 2.45 in the night intervening 07th and 08th of January, 1988. Karnapal immediately apprised him of the deteriorating condition of Sardar. In turn, A1 asked Sardar as to why he was creating a scene. However, while complaining of severe abdominal pain and insisting for an immediate treatment, Sardar breathed his last.

(x) Concealing factum of Sardar's custodial death from members of the police force and the SAF, A1 made them to believe that ailing Sardar was required to be taken immediately to Tikamgarh for necessary treatment. Accordingly, with the help of A2 and other police personnel, dead body of Sardar that was covered by a blanket, was placed in the rear side of police van. A1 then took out rifles and cartridges from Malkhana. One of the rifles was handed over to Bihari Lal (PW14) and another was taken by A1 himself. Obeying his direction the police personnel and members of the SAF got on in the van to accompany him up to Tikamgarh. However, as the vehicle reached near village Khakrone, A1 asked the driver namely Ramnaresh to turn it into jungle, that was located on the left side.

(xi) At the instance of A1 only, the vehicle was ultimately parked at Naupora. Expressing a false apprehension that the other suspects of the dacoity viz. Pappu and Pratap Singh were hiding themselves there only with a view to rescuing Sardar from their custody, he instructed all the police personnel except A2 to take respective positions at a distance of 100 yards. At this point of time only, the appellants with the help of Tunnai removed the dead body of Sardar from the van; carried it to a certain distance and fired shots at him in order to give his custodial death a colour of death in encounter.

(xii) Accordingly, A1 scribed Dehati Nalishi (Ex.P-6) to register a case under Section 307 and 224 of the IPC against Sardar, Pappu and Pratap Singh. It was mentioned therein that A2, Teklal (PW15) and Kushalpal had fired shots from the respective rifles killing

Sardar who was trying to escape. As the place of occurrence was located within the jurisdiction of police station Jeron, the Dehati Nalishi was forwarded to the SHO concerned for necessary action. The information as to so-called encounter was also duly communicated to the District Magistrate and Superintendent of Police.

(xiii) The Executive Magistrate Motilal Khare conducted the inquest proceedings. Thereafter, the dead body of Sardar was sent to Government Hospital Prithvipur for post-mortem. It was performed by a team of doctors comprising Dr. M.S. Rawat (PW8) and Dr. Santosh Asthana. They categorically opined that the gunshot injuries found on the body of Sardar were post-mortem in nature and his death was caused due to shock resulting from ante-mortem spinal injury.

(xiv) In the light of the medical opinion, Circle Inspector R.D. Uniya (PW7) recorded the FIR whereupon, a case under Section 302 and 201 of the IPC was registered at the police station Mohangarh only. Initially, Sub-Inspector Jiwanlal Yadav (PW21) conducted the investigation but later on, it was carried out by the CID Inspector Pahar Singh (PW22).

(xv) After due investigation, charge-sheet was put up against the appellants and Purushottam Das in the Court of CJM, Tikamgarh who committed the case to the Court of Session for trial.

4. The appellants denied the respective charges. In the examination, under Section 313 of the Code of Criminal Procedure, A1 reiterated the facts, as incorporated in Dehati Nalishi (Ex.P-6), suggesting that it was at the instance of Sardar that he along with the police party and panch witness Tunnai @ Amar Singh had proceeded to apprehend co-accused Pappu and Pratap Singh & also to recover remaining articles stolen in the dacoity. It contained the core of defence version to the following effect:-

"When the police party reached the jungle adjoining village Khakrone, all of a sudden, it was fired at from the opposite direction. Thereupon, he instructed his companions to respond to the attack by taking respective positions. However, Sardar, uttering that "Kapoore I have come", rushed towards the direction wherefrom the shots had come. At this juncture, there was cross-firing and, in addition, some of the inhabitants of nearby villages Garra and Khakrone also fired to drive off the dacoits. In the morning, dead body of Sardar was found near a big stone and he, accordingly, informed the Superintendent of Police about the encounter, resulting in death of Sardar. On 08.01.1988, S.P. R.L.

Armvanshi, after inspecting the spot, issued a press-note in respect of the encounter. However, on 09.01.1988, DIG visited police station Mohargarh and suspended the entire police staff. Thereafter, politicians namely Pratap Tiwari and Ghuwara unduly influenced the DIG by threatening to ignite the public uproar against the police's atrocities. It was in this background that the case was registered against him. A2 not only endorsed the statement made by A1 but also pleaded that he had not caused any injury to Sardar.

5. To bring home the charges, the prosecution examined as many as 22 witnesses including Hukum Chand (PW1), Nathua (PW2), Dr. M.S. Rawat (PW8), Constables Biharilal (PW14) & Teklal (PW15) and Head Constable Dwarka Prasad (PW16). The defence also produced 6 witnesses including Dr. Vidyut Kumar Rai (DW1), panch-witness Sheelchand Jain (DW2), and Sukhlal Rohit (DW3), a Constable of the SAF.

6. On consideration of the entire evidence on record, the learned trial Judge, for the reasons assigned in the judgment in question, proceeded to acquit all the three accused policemen of the charge of Sardar's murder. However, rejecting theory of his death in an alleged encounter as highly artificial, he firmly concluded that both the appellants were responsible for causing death of Sardar by subjecting him to custodial torture to elicit confession. Accordingly, he convicted the appellants for the offences under Sections 330 and 201 of the IPC and sentenced them as indicated hereinabove.

7. Legality and propriety of the impugned convictions have been assailed on following grounds :-

(i) The evidence that was found unworthy of credit in respect of co-accused Purushottam could not form basis of conviction of the appellants.

(ii) After recording the finding that the incriminating statements of Hukum Chand (PW1), Nathua (PW2), Jasrath (PW5), Dwarka Prasad (PW16) and Kailash (PW19) were not wholly reliable, the learned trial Judge committed serious illegality in holding that the injuries found on the body of Sardar were inflicted in the police custody.

(iii) There was no evidence on record to show that the appellants had voluntarily caused hurt to extort confession or to compel restoration of properties stolen in dacoity.

(iv) Autopsy Surgeon Dr. M.S. Rawat (PW8) did not rule out the possibility that the gun-shot injuries could also be ante-mortem.

(v) Nathua (PW2) and Babu (PW3) had specifically stated that

A2 was not previously known to them. Thereafter, their evidence as to complicity of A2 was not convincing for want of test identification parade. Further, A2, though, posted at the same police station was only required to assist A1 for investigation and had not participated in the alleged ill-treatment of Sardar.

(vi) The entire investigation based on a Dehati Nalishi (Ex.P-6), recorded by Circle Inspector R.D. Uniya was not only illegal but was also doubtful.

(vii) There were number of police officials who were present at the time when Sardar had died. As such, the defence version ought to have been accepted as probable.

However, the learned Deputy Govt. Advocate, while making reference to the incriminating pieces of evidence available on record, has contended that the convictions in question are well-merited.

8. Before proceeding to appreciate the merits of the rival contentions, it would be necessary to advert to the medical and forensic evidence available on record.

9. Dr. M.S. Rawat (PW8) testified that on 09.01.1988, he had found the following ante-mortem injuries, as described in the report (Ex.P-14), on the person of Sardar :-

(i) Multiple linear bruises, colour red blue, all over right hip underlying subcutaneous blood coagulated.

(ii) Multiple linear bruises, colour red blue all over left hip, underlying subcutaneous blood coagulated.

(iii) Multiple bruises, colour blue in area of 2" (torn) lower 1/3 of left side of chest

(iv) Bruises 1½" x 1/3" upper 1/3rd of left thigh lateral surface

(v) Bruises 1" x 1/3" beside injury no.(iv)

(vi) Bruises 1" x ½" just below left knee lateral surface

(vii) Multiple bruises over calf muscles are of both legs

(viii) Multiple abrasions in 1" diameter of perennial region

(ix) Multiple bruises over both sides of scrotum are present

(x) Multiple bruises are present over back on lumber and sacral region.

Under tissue injuries, there is huge haemotoma, present over lumber region (with coagulation present); with fracture of 4th lumber vertebra.

10. In his opinion, all the abovementioned injuries were caused by hard and blunt object and injury no.(x) was not only sufficient to cause death but was also homicidal in character.

11. He further proved existence of certain gun-shot injuries on the body of Sardar. These injuries were described as under :-

(i) One circular aperture is present over upper 1/3 of right side of chest (wound of entry)

(ii) One circular aperture is present over centre of neck, underlying trachea is pierced (wound of entry)

(iii) One circular aperture over right pectoral region (base of pectoral girdle) [wound of exit].

(iv) One circular aperture 3" away wound no. (iii) directed laterally (wound exit). All injuries are caused by gunshot piercing underlying tissues deep farcies muscles. Thoracic ribs are also fractured.

12. However, the Autopsy Surgeon characterized the gunshot injuries as post-mortem in nature. In this way, Dr. M.S. Rawat (PW8) reiterated the opinion as recorded by the team of doctors comprising himself in the report (Ex.P-14) that the cause of death of Sardar was shock due to spinal injury. He was cross-examined at length. However, nothing could be elicited so as to suggest that the gunshot injuries were ante-mortem.

13. Babu Singh (PW18) was examined as the witness of inquest panchnama (Ex.P-24). However, his statement that the blood was seen on the dead body of Sardar only was not questioned. Sukhdeen (PW20) is a resident of village Khakron. According to him, at about 4.00 a.m., he had come out of his house after hearing gunshots and joined the co-villagers who had assembled at Khirka. He further deposed that one of his co-villagers namely Halke had fired gunshots. It also came in his statement that while looking at Sardar's dead body from a distance, he did not notice any blood on or around it. Further, as per the statement of the forensic expert V.S. Chouhan (PW17), no trail of the blood on the corresponding path or the nearby stone was found at the spot where dead body of Sardar was lying. The absence of line of blood was indicative of the fact that Sardar was shot at when he was not alive. As such, the fact that blood was found on the dead body only completely ruled out the probability of the defence that Sardar was shot at while he was running away.

14. The nature and situs of injuries clearly indicated that Sardar was subjected to 3rd degree treatment leading to fracture in his 4th lumber vertebral. Moreover, as pointed out already, the circumstances surrounding the spot were also not supportive to the theory of encounter. In this view of the matter, learned trial Judge did not commit any illegality in holding that death of Sardar was not caused by any gun-shot injuries but was result of shock, consequent to spinal injury.

15. The question, therefore, arises as to who were the authors of injuries other than the gun-shot injuries found on the person of Sardar.

16. The prosecution evidence as to complicity of the appellants in causing death of Sardar may be classified under the following heads:-

(i) Evidence of fellow police personnel.

(ii) Evidence of other suspects of the dacoity.

(iii) Evidence of other witnesses.

17. Among the witnesses falling in category (iii) above, Indrapal Singh (PW12) is the son and Natthu Singh (PW11) and Laxman Singh (PW13) are respectively cousin and neighbour of Sardar. Their evidence primarily relates to the facts and circumstances under which Sardar was arrested and was brought to the police station. According to Indrapal, the appellants and co-accused Purushottam had not only beaten Sardar while apprehending him but had also subjected him to torture near a Banyan tree in village Marodi only. His testimony was duly substantiated by Natthu Singh. Their presence on these places was quite natural and the relationship with the deceased is not sufficient to discredit them. Further, as their neighbour Laxman Singh also corroborated the fact that Sardar was first taken to village Pipra to facilitate arrest of Pratap. According to him, he had also informed DSP, Jatara about what he termed as an illegal arrest of Sardar.

18. The prosecution version that on 05.01.1988 at 9 p.m., Sardar was apprehended by A1 and his companion police officials at his residence from village Madori and was brought to the police station for interrogation, as suspect in the dacoity was not disputed. Further, the alleged torture meted out to him at village Madori is also not relevant for discussion as, the spinal injury found fatal to Sardar was allegedly inflicted during a subsequent third degree treatment given to him during the period 5 p.m. to 9 p.m. on 07.01.1988.

19. Admittedly, at the relevant point of time, Dwarka Prasad (PW16) was posted as Head Constable and Biharilal (PW14) & Teklal (PW15) were working as Constables at P.S. Mohangarh only. Dwarka Prasad revealed as to how Sardar was arrested at Madori and was brought to the police station. As per his statement, - although Sardar was interrogated by A1 along with Hukma and Nathua yet, he was not taken to Dhana where at the instance of Hukma and Nathua, a bicycle and other properties were recovered. He further narrated the circumstances under which immediately after return from Dhana, A1 had called him from his quarters to board the van wherein Sardar was being taken to Tikamgarh. Teklal, who, admittedly, did not accompany A1 on his visit to Modori, substantially corroborated other assertions made by Dwarka Prasad. According to him, on 07.01.1988, he had performed guard duty at the police station from 2 p.m. to 6 p.m. and was relieved by Biharlal (PW14). This fact also derived support from evidence of Biharlal, who categorically stated that during his duty as guard from 6 p.m. to 9 p.m., he had seen both the appellants interrogating Sardar. He further deposed that he had also heard shouts of the appellants who while questioning Sardar were equipped with dandas. It is relevant to note that Dwarka Prasad,

Teklal and Biharilal gave almost identical version of the encounter. However, none of them admitted that Sardar was subjected to third degree method or his dead was fired at by the appellants. In the light of their evasive replies on these points, they were declared hostile and were cross-examined by the public prosecutor. However, none of them could be persuaded to reiterate the corresponding part of the respective police statements.

20. Thus, evidence of these police officials lent substantial support to the core and substance of the prosecution version yet, all of them refrained from admitting that the injuries no. (i) to (x) [above] were caused by the appellants during interrogation of Sardar at the police station or that the appellants were authors of the post-mortem gun-shot injuries. The trend of their evidence reminds me the following observations made by the Apex Court in *Munshi Singh Gautam v. State of M. P.* AIR 2005 SC 402 :-

> "Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues"

21. Accordingly, the deviations from the corresponding part of their case diary statements (Exs. P-19, P-20 P-21 respectively) indicating active involvement of the appellants did not assume much significance. Similarly, the evidence of Sheelchand (DW2) who is having a shop near the police station and Sukhlal Rohit, (DW 3) examined as one of the member of the SAF, present throughout the proceedings of interrogation of Sardar as well as so-called encounter leading to his death, also did not inspire confidence.

22. Jasrath (PW5) and his nephew Kailash (PW19) were allegedly detained by A1 along with Jagannath as suspects in the dacoity for the period of seven days commencing from 03.01.1988. As per their version, they had occasion to hear cries of Sardar suggesting that he was being subjected to violence in the adjacent room. Nothing could be brought in their cross-examination so as to suggest that they were, in any way, interested in implicating the appellants on absolutely false ground.

23. The other suspects examined to prove the involvement of the appellants in the custodial death of Sardar are Hukma (PW1) and Nathua (PW2). According to them, after being apprehended at village Dhana; they were taken to Barethi to explain as to how they had climbed over the house of Jagdish to commit dacoity. However, both of them, unequivocally, admitted that Sardar was arrested in pursuance of the information given by them only. They also described as to how on his refusal to admit complicity in the dacoity, Sardar was subjected to custodial torture by the appellants. They specifically deposed that Sardar was made to

swing to and fro on a rope what was termed as Laxman Jhula and was beaten brutally. As per their statement, Sardar has fallen down from the Jhula (swing) and had sustained injuries. Although, they were cross-examined at length yet, no material discrepancy could be brought on record with reference to their previous statements (respectively Ex.D-1 and D-3) recorded by Circle Inspector Jivanlal Yadav (PW21) and scribed by CID Inspector Pahar Singh (PW22) [Ex. D-2 and D-4 respectively]. However, their assertions that Sardar had died at about 9 p.m. was not acceptable in the light of a contrary statement made by Dr. Vidyut Kumar (DW1) who admittedly was called to treat Sardar at about 9 p.m. Moreover, other suspects viz. Ramkishan (PW4) and Babu (PW3), the maternal uncles of Hukma, who were brought from Dhana to the police station after alleged recovery of bicycle and nose-stud at the instance of Hukma also supported the fact that on his return from Dhana at about 3 a.m. only, A1 had realized that Sardar was not breathing.

24. The evidence of other defence witnesses namely Vinay Tripathi (DW5) and Suresh Kumar (DW6) correspond to certain newspaper clippings (Ex.D-14 and D-15 respectively) reflecting the press release made by S.P. and the public reaction thereto. However, these newspaper reports, not proved by evidence aliunde by the maker of the corresponding statement, are apparently inadmissible (See: *Laxmi Raj Setty v. State of T.N.* AIR 1988 SC 1274).

25. Learned Senior Counsel, while inviting attention to a decision of the Apex Court in *Muluwa vs. State of M.P.* AIR 1976 SC 989, has contended that the evidence of both Hukma (PW1) and Nathua (PW2) was not reliable and therefore, no significance could be attached to the fact that it was corroborated by a number of witnesses of the same brand. Reference has also been made to the decision of *State of Bihar vs. Nathu Pandey* AIR 1970 SC 27 to contend that there was no cogent evidence to suggest that the appellants had inflicted the injury that was found fatal to Sardar. However, as observed in the case of *State of M.P. vs. Shyamsundar Trivedi.* (1995) 4 SCC 262, if there is an evidence that a fatal injury was caused during the period when the person was in the police custody, the Court may presume that the police officer, having the custody of that person, was the author of such an injury.

26. The maxim *"falsus in uno falsus in omnibus,"* has no application in India and the witnesses cannot be branded as liars. For this, reference may be made to the principle laid down by the Apex Court in *Nisar Ali Vs. State of U.P.* AIR 1957 SC 366. Accordingly, the fact that they were disbelieved as against co-accused Purusottam or that their statements were inconsistent on material point is not sufficient to reject the evidence of the prosecution witnesses in its entirety as it is the duty of the Court to separate grain from chaff.

27. Torture in police custody infringes Art. 21 of the Constitution of India as well as basic human rights and strikes a blow at rule of law *(D.K. Basu vs. State of W.B* (1997) 1 SCC 416 referred to). Further, the offences relating to custodial

torture are the most difficult to be detected *(King Emperor vs. Pran Gawa* 1 CrLJ 289) and established as, generally, only circumstantial evidence leading to corresponding inference is available. However, in the case on hand, not only circumstantial but also direct evidence as to involvement of the appellants in causing custodial death of Sardar by using third degree method for interrogation with a view to extorting confession was available. From the prosecution evidence, it was also proved beyond a reasonable doubt that the appellants had staged a fake encounter to cause disappearance of the evidence pertaining to custodial violence.

28. In the face of overwhelming incriminating evidence, as re-appreciated above, the learned trial Judge did not commit any illegality in convicting the appellants for the offences charged with.

29. For these reasons, the convictions in question, being well merited, deserve to be maintained.

30. Coming to the question of sentence, it may be seen that the appellants have remained in custody for a total period of about 4 months and 4½ months respectively. It is also true that they have lost their jobs after having gone through the ordeal of a trial and their appeal before this Court has unfortunately remained pending for a considerable period of time. However, taking into consideration the nature of offences, their magnitudes and corresponding social impact, the delay in disposal of the appeal cannot be considered as mitigating circumstance to restrict the term of imprisonment to the periods already undergone.

31. In the result, both the appeals are dismissed and the impugned convictions as well as consequent sentences of the respective appellants are hereby affirmed.

32. Copy of the judgment be retained in the connected criminal appeal.

Appeal dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 945
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice Rakesh Saksena
12 March 2008*

DINESH — Appellant
Vs.
STATE OF M.P. — Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), Section 161 - Statements recorded by police during investigation - Cannot be used for any other purpose except provided in Section 162 of Code - Any part of statement duly proved may be used by accused and with permission of Court by prosecution - Contradict such witness in the manner provided by Section 145 of Evidence Act. (Para 15)

*Cr. A. No. 1974/2003 (Jabalpur)

B. Penal Code (45 of 1860), Section 302 or 304-(I) - Total lack of evidence regarding mal treatment of deceased (wife) by appellant and his family members - Genesis of occurrence remains shrouded in obscurity - Complete silence of deceased of any motive for appellant to suddenly ignite her - There would have probably occurred some serious altercation without any premeditation in heat of passion suddenly appellant lost control of himself and set fire to deceased - Subsequent conduct of appellant of taking deceased to hospital -Offence comes down from the first degree murder to culpable homicide not amounting to murder. (Para 15)

Cases referred :

AIR 2005 SC 97, (2002) 6 SCC 710

V.K. Lakhera, for the appellant,

R.S. Patel, Addl. Advocate General, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :-Appellant has been convicted under section 302 of the Indian Penal Code for committing murder of his wife Anita @ Sukbariya by setting her ablaze and has been sentenced to imprisonment for life and a fine of Rs. 5,000/-, with default stipulation.

2. Succinctly put the prosecution case is that Anita was married to the appellant 6-7 years ago prior to the date of incident. After marriage behaviour of appellant and his family members was not congenial with her. On the night intervening 9th and 10th of May, 1994, Anita suffered burn injuries in the house of her husband. She was taken to Gandhi Medical Hospital, Rewa, in the morning of 10th May, 1994. On 11-5-1994 Dr. Deepak Sharan Kapoor (PW-12) sent a written intimation (Ex. P/11) to police outpost of Gandhi Medical College, Rewa, with a request that arrangement be made for recording her dying declaration. Shri Rajeev Shrivastava, Naib Tahsildar (PW-11) went to Gandhi Medical College, Rewa, on 12-5-1994 at about 7.10 P.M. and after obtaining the report of concerned doctor that Anita was fit to give her statement, recorded her dying declaration (Ex.P/10). In the said dying declaration Anita disclosed that she was set ablaze by her husband Dinesh. She stated that her father-in-law and sons of uncle-in-law did marpeet with her. At that time her husband was at Allahabad. When he returned from Allahabad, he also beat her. They had tried to turn her out of the house, but when she did not leave the house, she was burnt while she was asleep. At the time of occurrence hands of Dinesh also got burnt. On her screeming, her father-in-law came down to the spot and poured water on her. Her husband, his elder brother and sons of uncle-in-law carried her to hospital. On 16-5-1994 at about 2.45 P.M. Anita Bai succumbed to her injuries. Intimation in this regard was sent from the hospital to the police station whereupon a marg under section 174 of the Code of Criminal Procedure was registered by Police Station – Laur. On receipt of marg intimation

(Ex.P/7), Sub-Inspector Om Shankar Shukla (PW-10) recorded the first information report (Ex.P/8) on 16-5-1994. During the investigation he recorded the case diary statements Sukhlal (P.W.1), Chandrabhan (PW-2), Sumitri (PW-3) respectively the father, brother and mother of Anita Bai, besides the statements of other witnesses and after completion of investigation filed charge sheet against the appellant under section 302 of the Indian Penal Code.

3. During trial, appellant abjured his guilt and pleaded false implication. According to his statement recorded under section 313, Cr. P. C. Anita Bai had set fire to herself. He alongwith other persons had taken her to hospital. After 3-4 days when her parents came to hospital, some inimical people of his village prompted them to make allegation against him of burning Anita. It was also stated that after the occurrence Anita had remained unconscious till her death.

4. Trial Court essentially relying upon the evidence of dying declaration (Ex. P/10) recorded by Naib Tahsildar Rajeev Shrivastava (PW-11) and the oral dying declaration made by Anita to Sukhlal (PW-1), Chandrabhan (PW-2), Sumitri (PW-3) and Dadai (PW-7), convicted the appellant for committing murder of Anita Bai by setting her on fire.

5. Learned counsel for the appellant submits that the dying declaration (Ex. P/10) recorded by Naib-Tahsildar as well as the alleged oral dying declaration made by deceased to her relatives are wholly unreliable. He submits that non-lodging of the first information report by the father and brother of Anita Bai despite knowing that she was burnt by the appellant indicates that the accusation made against the appellant is after thought. When the alleged incriminating dying declaration (Ex.P/10) was made to Naib Tahsildar Rajeev Shrivastava (PW-11) on 12-5-1994, it is suspicious that no offence was registered by the police at that time. He submits that the deceased was a characterless woman; she was seen in a compromising position with Bihari Loniya for which she was admonished. Feeling ashamed, she committed suicide by setting fire to herself. Learned counsel drew our attention to the case diary statements of Kandiya, Shyamlal Sharma, Manti, Babadin and Harihar Prasad, filed with the charge sheet.

6. Contrarily, learned counsel for the respondent/State submits that the dying declaration recorded by Naib Tahsildar and the evidence of oral dying declaration made by deceased to her parents and brother are trustworthy. According to him, the case diary statements of witnesses, who were not examined before the trial Court, could not be looked into by the Court. He justifies the judgment of the Court below by adopting the reasonings given by the learned trial Court.

7. We have heard the arguments of the counsel of both the sides and perused the material on record.

8. The Apex Court in *State of Maharashtra vs. Sanjay D. Rajhans* (AIR 2005 SC 97) has held that " It is not the plurality of the dying declarations, that adds weight to the prosecution case, but their qualitative worth is what matters. It has

been repeatedly pointed out that the dying declaration should be of such nature as to inspire full confidence of the Court in its truthfulness and correctness (vide the observations of Five-Judge Bench in Laxman v. State of Maharashtra (2002) 6 SCC 710). Inasmuch as the correctness of dying declaration cannot be tested by cross-examination of its maker. "great caution must be exercised in considering the weight to be given to this species of evidence". When there is more than one dying declaration genuinely recorded, they must be tested on the touchstone of consistency and probabilities. They must also be tested in the light of other evidence on record."

9. According to the dying declaration (Ex.P/10) recorded by Naib Tahsildar Rajeev Shrivastava (PW-11), deceased stated that her husband Dinesh had set fire to her. On the same day, prior to the occurrence her father-in-law and sons of uncle-in-law had beaten her while her husband had been out to Allahabad. He returned from there in the night, then he also beat her. At about 12-1 o'clock in the night while she was asleep, Kerosene was poured on her and she was burnt. Hands of her husband had also got burnt. On hearing her cries, her father-in-law and other inmates of the house rushed and doused her with water. She was taken to hospital by her husband and sons of uncle-in-law. Since both hands of Anita were burnt, she could not put her thumb impression on the dying declaration.

10. Rajeev Shrivastava (PW-11) testified that he had recorded the statement of Anita at 7.10 P.M. He had obtained the report from the doctor that she was in fit condition to give the statement and that he had recorded her verbatim statement. He stood firm in the cross-examination. Nothing could be brought out to discredit him. He categorically deposed that at the time when her statement was recorded, she was fit and was giving rational and appropriate answers to the questions put to her. In our opinion, the evidence of Rajeev Shrivastava (PW-1) is quite trustworthy.

11. Sukhlal (PW-1), father of Anita Bai testified that the behaviour of appellant and his family members was not cordial with Anita Bai. They used to manhandle her. When he came to know that Anita Bai was burnt by her in-laws, he went to hospital at Rewa. Anita Bai was talking, she informed him that her husband had set fire to her. At that time appellant was also present in the hospital and was looking after her treatment. He deposed that he had seen both the hands of appellant in burnt condition. The evidence of Sukhlal (PW-1) is substantially corroborated by the evidence of Chandrabhan (PW-2) and Sumitri (PW-3). Dadai (PW-7), a cousin of Sukhlal, has also testified that Anita had told him that appellant had set her blaze. It is to be noted that the appellant, in the cross examination, put suggestions to witnesses that in order to escape ignominy, Anita Bai immolated herself, but they were denied by Sukhlal (PW-1) and Dadai (PW-7).

12. From the evidence of Dr. V. K. Sharma (PW-13) it has been established that Anita Bai had died of burn injuries.

13. On close scrutiny of the evidence of dying-declaration (Ex.P/10) recorded

by Naib Tahsildar Rajeev Shrivastava (PW-11) and the evidence of oral declaration made to Sukhlal (PW-1), Sumitri (PW-3) and Dadai (P.W.7) we are satisfied that Anita Bai had made the aforesaid dying-declaration and Ex.P/10 was correctly recorded by Rajeev Shrivastava (PW-11). In view of the above evidence we are convinced that the appellant had set fire to Anita Bai.

14. However, when we turn our attention to the contents of the dying-declaration (Ex.P/10), we find that Anita Bai was beaten up by her father-in-law and sons of her uncle-in-law in the day time, prior to the incident. At that time appellant was at Allahabad. In the evening inmates of the house also tried to turn her out of the house. The incident of her burning took place at about 12 o'clock in the night when appellant returned from Allahabad while she was asleep. It has also been admitted by her that hands of appellant were also got burnt and that the appellant and sons of her uncle-in-law had taken her to hospital. It has also been deposed by Sukhlal (PW-1), Sumitri Bai (PW-3) and Dadai (PW-7) that appellant remained present in the hospital throughout and took care of the treatment of Anita Bai. There is absolutely nothing on record, including the dying-declaration (Ex.P/10), to give a clue as to why father-in-law and sons of uncle-in-law of Anita Bai assaulted her when appellant was out at Allahabad. It is suspicious that after returning from Allahabad in the night appellant too beat her. It is still more suspicious that though police came to know about the occurrence on 11-5-1994, dying declaration (Ex.P/10) was recorded on 12-5-1994 and parents of deceased had reached the hospital long before the death of Anita Bai, yet no first information report was lodged before 16-5-1994. No doubt the suggestions put to Sukhlal (PW-1) and Dadai (PW-7) that Anita Bai set fire to herself in order to save her from ignominy were denied but at the same time, in the above circumstances they create suspicion of some serious misconduct on the part of Anita Bai.

15. Learned counsel for the appellant drawing our attention to the case diary statements of Kandiya, Manti and Babadin argued that Anita Bai had developed illicit relations with Bihari Loniya and that she was seen in a compromising position with him by Kandiya. This rumour was spread in the village and probably feeling aggrieved by the profligacy of Anita, appellant set her to fire or she herself committed suicide. We are afraid that the statements recorded by police during investigation cannot be used for any other purpose except provided in section 162 of the Code of Criminal Procedure, according to which, when any witness is called for the prosecution in inquiry or trial, whose statement had been reduced in writing during investigation, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court by the prosecution to contradict such witness in the manner provided by section 145 of the Indian Evidence Act. It has been specifically provided in sub-section (1) of section 162, Cr.P.C. that no statement recorded under section 161 or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as provided at any inquiry or trial in respect of any

offence under investigation at the time when such statement was made. In view of this legal position it is not possible for us to take into consideration the statements of aforesaid witnesses recorded by the police during investigation. However, in view of the fact that there is total lack of evidence on record as to under what circumstances family members of appellant and appellant himself mal-treated Anita Bai, the genesis of the occurrence remains shrouded in obscurity. These facts lead us to think and especially the complete silence of the deceased of any motive for appellant to suddenly ignite her, that when appellant came back to his house from Allahabad in the night, there would have very probably occurred some serious altercation in the course of which without any premeditation in the heat of passion suddenly appellant lost control of himself and set fire to Anita Bai. This view of ours further finds support from the immediate subsequent conduct of appellant of taking her to the hospital for necessary treatment. In this view of the matter we feel persuaded to bring down the offence of the appellant from the first degree murder to culpable homicide not amounting to murder.

16. We, therefore, alter the conviction of the appellant from section 302 to Section 304 Part-I of the Indian Penal Code and impose a sentence of rigorous imprisonment for 10 years on him. Sentence of fine under section 302 of the Indian Penal Code is set aside. It has been pointed out that appellant has remained in custody fore more than 14 years. He shall be released forthwith, if not required in any other case.

Order accordingly.

I.L.R. [2008] M. P., 950

APPELLATE CRIMINAL

Before Mr. Justice S. Samvatsar & Miss Justice Sheela Khanna

13 March, 2008*

BHUPENDRA & ors. — Appellants

Vs.

STATE OF M.P. — Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989) - Sections 3(2)(iv), 3(2)(v) - Section 3(2)(v) provides that a person who commits crime on ground that such person is a member of SC or ST, but these words are missing in Section 3(2)(iv) of Act - Requirement of knowledge of accused that victim is member of S.C. or S.T. is not in Section 3(2)(iv) - Court when record conviction U/s 3(2)(iv) has no discretion but to award sentence of life imprisonment. (Para 17)

Cases referred :

(2006) 2 SCC (Cri) 1, 2006 (4) Crimes 329 (SC)

Shailendra Singh with *Vinay Sharma*, for the appellants,

*Cr.A. No. 284/1999 (Gwalior)

Mohd. Irshad, Panel Lawyer, for the respondent/State

JUDGMENT

The Judgment of the Court was delivered by S.SAMVATSAR, J.:- This appeal is preferred by the appellants-accused being aggrieved by the judgment dated 10/5/1999 delivered by the 2nd Additional Session Judge, Dabra District Gwalior in Sessions Trial No.47/1998, whereby the Sessions Court has convicted the present appellants for commission of offence under Section 436 read with Section 34 IPC and sentenced to undergo five years' rigorous imprisonment with fine of Rs.5,000/- each, in default of payment of fine, they are directed to undergo further one year's rigorous imprisonment. The appellants are also convicted by the impugned judgment for commission of offence under Section 3(2)(4) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced to undergo life imprisonment with fine of Rs.5,000/- each, in default of payment of fine they are directed to undergo further one year' R.I.

2. During the pendency of this appeal, appellant No.2 Santo alias Satish died, hence his appeal stood abated.

3. As per the prosecution case, in the intervening night of 4 and 5th March, 1998 complainant Babulal Jatav was sleeping in his house with his family after taking food. He was awoken by his wife Leelavati. Both of them came out and saw accused Lakke Pandit and Satto Pandit ablazing their huts (Madaiya). Bhupendra Pandit was standing on the ground. They asked them as to what they are doing; whereupon the accused threatened them and after abusing they ran away. Complainant Babulal shouted, on which persons residing in nearby colony came to the spot. By that time three huts of the complainant were burnt.

4. Three-four days prior to the present incident, at about 11:00 in the night accused Lakke Pandit had gone to the house of the complainant and pushed the door by leg. However, the door could not open. Next day, complainant and his wife went to the house of Lakke Pandit, where they met Lakke Pandit and his father Gauri Shankar. They made complaint to Gauri Shankar about the incident. On that Gauri Shankar abused them with reference to thier caste and threatened to set their huts ablaze. Complainant Babulal and his wife returned back to their house. Due to this enmity, Gauri Shankar got the house set at fire with the help of his sons Lakke, Satto and Bhupendra. Due to the fire, household goods, cereals, husk, table fan, oil and cash etc. had burnt.

5. On the report lodged by the complainant Crime No.21/98 was registered and the police after investigation filed challan against the accused. The matter was committed to the Sessions Court and the Sessions Court framed charge against the accused for commission of offence under Sections 436 in alternative 436/34 of IPC and Section 3(2)(4) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Sessions Court after recording the evidence and appreciating the same convicted the accused as aforesaid, hence this appeal.

6. Shri Shailendra Singh, learned counsel for the appellants submitted that the findings arrived at by the Sessions Court are not supported by the evidence on record, and therefore, order of conviction deserves to be set aside. It is contended that even assuming that offence is proved, punishment awarded by the Sessions Court is on higher side. It is further contended that appellant No.3 Lakke alias Lokendra is in custody for more than 10 years, hence lenient view should be taken.

7. On the other hand, Mohd. Irshad, learned counsel for the respondent/state supported the impugned judgment. He submits that the Sessions Court has not committed an illegality in convicting the present appellants.

8. We have heard learned counsel for the parties and perused the evidence on record.

9. Babulal is examined as PW-1, who is author of the FIR (Ex.P-1). This witness states that he knows the accused. Kalicharan is his brother and Megha Nath is his uncle. Accused Bhupe, Satto and Lokendra got three huts ablazed at 12-1 in the night. At that time he was sleeping in the hut. He was awoken by his wife Leelavati after hearing bleat of goat. He saw Lakke and Satto ablazing their huts (Madaiya). Bhupendra was standing on the ground. He asked them as to what they are doing; whereupon the accused threatened them and after abusing they ran away. Complainant Babulal shouted, on which persons residing in nearby colony came to the spot. By that time his four goats were injured. Due to the fire, household goods, cereals, husk, and cash amount of Rs.12000/- had burnt. In para 2 this witness states that three days prior to the incident Lakke had come to his house and pushed the door by leg. Lakke abused her wife. He and his wife went to the house of father of Lakke, where Gauri Shankar father of Lakke abused them with reference to his caste and threatened to ablaze their huts. Thereafter this witness lodged report in the police station. A copy of the report is Ex.P-1. In para 5 of his cross examination, he admits that there was a conflict between his brother Gangaram and accused Lakke about the cycle. He states that he was not in his house when accused Lakke pushed the door of his house. He further states that he had not narrated this fact to any one. From perusal of para 6 of his statement, we find minor contradiction in his statement and nothing in his cross examination is brought to disbelieve his statement.

10. Leelavati wife of the complainant is examined as PW-2. She states that she knows the accused. They reside in the same colony. She states that her huts are temporary huts. She has five huts, out of which three huts are covered by tiles, while two huts are covered by straws. She states that she wake up after hearing goats' bleat, thereafter she awaked her husband, then they came out and saw that Lokendra was setting ablaze their huts. Bhupendra was standing on the ground. On asking about what they are doing, then they asked them to keep mum. They also abused them with reference to their caste. Goats were bleating and they took them out, and thereafter the accused ran away. She states that her statement was recorded by the police.

11. Mahendra Dev Singh is PW-3, who had recorded the FIR (Ex.P-1). Ramesh Prasad Upadhyaya is examined as PW-4. He is a witness to Ex.P-2.

12. Ramesh is examined by the defence as DW-1 to show that wife of the complainant Babulal is not of a good character.

13. From perusal of over all evidence, we find that statement of Babulal (PW-1) is fully corroborated by the statement of Leelavati (PW-2). They have specifically stated that they had seen the accused Lokendra and Satto were ablazing their huts, while accused Bhupendra was standing on the ground, and there is nothing in their cross examination to disbelieve them to that extent.

14. So far as accused Bhupendra is concerned, it is alleged that he was standing near the place of incident. He is impleaded as accused with the help of Section 34 of IPC. From perusal of evidence available on record, we find that there is absolutely no evidence to hold that he had also common intention with the other co-accused. As per the evidence , he is merely present on the spot. In such circumstance, his conviction deserves to be set aside.

15. So far as accused Lakke alias Lokendra is concerned, there is definite evidence on record to show that he ablazed the huts of the complainant, due to which household goods, cereals, husk, oil and cash etc. had burnt.

16. Contention of learned counsel for the appellants is that punishment imposed by the Sessions Court is on higher side. From perusal of the provisions of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 we find that offence is covered in Section 3(2)(iv) of the Act, 1989, which provides as under:-

> "Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe---
>
> "commits mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause destruction of any building which is ordinarily used as place of worship or as a place for human dwelling or as a place for custody of the property by a member of Scheduled Caste or a Scheduled Tribe, shall be punishable with imprisonment for life and with fine."

17. From perusal of the provisions of the said section, it appears that only sentence prescribes under the said section is life imprisonment. Contention of learned counsel for the appellants is that unless and until it is proved that the appellants were aware about the fact that the complainant and his wife were belonging to the Scheduled Castes and Scheduled Tribes, they cannot be held guilty of the offence. For this purpose, he has relied on judgment of the Apex Court in the case of *Dinesh alias Buddha Vs. State of Rajasthan*, (2006) 2 SCC (Cri), and in the case of *Ramdas and others Vs. State of Maharashtra*, 2006(4) Crimes 329 (SC). From perusal of both these judgments, we find that in those cases offence under Sections 376/34 is made out, and the offence was covered

under 3(2)(v) of the Act, 1989, in which it is provided that who commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. Thus, said section provides that a person who commits crime on the ground that such person is a member of Scheduled Caste and Scheduled Tribe, but these words are missing in clause (v) of sub section 2 of Section 3 of the Act, 1989. Section 3(2)(v) of the Act, 1989 provides that a person commits mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause destruction of any building which is ordinarily used as place of worship or as a place for human dwelling or as a place for custody of the property by a member of Scheduled Caste or a Scheduled Tribe, shall be punishable with imprisonment for life and with fine. Thus, there is difference between the words mentioned in clause 4 and 5 of sub-section 2 of Section 3 of the Act, 1989. The requirement of knowledge of the accused that a victim is a member of Scheduled Caste and Scheduled Tribe is not in clause 4. In such circumstances, this Court has no discretion, but to award sentence of life imprisonment.

18. As already stated, we find that there is no evidence against the appellant No.1 Bhupendra to involved in the offence or about his common intention. In such circumstances, we set aside the conviction of appellant No.1 Bhupendra and maintain that against appellant No.3 Lakke alias Lokendra.

19. In the result, the appeal is partly allowed. The conviction of appellant No.1 Bhupendra under Section 436/34 of IPC and under Section 3(2)(4) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act and sentence thereon is hereby set aside and maintain the conviction of appellant No.3 Lakke alias Lokendra under Section 436 of IPC and under Section 3(2)(4) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act and sentences thereon passed by the trial Court. Both the sentences to run concurrently. Appellant No.1 Bhupendra is on bail. His bail bond and surety stand discharged. Appellant No.3 Lakke alias Lokendra is in custody, hence no further orders are necessary.

Appeal partly allowed.

I.L.R. [2008] M. P., 955

CRIMINAL REVISION

Before Mr. Justice S.K. Kulshrestha

29 January, 2008*

MARRY JANI KUMRAWAT Applicant

Vs.

KRISHNAKANT Non-applicant

A. Negotiable Instruments Act (26 of 1881), Section 138, Criminal Procedure Code, 1974, Section 357(3) - Compensation - Power to grant compensation animates only from Section 357 (3) of Code and not from Section 138 of Act - If fine is imposed, amount of compensation cannot be arbitrary or unreasonable and should be lesser than amount which can be granted by Civil Court - Criminal Court is not a substitution for a Civil Court. (Paras 7 & 8)

B. Negotiable Instruments Act (26 of 1881), Section 138, Criminal Procedure Code, 1974, Section 357(3) - Compensation - Dishonour of cheque occasions to party is harassment of initiating proceedings against such party and pursuing litigation in which inconvenience is suffered in addition to expenses incurred - This loss deserves to be compensated. (Para 9)

C. Negotiable Instruments Act (26 of 1881), Section 138, Criminal Procedure Code, 1974, Section 357(3) - Compensation - Deterrent provisions contained in Section 138 of Act are devised to ensure sanctity to the amount paid by cheque but not for recovery of amount. (Para 9)

Cases referred :

2007 Cr.L.J. 2951, 2007 Cr.L.J. 1486, AIR 2001 SC 567, (2007) 6 SCC 528.

None, for the applicant

N.K. Maheshwari, for the non-applicant

JUDGMENT

S.K. KULSHRESTHA, J. :– This revision has been filed by the applicant against the order dated 20.1.2007 in Criminal Appeal No. 474/2006 passed by the learned Second Additional Sessions Judge, Mhow by which the conviction of the applicant under Section 138 of the Negotiable Instruments Act, 1881 and award of compensation of Rs. 1,20,000/- to the complainant has been up held and she has been directed to undergo also substantive sentence till rising of the Court.

2. The applicant was prosecuted in the Court of the Judicial Magistrate Class-I, Mhow for commission of an offence under Section 138 of the Negotiable Instruments Act and by order dated 22.8.2006 passed in Criminal Case No. 1540/2004, while convicting the applicant thereunder, she was directed to pay compensation to the respondent in the sum of Rs. 1,20,000/-, otherwise to undergo R.I. for three months. An appeal was filed by her against the said judgment under

*Cr.R. No. 316/2007 (Indore)

the provisions of Section 374 of the Cr.P.C. and simultaneously therewith a revision was filed by the respondent before the Sessions Court for awarding substantive sentence to the applicant and for enhancement of the compensation. The appeal and the revision were decided by the impugned common judgment and in addition to the direction for compensation and dismissal of her appeal, the revision filed by the respondent was partly allowed and the applicant was awarded sentence till the rising of the Court. The applicant, therefore, prays that the order passed by the Courts below be set-aside and she may be acquitted of the charges.

3. It was not disputed before the Trial Court that the applicant had issued the cheque in the sum of Rs. 1,20,000/- but when the same was presented to the Bank, it was dishonored. In this respect a notice had been sent on 17.8.2004 and despite receipt of the notice, she had not paid the amount of the cheque that was issued by her. It was in this context that the respondent filed a complaint on 10.9.2004 stating that despite notice she had not cleared the amount of cheque and had thus committed offence under Section 138 of the Negotiable Instruments Act; 1881 (hereinafter referred to as the Act).

4. Learned Counsel for the respondent submits that once it was patent that the applicant accused had not paid the amount of the cheque after its dishonour and after the notice was served on her in accordance with the provisions of Section 138 of the Act, the applicant had no case merely because the Court, under the provisions of Section 357 (3) of the Cr.P.C., has awarded compensation to the tune of the amount of the cheque.

5. The core question that arises in the present case is as to whether the Trial Court can act as a Civil Court or Executing Court on finding that a person has committed offence under Section 138 of the Act. Learned Counsel for the respondent has invited attention to the judgment of the Supreme Court in *P. Suresh Kumar v. R. Shankar* 2007 CRI.L.J.2951 by which grant of compensation to the tune of Rs. 7,00,000/- instead of fine of Rs. 5,000/- was approved. Attention has also been invited to the judgment of the Kerala High Court in *Ramkrishnan v. Gangadharan Nair & Ano.* 2007 CRI. L.J.1486 in which it was held that in the facts and circumstances of this case, direction to pay a sum of Rs. 3.5 Lakhs as compensation was not excessive. Attention has also been invited to the judgment of the Supreme Court in *Pankajbhyai Nagjibhai Patel v. State of Gujarat and another* AIR 2001 Supreme Court 567 holding that the limit of fine of Rs.5,000/- which a Judicial Magistrate can impose, cannot be exceeded merely on account of the provision for fine made in Section 138 of the Act. Subsequently, by Act No.55 of 2002 the provision contained in Section 143 of the Act has been amended and the first Proviso appearing under Sub-Section (1) of Section 143 makes provision as under:-

> 143. Power of Court to try cases summarily.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of

1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

6. In the present case, even assuming that the conviction of the applicant is proper, the question that arises for consideration is as to whether in all cases the Magistrate trying the offence under Section 138 of the Act is required to compensate the complainant under the provisions of Section 357(3) of the Cr.P.C. and to act as Civil or the Executing Court.

Section 138 of the Act reads as follows:-

138. Dishonour of cheque for insufficiency, etc., of funds in the account.-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period

of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

7. A perusal of the Section manifests that it contemplates sentence of imprisonment for a term which may extend to two years or fine that may extend to twice the amount of cheque, or with both. Thus, the power to grant compensation animates only from Section 357(3) of the Cr.P.C. and not from Section 138 of the Act. In this connection, I may refer to the view expressed by Their Lordships in the case of *Dilip S. Dahanukar vs Kotak Mahindra Co. Ltd. and Another* (2007) 6 Supreme Court Cases 528. In the said case the Supreme court has observed in paragraph 39,40,41,42 and 43 of the report as under:-

39. If a fine is to be imposed under the Act, the amount of which in the opinion of Parliament would be more than sufficient to compensate the complainant, can it be said, that an unreasonable amount should be directed to be paid by the court while exercising its power under sub-section (3) of Section 357 ? The answer thereto must be rendered in the negative. Sub-Section (5) of Section 357 also provides for some guidelines. Ordinarily, it should be lesser than the amount which can be granted by a civil court upon appreciation of the evidence brought before it for losses which might have reasonably been suffered by the plaintiff. Jurisdiction of the civil court, in this behalf, for realisation of the amount in question must also be borne in mind. A criminal case is not a substitution for a civil suit, far less execution of a decree which may be passed..

40. Prosecution under the Act may be contemplated as a measure of deterrence, but the same is never meant to be a persecution.

41. Even in a case where violation of fundamental right guaranteed under Article 21 is alleged, the amount of compensation cannot be arbitrary or unreasonable even under public law.

42. In *Sube Singh v. State of Haryana* it is stated: (SCC pp. 198-99, para 38)

"The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure."

43. It does not appeal to us that although a compensation payable out of the quantum of fine would remain stayed under sub-section (2) of Section 357 of the Code, if a compensation is directed to be paid under sub-section (3) thereof, the same would not attract the said provision. (See *P. Suresh Kumar v. R. Shankar*).

8. From the above decision of the Supreme Court it is luculent that if fine is imposed, the amoujnt of compensation cannot be arbitrary or unreasonable and should be lesser than the amount which can be granted by the Civil Court upon appreciation of the evidence brought before it for losses which the complainant had reasonably suffered. The Jurisdiction of the Civil Court for realisation of the amount in question must also be borne in mind as a criminal case is not a substitution for a civil suit far less execution of a decree which may be passed. I have, therefore, no hesitation in holding that the Judicial Magistrate has exercised the power capriciously without regard to the fact that basically it is the Civil Court which considers such claim and decrees the amount to be realised by a plaintiff. It is, therefore, clear, as observed by the Supreme Court, prosecution under the Act cannot be a device for persecution.

9. The loss that dishonour of cheque occasions to a party is the harassment of initiating proceedings against such party under Section 138 of the Act and pursuing the litigation in which inconvenience is suffered in addition to the expenses incurred. It is this loss which deserves to be compensated, of course, without in any way affecting the power of the Trial Court to award compensation with regard to the other losses suffered. The learned Magistrate has directed payment of compensation in the sum of Rs. 1,20,000/-, the amount of the dishonoured cheque, and has acted as a Civil Court or an Executing Court for recovery of the amount due to the complainant. Such a course in the light of the decision in Dilip S. Dahanukar (supra) though cannot be deprecated, it does create a situation that the message that reaches the public is that the amount is recoverable in such proceedings. I am, therefore, of the considered view that the learned Magistrate should have first seen whether the amount to be compensated should also include the amount of the cheque or the matter should be left for determination by a Civil Court. I may add that the deterrent provisions contained in Section 138 of the Act are deviced to ensure sanctity to the amount paid by cheque but not for recovery of the amount.

10. Learned Counsel for the respondent submits that since now the amount has already been paid by the applicant and insofar as the offence is concerned, the same has already been brought home, the applicant is not entitled to claim any relief. There is substance in the contention of the learned Counsel. Though the course adopted by the learned Magistrate cannot be strictly approved, since the amount has already been paid to the complainant (aggrieved person,), no orders are necessary for its restitution.

11. Accordingly, maintaining the conviction of the applicant under Section 138 of the Act and the sentence awarded to her, this revision is disposed of with no orders for restitution of the amount of Rs. 1,20,000/- allowed as compensation.

Revision disposed of.

I.L.R. [2008] M. P., 960
CRIMINAL REVISION
Before Mr. Justice S.C. Vyas
26 February, 2008*

JAWAHARLAL & ors. — Applicants
Vs.
STATE OF M.P. — Non-applicant

Penal Code (45 of 1860), Sections 147, 324/149, Probation of Offenders Act, 1958, Section 4 - Incident took place about 20 years back when applicants no. 1 and 3 were 25 and 24 years of age and applicant no.2 was 60 years of age - Applicants first offenders - Maximum punishment under Section 324 prescribed is 3 years - Benefit of Act can be extended if offence is punishable with imprisonment upto 7 years and accused is first offender - Applicants entitled for benefit of Section 4 of Act - Revision allowed partly. (Para 6)

Raman Patel, for the applicants
Vijay Bhatnagar, Panel Lawyer for the Non-applicant/State

ORDER

S.C. VYAS, J. :–The legality and propriety of the judgment of criminal appeal No.42/1997 passed by IVth Additional Sessions Judge, Rewa dated 14.7.1998 is under challenge in this revision whereby the learned Sessions Court has confirmed the finding of conviction and order of sentence recorded by Judicial Magistrate First Class, Rewa against the present applicant in criminal case No.267/1996 whereby applicants Jawaharlal, Mahaveer and Rajendra vide judgment dated 14.2.1997 were found guilty of offence punishable under Section 147 and 324 read with 149 of IPC and have been sentenced to undergo rigorous imprisonment for 3 months and 6 months respectively for these offences alongwith fine of

*Cr. Rev. No. 820/1998 (Jabalpur)

Rs.100/-. It has further been directed that they will undergo rigorous imprisonment of 1 month in default of payment of fine.

2. The short facts of the case as apparent from the judgment of the Trial Court are, that on 24.12.1998 in the evening about 5 p.m. when complainant Ramswaroop, Ravishankar and Budhesen were coming back to home, they were intercepted in the way by the present applicants and the other accused persons who have been released on probation of good conduct by the Trial Court. It is alleged that present applicants were armed with sticks and one Ramvati who has been acquitted by Appellate Court brought the axe and handed it over to applicant No.1 Jawahar for causing injury by that weapon to Ramswaroop. Thereafter present applicants also caused lathi blows to said Ramswaroop who sustained injuries. The matter was reported to the police and on the basis of FIR offence was registered. As per medical report of Dr.N.Narendranath Mishra, he sustained one incised wound, two abrasions and swelling. In the same incident Kamala also sustained 6-7 incised wounds. After investigation the chargesheet was filed against these applicants and other accused persons. They were tried by learned Magistrate, ultimately they were found guilty and have been convicted and sentenced as aforesaid.

3. Learned counsel for the applicant submitted that he does not want to challenge the finding of guilty of the present applicants as recorded by the Trial Court and prayed that the matter be heard only on the quantum of sentence.

4. Otherwise also the record of Trial Court shows that the apart from Ramswaroop, Kamala (PW/2) and Budhesen (PW/3) have also been produced as eye witness. Bhimsen (PW/4) has also seen the incident.All these witnesses they supported the case of prosecution. The matter was reported immediately to the police and the expert opinion of Dr. Narendranath Mishra (PW/7) has also corroborated to the prosecution story. Therefore, on facts there is no scope of interference in the finding of guilty and conviction recorded by Trial Court and confirmed by the Appellate Court.

5. Only on quantum of the sentence learned counsel for the applicant submits that the incident happened in the years 1998 at that time the applicant No.1 Jawaharlal was 25 years of age, applicant No.2 Mahaveer was old person of 60 years age and applicant No.3 Rajendra was 24 years of age. It has been submitted that there is nothing on record to show that the applicants are habitual offender or earlier any case was registered against them. In these circumstances it has been submitted that the applicants are first offenders. Being first offenders they could also be extended the benefit of provision of Section 4 of Probation of Offenders Act. In alternative it has also been argued that the applicant are facing the agony of criminal trial and thereafter from the date of judgment the fear of going to jail for last so many years. The incident was 20 years old and applicants are suffering during these 20 years by facing criminal prosecution and it can be

termed sufficient punishment to them and in these circumstances it has been prayed that in place of sending them to jail they may be sentenced with fine only.

6. I have taken into consideration these arguments and perused the judgment of trial court as well as appellate court and the record of the trial court. From the judgment of the appellate court it appears that the other accused persons namely Virendra and Babulal have been released under Section 4 of Prabation of Offenders Act, looking to the mandatory provision of Section 6 in view of the fact that both are of 20 years age. So far the present applicants are concerned the appellate court declined to extend the same benefit to them because they had crossed the age of 21 years. So far provision of Section 4 of Act are concerned if the offence is punishable with imprisonment upto 7 years and when there is case of first offender then the benefit of that Act can also be extended to such first offender. In the present case as argued, all the three applicants are first offenders. There is nothing on record to indicate that any offence was registered against them in past. Offence under Section 147-324/149 IPC have been found proved against them beyond reasonable doubt. The maximum punishment prescribed under Section 147 is 2 years and for the offence punishable under Section 324 the maximum punishment prescribed is 3 years along with or without fine. It is clear that no offence is proved against the applicants punishable with imprisonment for 7 years or more. In these circumstances when the benefit of Section 4 of Probation of Offenders Act was extended to other accused persons then the same benefit should have been provided to the present applicants also looking to the nature of the offence and circumstances under which it has been committed.

7. Therefore, I find that learned Appellate Court has committed irregularity and so the revision deserves to be allowed. The same is hereby allowed. In place of sending the applicants to jail it is directed that they be released on probation of good conduct for a period of 3 years and to serve the sentence as and when called upon during the period of 3 years on their furnishing bond of Rs.10,000/- and surity of like amount to the satisfaction of the Trial Court. Such bond and surity should be produced before the Trial Court within a period of 30 days from the date of receipt of this order to CJM, Rewa.

Revision allowed.

I.L.R. [2008] M. P., 963

CRIMINAL REVISION

Before Mr. Justice S.C. Sinho

25 March, 2008*

RAZZAK KHAN & ors. Applicants

Vs.

SHAHNAZ KHAN Non-applicant

A. Protection of Women from Domestic Violence Act (43 of 2005), Section 17 - Right to reside in a shared household - Whether divorcee wife has right to reside in an ancestral house of husband - Yes, every woman in a domestic relationship has right to reside in the shared house. (Para 13)

B. Protection of Women from Domestic Violence Act, (43 of 2005), Section 19 (1) (f) - Alternate accommodation or to pay rent for the same - The claim for alternative accommodation can only be made against husband - Wife is entitled a right to residence in a shared house belonging to husband or house which belongs to joint family of which husband is a member. (Para 14)

C. Practice & Procedure - Strict rule of pleadings are not applicable in proceedings under the Protection of Women from Domestic Violence Act, 2005 - Wife did not refer name of her foster son in original application before JMFC - However Appellate Court granted Rs. 500/- maintenance to foster son - Order upheld by High Court. (Para 9)

Case referred :

Civil Appeal No 5837/06 decided on 15-12-2006

Ahadulla Usmani, for the applicants

Imtiaz Hussain with *Mohd. Qasim,* for the non-applicant

ORDER

S.C. Sinho, J. :–These two revisions against the order passed in Criminal Appeal No. 501/07 (Razzak Khan and 2 others Vs. Smt. Shahnaz Khan) and Criminal Appeal No. 595/07 (Smt. Shahnaz Khan Vs. Razzak Khan and 2 others) dated 19.12.2007, passed by 6th Additional Sessions Judge Jabalpur arising out of the order passed in complaint case No. 23/2007 order dt. 29.9.2007 by learned JMFC Jabalpur in proceeding under Section 9(b) 37(2) (c) of Protection of Women from Domestic Violence Act, 2005 (in short "Act 2005") whereby these revisions have been filed before this Court.

2. This is undisputed that Ramzan Khan and Smt. Shahnaz Khan has taken divorce on 3.5.2007 in presence of witnesses. Razzak Khan, Rehman Khan and Ramzan Khan are real brothers and Smt. Shahnaz Khan is the daughter of real sister of the applicants whose first marriage has been performed with Musarraf Khan and out of first wedlock Master Shoaib was born who is presently 16 years

*Cr Rev No. 68/2008 (Jabalpur)

of age. After lapse of 12 years of the death of her first husband, Shahnaz Khan has performed Nikah with Ramzan Khan on 19.3.2003 and both of them were living in a rented house. Ramzan Khan after the death of his father Rasool Khan, on 7.2.2006 started living in ancestral house with his two brothers along with his wife Shahnaz Khan.

3. The Shahnaz Khan filed a complaint under Section 9(b) 37 (2) (C) of the "Act 2005" for claiming relief under Section 18 to 20 before JMFC Jabalpur. The JMFC vide order dated 29.9.2007 granted following reliefs to Smt. Shanaz Khan.

> 1. Smt. Shahnaz Khan is entitled for sum of Rs. 16,439/-as expense of delivery and medicines from Ramzan Khan.
>
> 2. Ramzan Khan shall not restrain Smt. Shahnaz Khan for going to service (work place) nor he will snatched her salary.
>
> 3. Ramzan Khan shall give Rs. 2000/- per month toward the maintenance to Smt. Shahnaz Khan and son Gazi Khan.
>
> 4. Ramzan Khan shall not assault and abuse the applicant (Smt. Shahnaz Khan)
>
> 5. Shri Ramzan Khan shall pay necessary medical expenses in relation to newly born baby.
>
> 6. Protection Officer was directed to ensure the delivery of the Stridhan as per annexed to the complaint in his presence.

4. In Criminal Appeal No. 595/07 learned 6th Additional Sessions Judge modified relief to Smt. Shahnaz Khan and directed protection officer for providing accommodation in the ancestral house of husband under Section 19 (1) (f) of the "Act 2005" and further granted Rs. 500/- per month maintenance in favour of the foster son Shoaib Khan.

5. Learned Advocate of Shri Razzak Khan, Rahman Khan and Ramzan Khan argued in detailed that Smt. Shahnaz Khan is a working as a Clerk in MPSRTC and comfortably living in her parental house with her sons. She is in a better financial position whereas Ramzan Khan is a photo copy mechanic and living with brothers and hardly able to maintained himself. However, Shri Usmani has conceded that even now he is prepared to pay 500/- per month to Smt. Sahahnaz Khan and children. Learned Advocate has further argued that it will not be proper in view of the fact that Shahnaz Khan after divorce will live in the shared house with Ramzan Khan and she is living very comfortably in her ancestral house with her parents and brothers.

6. However, in Criminal Revision No.112/2008, Smt. Shahnaz Khan has demanded enhancement of the quantum of maintenance regarding Gazi Khan from Rs.1000/- to Rs.2000/- and regarding foster son Shoaib Khan from Rs.500/- to Rs.1000/- per month from the date of application and also demanded adequate compensation in terms of Section 20 and 22 of "Act 2005". Shri Imtiaz Hussain learned counsel for Smt. Shahnaz Khan has argued that looking to the price index

meager relief is granted to her and children. Therefore, this amount should be enhanced.

7. Both the learned counsel were heard at length.

8. It is admitted position that Ramzan Khan has given divorce to Smt. Shahnaz Khan on 3.5.2007. Smt. Shahnaz Khan is working as a clerk in the MPSRTC at Jabalpur and living in her parental house.

9. Learned Advocate of Razzak Khan and others Shri Ahdullaha Usmani argued that because Smt. Shahnaz Khan is working as a clerk, therefore, her financial position is much better then her husband who is casually working as a photo copy mechanic and suffering from heart problem. The learned appellate Court after considering the evidence produced by both the parties held that Smt. Shahnaz Khan and her children are entitled for 2500/- per month relief. Shri Usmani, learned counsel argued that applicant Smt. Shahnaz Khan did not refer name of her foster son Shoaib Khan in original application before J.M.F.C. therefore, learned appellate court without any cause granted Rs.500/- maintenance to Gazi Khan. It is admitted position that Gazi Khan is foster son of Smt. Shahnaz Khan and Razzak Khan and strict rule of pleadings are not applicable in proceedings under the "Act 2005". Shri Imtiaz Husain, learned Advocate of Shahnaz Khan has argued at length that looking to the present price index quantum of monthly maintenance of Rs.1000/- to Gazi Khan and Rs.500/-to Shoaib Khan should be enhanced and further adequate compensation be granted to Smt. Shahnaz Khan.

10. It is admitted position that Smt. Shahnaz Khan is working as a clerk in M.P.S.R.T.C. Jabalpur whereas her husband Ramzan Khan is a photocopy mechanic and not getting regular salary, he is also suffering from heart ailment. In these circumstances, both the court below after appreciation of evidence has given findings of income, regarding financial status of the parties. This Court is of the view that the monthly maintenance granted by learned appellate court is justified.

11. Shri Ahdullaha Usmani learned Advocate for Razzak Khan and others has vehemently argued that if divorcee wife Smt. Shahnaz Khan will stay in the shared house with applicant then it will create many problems. Further Smt. Shahnaz Khan is living comfortably with her brother in her parental house and therefore, the .revisional court has committed a grave mistake in ordering for providing accommodation to her in the house of husband and brothers. He has further argued that because Ramzan Khan has given divorce to Smt. Shahnaz Khan therefore, jurisdiction under "Act 2005" is not attracted.

12. It is clear that applicant and his two brothers are staying in a three-storied house at Jabalpur. In this regard it will be proper to reproduce Section 17(1) of the Act of 2005.

17.(l) Right to reside in a shared household.

Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall

have the right to reside in the shared house hold, whether or not she has any right, title or beneficial interest in the same.

This Section lays down that irrespective of any contrary proviso in any other law, every woman in a domestic relationship shall have the right to reside in the shared household and the aggrieved person shall not be evicted or excluded from the shared household by the respondent except in accordance with the procedure established by law. Further Section 2 of "Act 2005" defines " aggrieved persons" and "domestic relationship" and "shared household" as given below -

2. Definitions .-

(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

13. Thus it is clear that every women in a domestic relationship shall have the right to reside in the shared house except in accordance with the procedure established by law therefore, this argument of applicant has no force that divorcee wife Shahnaz Khan has no right to reside in a ancestral house of husband or such living will amount to 'Haram'

14. Further as held by Apex Court in *S.R. Batra Vs. Smt. Tarun Batra,* Civil Appeal No. 5837/06 (SC) decided on 15th December, 2006, it is made clear that the claim for alternative accommodation can only be made against husband Ramzan Khan and she is entitled a right to residence in a shared house would only mean house belonging to husband Ramzan Khan or house which belongs to joint family of which husband is a member.

15. If circumstances required so, divorcee wife Shahnaz Khan in view of Section

19 (1) (f) of the "Act 2005" in the alternative husband Ramzan Khan is directed to secure same level of alternate accommodation for Shahnaz Khan as enjoyed by her in the shared house with the help of protection officer or he will pay Rs. 900/- per month rent to Smt. Shahnaz Khan from date of trial court order i.e. 29.9.2007.

16. Suffice it to say that the learned Additional Sessions Judge, Jabalpur, has not committed any error of law and fact in impugned Criminal Appeal No. 501/2007 and 595/2007 dated 19.12.2007. This court does not find any such illegality, irregularity or perversity in the impugned order to interfere in these revision petition except modification as provided in Section 19(1) (f) of the "Act 2005".

17. With this modification, Both revisions are dismissed.

Revisions dismissed.

I.L.R. [2008] M. P., 967

MISCELLANEOUS CIVIL CASE

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

20 February, 2008*

PRAKASH CHAND NAHTA — Applicant

Vs.

COMMISSIONER OF INCOME TAX, JABALPUR — Non-applicant

Income Tax Act (43 of 1961), Section 131 - Power regarding discovery, production of evidence etc. - Witness summoned and examined by Assessing Officer - Prayer to cross examine him rejected - Witness later on filing affidavit in variance of original statement - Held -Assessing Officer relied heavily on the statement of witness - It was obligatory on the part of assessing officer to allow the prayer for cross examination - Reference answered accordingly.

Cases referred : (Paras 15 & 16)

(1994) 210 ITR 103 (Cal), (1994) 209 ITR 821 (Ker), (1995) 39 STC 478 (SC), (1995) 98 STC 338 (Pun), (2006) 287 ITR 91, (2007) 295 ITR 105, (1977) 39 ITR 478 (SC)

A.P. Shrivastava, for the applicant.

Rohit Arya, and *Sanjay Lal,* for the non-applicant

O R D E R

The Order of the Court was delivered by DIPAK MISRA, J. :–This is a reference by the Income Tax Appellate Tribunal under Section 256 (1) of the Income Tax Act, 1961 at the instance of the assessee in respect of the following two questions:

> "1. Whether in view of the facts that Mohd. Rasid, Proprietor of Mohd. Mohammad Rasid & Co., Jabalpur, was not summoned in

*M.C C. No. 668/1991 (Jabalpur)

evidence by the Income-tax Officer, in spite of the request made by the applicant under Section 131, in this behalf there is justification in law to use the evidence recorded behind the back of the applicant without affording an opportunity to him to cross examine the said Mohd. Rashid and drawing an adverse inference?

2. Whether the assessment vitiated in law as the IAC assessment has not given reasonable opportunity of being heard and failed in summoning the witnesses as requested u/s 131 and his failure to consider the affidavit of Mohd. Rashid filed along with the written reply submitted on 31.12.1985.?"

2. To deal with the aforesaid questions the facts which are essential to be stated are that the assessee is an individual and carries on business of purchase and sale of silver ornaments, utensils, etc. in the name of M/s Anil Kumar Sheetal Kumar Nahata. A search was conducted by the Income-tax Department on the residential and business premises of the assessee commencing 13.12.1983 to 17.12.1983. During the search silver ornaments and utensils were seized and were found to be in excess of the accounts as per books of account. After the assessment proceeding silver ornaments amounting to 125.44 kilograms were held by the Income Tax Officer unexplained and he made an addition of Rs.3,49,225/- for the purpose of computation under the Act. The assessee had explained that the said silver to have purchased from one Rashid & Company of Jabalpur. The aforesaid explanation was not accepted by the Revenue because at the time of search this silver was not found recorded in the books of account and further the assessee in his examination under Section 132 (4) of the Act had not offered any explanation about the source of acquisition. That apart on inquiry Mohd. Rashid, the alleged proprietor was found to be a man of very humble means and the assessee did not produce him for examination. It is worth noting that the assessing officer examined the said Mohd. Rashid behind the back of the assessee. The assessee made a prayer under Section 131 of the Act to summon Mohd. Rashid, the proprietor of Mohd Rashid and Company for cross-examination on the ground that the statement of Mohd. Rashid was utilised against the assessee. The said prayer of the assessee was not acceded to by the assessing officer and the order of assessment came to be passed.

3. Being dissatisfied with the aforesaid order the assessee preferred an appeal before the Commissioner of Income Tax (Appeal) who by order dated 16.5.1986 confirmed the same. Being aggrieved by the said order the assessee preferred an appeal before the tribunal and the tribunal gave the stamp of approval to the order passed by the first appellate authority. An application was filed for rectification of the order which was declined. Thereafter an application was made to refer the questions of law to this Court and on the basis of the said application the present reference was made.

4. It is apposite to mention that this Court by order dated 17.1.1996 answered

the reference against the assessee and in favour of the Revenue. Being grieved of the aforesaid order of this Court the assessee preferred SLP (Civil) No.16453/ 1996 before the Supreme Court. The Apex Court expressed the view that it is clear from the judgment of the High Court that it proceeded on the basis that the questions that were before it arose upon an order passed by the tribunal in a rectification proceeding. Their Lordships looked at the reference application under Section 256(1) of the Act and expressed the opinion that it is clear therefrom that what was sought to be referred were questions that arose out of the principal order that had been passed on 11.1.1988. Being of this view the Apex Court allowed the appeal and directed this Court to decide the reference.

5. At the outset it is of immense significance to understand the basic controversy of the decisions of the tribunal. The tribunal noted in paragraph 33 of the order that the Income Tax Officer had informed the assessee that he had already examined the owner of the firm Rashid & Co. who had denied to have any transaction with the assessee. The tribunal further opined that whatever was the material in the statement of Mohd. Rashid was fairly communicated to the assessee and that apart it was not the case of the assessee that he did not know what Mohd. Rashid had stated. The tribunal in paragraph 38 of its original order expressed the view that the rules of natural justice are not meant for nullifying the procedures on small technicalities and also not meant to help those who adopt a very evassive attitude. They are meant to advance the cause of justice and to help a person who really wants to avail the right of defending himself. The tribunal further proceeded to state that the principles of natural justice does not need any literal compliance in each case. Regarding the case at hand it was ruled by the tribunal when the copies of the statements of Mohd. Rashid and Iddu had been supplied to the assessee, though he never asked for that, there was substantial compliance of principles of natural justice and no prejudice has been caused. The tribunal also opined that the findings recorded by the authorities below are well sustainable even if the statement of these witnesses are excluded from consideration altogether.

6. Thus, the issue that arises for consideration basically relates to applicability of principles of natural justice to the proceeding when a prayer was made under Section 131 of the Act. First we shall deal with the said facet and thereafter proceed to deal with whether the order of assessment is vitiated by not summoning the witnesses as requested by the assessee under Section 131 of the Act and whether the tribunal is justified in holding even if their statements are excluded the addition is sustainable.

7. . Mr. A.P. Shrivastava, learned counsel appearing for the assessee has submitted that a statement recorded behind the back of the assessee cannot be used against the assessee without giving an opportunity of rebuttal. The learned counsel has contended that the assessee has a right to cross-examine any witness whose statement has been recorded behind his back. To substantiate his

submissions he has placed reliance on the decisions rendered in *CIT Vs. Eastern Commercial Enterprises* (1994) 210 ITR 103 (Cal), *P.S. Abdul Majeed Vs. Ag IT and STO,* (1994) 209 ITR 821 (Ker), *Chaman Lal Dhingra Vs. CIT*, (1995) 39 STC 478 (SC) and *Anupam Agencies Vs. State of Punjab,* (1995) 98 STC 338 (Punj). He has also commended us to the decision rendered in *Rajesh Kumar and Others Vs. Deputy Commissioner of Income-tax and Others,* (2006) 287 ITR 91. Mr. Shrivastava has also placed heavy reliance on the Division Bench decision of Delhi High Court in *Commissioner of Income Tax Vs. Dharam Pal Prem Chand Ltd.*, (2007) 295 ITR 105.

8. Mr. Rohit Arya, learned senior counsel along with Mr. Sanjay Lal submitted that Section 131 of the Act does not envisage availability of opportunity of hearing and, therefore, contention raised is without any substance. It is proponed by Mr. Arya that the tribunal is absolutely correct in holding that there has been substantial compliance of principles of natural justice and, therefore, no prejudice is caused to the assessee. The learned senior counsel for the Revenue canvassed that the findings of the tribunal to the effect that if statements of the witnesses are excluded the order of assessment is sustainable cannot be found fault with and, therefore the assessment order and affirmation thereof by the CIT (A) and the tribunal cannot be put at naught.

9. To appreciate the controversy involved it is apposite to refer to the chronology of events. The search of the premises in question took place on 13.12.1983 and the books of account including silver ornaments were seized. Mohd Rashid, the proprietor of M/s Rashid and Co. was summoned under Section 131 to appear on 1.10.1985. The 'Amanat Book' showed M/s Rashid and Co. issued the bills on three dates, namely, 8.12.1983, 10.12.1983 and 11.12.1983 of 40.300 kg., 50.340 kg and 34.800 kg of silver respectively amounting Rs.1,77,117/-. The assessee had filed correspondences made between it and Rashid and Co. regarding the payment of the amount. After the statement of Mohd. Rashid was recorded Mohd. Rashid moved an application stating that his statement was recorded under coercion and he retracted the statements confirming the transaction entered between him and the assessee. As stated earlier the assessee requested the assessing officer for summoning Mohd Rashid so that the real facts could come to light. The assessing officer accepted all the entries recorded in 'Amanat Book' except the entries pertaining to M/s Rashid & Co. The affidavit of the Mohd Rashid and bank transaction made by him were ignored. The assessing officer on the basis of the statement made an addition of Rs.3,49,225/- against the bill amount of Rs.1,77,117/-

10. In this factual backdrop it is submitted by Mr. Shrivastava that the statements were recorded behind the back of the assessee and hence, they could not have been taken into consideration while passing the order. To appreciate the said submission it is seemly to reproduce Section 131 of the Act. It reads as under:

"131. Power regarding discovery, production of evidence, etc. (1)

The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commisssioner (Appeals) and Chief Commissioner or Commissioner shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:-

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) issuing commissions.

(1A) If the Director General or Director or Joint Director or Assistant Director or Deputy Director, or the authorised officer referred to in sub-section (1) of Section 132 before he takes action under clauses (i) to (v) of that subsection has reason to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction then, for the purposes of making any enquiry or investigation relating thereto, it shall be competent for him to exercise the powers conferred under sub-section (1) on the income-tax authorities referred to in that sub-section, not withstanding that no proceedings with respect to such person or class of persons are pending before him or any other income-tax authority.

(2) xx xx xx

(3) Subject to any rules made in this behalf, any authority referred to in sub-section (1) or sub-section (1A) may impound and retain in its custody for such period it thinks fit any books of account or other documents produced before it in any proceeding under this Act:

Provided that an Assessing Officer or an Assistant Director or Deputy Director shall not-

(a) impound any books of account or other documents without recording his reasons for so doing, or

(b) retain in his custody any such books or documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of the Chief Commissioner or Director General or Commissioner or Director therefor, as the case may be."

10. On a bare reading of the said provision it is manifest that the same empowers the Income Tax Officer to enforce the attendance of any person and examine him

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on oath. That power has been exercised by the assessing officer in the assessing proceeding. It is contended by Mr. Shrivastava that when a witness has been examined by the assessing officer and his statement has been pressed into service, the assessee should have been allowed to cross-examine, more so, when he had filed an affidavit retracting from his earlier statements.

11. In *P.S. Abdul Majeed Vs. Agricultural Income-Tax and Sales Tax Officer and Others,* (1994) 209 I.T.R. 821 (Ker.) the High Court of Kerala took note of the order of reassessment which was made without any reference to inspection records and made on the basis of strength of the entries in the auctioneers' records. In that context it was held that reliance on the auctioneers' records and treating them as if they were conclusive did violence to the principles of natural justice when the petitioner had prayed for an opportunity to cross-examine the auctioneers. It was ruled therein that when such a request was made it was incumbent on the officer to afford an an opportunity to the assessee to cross-examine the authors of those books.

12. In this context, we may refer to a three-Judge Bench judgment of the Apex Court rendered in *State of Kerala Vs. K.T. Shaduli Yusuff,* (1977) 39 I.T.R. 478 (SC) wherein their Lordships expressed the view that where the entries in third party's accounts were used to reject assessee's accounts to pass best judgment assessment, denial of assessee's request to cross-examine the third party vitiates the order of assessment.

13. In *Rajesh Kumar* (supra) the Apex Court has expressed the opinion that assessment proceeding is a part of judicial process and when a statutory process is exercised by the assessing authority in exercise of its judicial functions which is detrimental to the assessee, it is not and cannot be administrative in nature. Their Lordships expressed the opinion that when civil consequences ensue, there is hardly any distinctiion between an administrative order and a quasi-judicial order and it attracts the principles of natural justice. Mr. Rohit Arya, learned senior counsel for the Revenue submitted that the said decision is distinguishable as that deals with giving of reasons. We have referred to the same only to show that principles of natural justice are applicable when adverse civil consequences are visited to an assessee.

14 Recently in *Dharm Pal Prem Chand Ltd.* (supra) the Delhi High Court took note of the fact situation where the assessing officer had passed an assessment order on the base of a report obtained from the research institute,namely, Shri Ram Institute of Industrial Research, New Delhi. The assessee had filed objections thereto and requested to cross-examine the analyst. The assessing officer did not pay any heed to the same and proceeded to pass order of assessment. The order of assessment was assailed by the assessee before CIT (A) and a contention was raised that request to cross-examine the analyst had not been allowed . The CIT (A) accepted the contention of the assessee and concluded that the assessing officer had wrongly avoided granting permission to the assess to cross-examine

the analyst and held that the order of assessment is vitiated in law. The revenue preferred an appeal before the tribunal and the tribunal dismissed the appeal on the ground that in the absence of grant of permission to cross-examine the analyst who had prepared the test report the order of assessment was vulnerable. Against the order of the tribunal the revenue approached to High Court and the High Court while dismissing the appeal filed by the Revenue has held as under:

> "There is no doubt that even if the strict rules of evidence may not apply the basic principles of natural justice would apply to the facts of the case. The Assessing Officer placed reliance upon the report of Shri Ram Institute for Industrial Research for deciding against the assessee. The report cannot be automatically accepted particularly since there is a challenge to it and the assessee had sought permission to corss-examine the analyst making the report. Since the Assessing Officer did not permit the correctness or otherwise of the report to be tested, tehre is a clear violation of the principles of natural justice committed by him relying upon it to the detriment of the assessee. As observed by the Constitution Bench in *C.B. Gautam Vs. Union of India* (1993) 199 ITR 530 (SC) that, "he observance of the principles of natural justice is the pragmatic requirement of fair play in action."

15 In the case at hand Mohd. Rashid was summoned and his statement was recorded. A request was made by the assessee to cross-examine him. The same was not allowed. On a perusal of the assessment order it is perceivable that the assessing officer has heavily relied upon the statement of Mohd. Rashid. The assessing officer has expressed the opinion that there could not have been any transaction between M/s Rashid & Co. as it was a small firm and not assessed to income tax.

16. In the obtaining factual matrix the seminal question is whether the said statement of Mohd Rashid could have been utilised against the assessee without calling him for cross-examination. It is of immense significance that Mohd. Rashid has filed an affidavit in variance of his original statement. That apart, the assessing officer has ignored the affidavit and ascribed reasons how the transaction with said Mohd. Rashid was not worth given credence. The genuineness of bills produced by the assessee has not been accepted exclusively on the basis that the said Mohd. Rashid was a small businessman and was not assessed to income tax. The aforesaid circumstances eloquently speak that the addition in the order of assessment has been made on the basis of the statement made by Mohd. Rashid. There is no cavil that a prayer was made under Section 131 of the Act to summon said Mohd. Rashid for cross-examination. That has not been done. The language employed under section 131 of the Act empowers the assessing officer to ensure the attendance of any person. When the statement of Mohd. Rashid was used against the assessee and an affidavit was filed controverting the same. We are disposed to think, it was obligatory on the part of the assessing officer to allow the

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prayer for cross-examination. That would have been in the fitness of things and in compliance of principles of natural justice.

17. In view of the aforesaid we answer the reference holding that as the assessing officer had not summoned Mohd Rashid, the proprietor of M/s Rashid & Co., Jabalpur inspite of the request made under Section 131 of the Act , the evidence of said Mohd Rashid could not have been used against the assessee and in the absence of affording reasonable opportunity of being heard by summoning the said witness the assessment order is vitiated and cannot be saved as the addition has been made on the foundatiion of his deposition.

18. In the result, we answer the reference in affirmative in favour of the assessee and against the Revenue. There shall be no order as to costs.

Order accordingly.

I.L.R. [2008] M. P., 974

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

31 January, 2008*

SANJAY MOHASE — Applicant

Vs.

STATE OF M.P. & anr. — Non-applicants

Penal Code (45 of 1860), Sections 177,199, 218, Criminal Procedure Code, 1974, Section 482 - A complaint filed by Jr. Engineer against a dead person U/s 138 of Electricity Act - When this fact came into the knowledge of Court - Proceedings were dropped - Show cause notice issued against Jr. Engineer why he has filed complaint against dead person - Thereafter, applicant working as CMD was directed to conduct enquiry - Applicant submitted the report that sons of deceased had given false information at the time of inspection - Report of applicant not accepted by Special Judge and issued show cause notice as to why he be not punished U/ss 177, 199 and 218 of Code - Held - No material before Special Judge on the basis of which report of applicant could be disbelieved - Conclusions drawn by Special Judge on imaginary grounds only - Show cause notice to applicant totally unwarranted and an abuse of process of law - Petition allowed. (Para 9)

Deepak Sharma, for the applicant

Mamta Shandilya, Panel Lawyer for the non-applicant No.1/State

R.L. Mishra, for the non-applicant No.2

ORDER

S.C. VYAS, J. :–Heard finally with the consent of all the parties.

This is a petition filed under Section 482 of Cr.P.C. for quashing the order passed by IInd Additional Sessions Judge and Special Judge, Ujjain in Criminal

*M.Cr. C. No. 2273/2007 (Indore)

Case No. 716/06, whereby show cause notice has been given to the present petitioner as to way he be not prosecuted under Sections 177, 199 and 218 of IPC.

2. Short facts of the case are that a private criminal complaint, on behalf of M. P. Western Area Electricity Supply Co. Ltd., through its Junior Engineer, Mr. Ganesh Prasad Sahu, was filed against one Shankarlal S/o Babru Mali for trial of the offence punishable under Section 138 of the Electricity Act, 2003, on the allegation that his electricity connection was disconnected temporarily, but even then direct supply line was connected and by passing the matter, the electrical energy was stolen by him. Along with complaint a Panchnama was also filed stating that it was Shankarlal S/o Babru who connected direct supply line and was committing theft of electricity.

3. The case was registered by learned Special Judge and order for issuance of bailable warrant against the accused Shankarlal was passed on 30.8.2006.

4. On 9.2.2007, the matter came again before that Court with a report of police station – Ingoriya to the effect that the said accused Shankarlal had already died around three years back. A certificate issued by Sarpanch of the Gram Panchayat was also annexed along with service report. Considering this report the case against deceased Shankarlal was dropped and proceedings were terminated. But after terminating the proceeding and passing an order of filing the case, further order was passed to issue show cause notice to the complainant as to why he has filed a complaint against the dead person. He was directed to remain present in person before that Court on 21.2.2007. On 21.2.2007 complainant G. P. Sahu appeared before that Court and sought time for filing reply of show cause notice. Time was granted upto 27.2.2007, on that date again time was sought, on the ground that his mother was not well, but this ground was not found proper by the learned Trial Judge and his application was disallowed, thereafter CMD of the Electricity Supply Company was directed to conduct an inquiry against Junior Engineer, G. P. Sahu and to submit his report within one month. Such report was submitted on behalf of the CMD on 4.4.2007. It was found that when the premise was inspected by the Junior Engineer, then sons of deceased Shankarlal gave false information, who were present at the time of inspection. As the lineman or other persons serving in the electricity supply company were not personally knowing the deceased Shankarlal, therefore, they believed the information given by the sons of deceased Shankarlal and prepared Panchnama accordingly and thereafter, complaint was filed. This report was also not accepted by learned Special Judge, on the ground that the CMD is simply concealing the illegal act of Junior Engineer, G. P. Sahu and has filed a false report before the Court. On the basis of this observation the impugned show cause notice was issued to the CMD, Electricity Supply Company. Feeling aggrieved by this order of issuance of show cause notice, this petition has been filed.

5. Learned counsel for the petitioner submitted that there was no other way but to believe the information given by the sons of the deceased and to act

accordingly, when the premises was inspected by the Junior Engineer of the department. He submit that it is a matter of common experience that as and when officers of Electricity Supply Company visit a particular place, then most of the villagers do not cooperate with them, because usually such inspections are for detection of electricity theft and many persons of the rural areas are involved in such type of activities. He further submitted that the inquiry report which was submitted by present petitioner before learned Special Judge was prepared on the basis of the material facts, which were obtained by him during such inquiry and there was nothing before learned Special Judge to disbelieve this inquiry report. No material was placed by anyone before Special Judge at the time of considering this inquiry report. The conclusions which have been drawn by learned Special Judge were totally imaginary and the order of issuance of show cause notice for prosecution of the CMD of the Electricity Supply Company was totally unwarranted and was uncalled for.

6. Learned counsel appearing for the Electricity Supply Company also supports this contention.

7. Learned panel lawyer who is appearing for the State is also having a similar view.

8. I have considered the aforesaid arguments and perused the record of Court below. From the record it is clear that, the private complaint was filed along with a Panchnama, which was prepared on spot. It has been mentioned in that Panchnama that nobody singed that Panchnama on behalf of the consumer which shows that who ever was present on behalf of the consumer has refused to signed that Panchnama and had not cooperate with the officer of the Electricity Supply Company. This Panchnama only bears signature of the Junior Engineer and the Lineman. This fact further indicates that no villagers came forward to cooperate in the proceedings which were being done by the officer of Electricity Supply company. The copy of the register of Electricity Supply Company shows that the connection of Shankar S/o Babru Mali was discontinued as back as 6.3.2005 and it was never reconnected. At that time one Dayaram signed the register of such discontinuation which shows that someone else was present when the connection was disconnected. The service report of the bailable warrant shows that when police officers went to the village in the month of January, 2007, then in the same month a certificate was obtained from Gram Panchayat in which the Sarpanch certified that Shankarlal died approximately around three years back. There is nothing to show that the certificate was issued on the basis of any entries in the birth and death register of the Panchayat. It is surprising that this type of document was fully believed by the Special Judge and only on the basis of such photocopy of certificate issued by Sarpanch, show cause notice for prosecution has been issued to the CMD of Electricity Supply Company.

9. It is again surprising that when the report of the CMD came before learned Special Judge for consideration, then apart from that report there was no other

material before that Court, on the basis of which that report could be disbelieved, but without any basis and without any material unnecessarily some conclusions were drawn by learned Special Judge only on imaginary grounds.

10. When, learned Special Judge had already passed an order of terminating the proceedings of prosecution of Shankarlal on the basis of death certificate issued by Panchayat, then there was no occasion for issuance of any show cause notice to the complainant in the same proceedings. If the Court was of the opinion that such notice is necessary, then separate miscellaneous case should have been registered, at the place of keeping the record of that disposed of case in the case and not sending the same to the record room, though final order was passed in that case. This action shows that the proceedings were unnecessarily kept pending by the learned Special Judge.

11. Considering the matter from all angles, I find that the order of issuance of show cause notice to the CMD was totally unwarranted and was simply an abuse of process of law. Such order is not sustainable and is to be quashed. Therefore, this petition is allowed and the order impugned passed by learned Special Judge is hereby quashed.

12. A copy of this order be sent to the learned Special Judge along with the record.

Petition allowed

I.L.R. [2008] M. P., 977

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Sinho

3 April, 2008*

HARISHANKAR & anr. Applicants

Vs.

STATE OF M.P. Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 473 - Powers U/s 473 are discretionary and wider than Section 5 of Limitation Act - Whenever a time bar challan is filed - Opportunity should be given to both parties to satisfy the Court for purpose of condonation of delay - Delay has to be condoned with exercise of judicial discretion as well as by speaking order - Trial Court took cognizance of offence without satisfying itself about delay - Order contrary to law - Quashed. (Paras 8 &9)

Case referred :

1977 Cr. LJ 90 (MP)

Priyank Choubey, for the applicants

Pankaj Dixit, Panel Lawyer for the non-applicant

*M.Cr. C. No. 770/2008 (Jabalpur)

ORDER

S.C. SINHO, J. :–This petition under Section 482 of Cr.P.C. has been filed by the applicants Harishankar and Chotelal whose application under Section 468 of Cr.P.C. (hereinafter referred to as "Code") was dismissed by J.M.F.C. Begumganj, Raisen in Regular Trial No.73/2007. Further applicants has prayed that F.I.R. dt.9.10.2006 and R.T. No. 73/07 pending before JMFC, Begumganj under Section 224 of I.P.C. and 31 (B) of Prisoners Act 1900 be quashed.

2. Applicants case is that, both the applicants were convicted by Second Additional Sessions Judge Begumganj, Raisen under Section 302, 34 and 324 of I.P.C on 10.8.1992 in Sessions Trial no.87/1986 for life imprisonment and one year sentence. While applicants were in jail, applicant No.1 Harishankar was released on Parole on 21.8.1998 and Applicant No.2 Chotelal on 28.1.1999. However, applicant no.1 was to surrender on 5.9.1998 and applicant no.2 on 12.2.1999 after parole but they did not surrender and applicant no.1 and 2 were arrested respectively on 20.11.1998 and on 13/04/00.

3. On 9.1.2006, P.S.O. Begumganj registered Crime No.286/06 against these applicants under Section 31 (B) of Prisoners Act 1900 and filed a challan before the J.M.F.C. Begumganj, Raisen and the learned Magistrate has framed charges against these applicants under Section 224 of I.P.C. and 31 (B) of Prisoners Act 1900 on 13.12.2007. However, applicants moved an application before J.M.F.C. Begumganj the incident took place on 21.8.1998 and 28.1.1999 and after lapse of 8 years Court cannot take cognizance in view of Section 468 of the Code. However, learned Magistrate vide impugned order dt.4.10.2007 and learned Additional Sessions Judge, Begumganj, vide order dt.15.11.2007 dismissed their prayer hence, this petition under Section 482 of the Code has been filed.

4. It has been contended by Shri Priyank Choubey, learned counsel for the applicants that applicant No.1 Harishankar was released on Parole on 21.8.1998 and Applicant No.2 Chotelal on 28.1.1999 up to 5.9.1998 and 12.2.1999. However, both the applicants absconded and applicant no.1was arrested on 20.11.1998 and applicant no.2 on 3.4.2000. The F.I.R. against these applicants was lodged by Town Inspector Begumganj on 9.10.2006 almost 8 years of the offence u/s 31 (B) of Prisoners Act, 1900.

5. Learned Panel Lawyer of the State/respondent Shri Pankaj Dixit has argued that as soon as information was received by Town Inspector Begumganj, F.I.R. was lodged on 9.10.2006 and supported the impugned order.

6. It will be profitable to reproduce Section 468 of Cr.P.C. which reads as under;-

> "Section 468 Bar to taking cognizance after lapse of the period of limitation-(1) Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an offence of the category

specified in sub-section (2) after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only:

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

3. For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.

7. Applicants are charged under Section 224 of I.P.C. and 31 (B) of Prisoners Act 1900, in both these offences, applicants can be punished with imprisonment for either description for a term which may extend to 2 years or with fine or with both. In these circumstances, as provided in Section 468 (2)(C) of Cr.P.C. the period of limitation is 3 years in these circumstances the Court could not have taken cognizance of the offence under Section 224 of I.P.C. and 31(B) of Prisoners Act, 1900 after 3 years. Further Section 473 of Cr.P.C. provides extension of period of limitation in certain cases which reads as under:-

473. Extension of period of limitation in certain cases – Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may make cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

8. This section has given judicial powers and discretion to take cognizance even after the limitation period, but if sufficient cause is shown or interest of justice demand so. Power under Section 473 are discretionary and wider then Section 5 of Limitation Act. Whenever a challan is filed, court must see that it is in limitation as provided in Sections 468 of the Code. If it is time bar, opportunity should be given to both parties to satisfy the court for purpose of condonation of delay. Delay has to be condoned with exercise of judicial discretion as well as by speaking order as held in *Krishna Sanghi and others Vs. State of M.P.* 1977 Cr.L.J. 90 (M.P) and *State of Himachal Pradesh Vs. Tara Dutt* AIR SC 297.

9. In this case, neither prosecution has moved any application under Section 473 of Cr.P C. neither applicants were heard nor learned Magistrate has condoned the delay by any speaking order and trial court took cognizance of the offence

without satisfying itself about the delay which is contrary to the provision of the law.

10. For the reasons stated above, the petition succeeds and allowed. Consequently, Regular Trial no.73/2007 pending before J.M.F.C. Begumganj is barred by limitation and hereby quashed.

Petition allowed.