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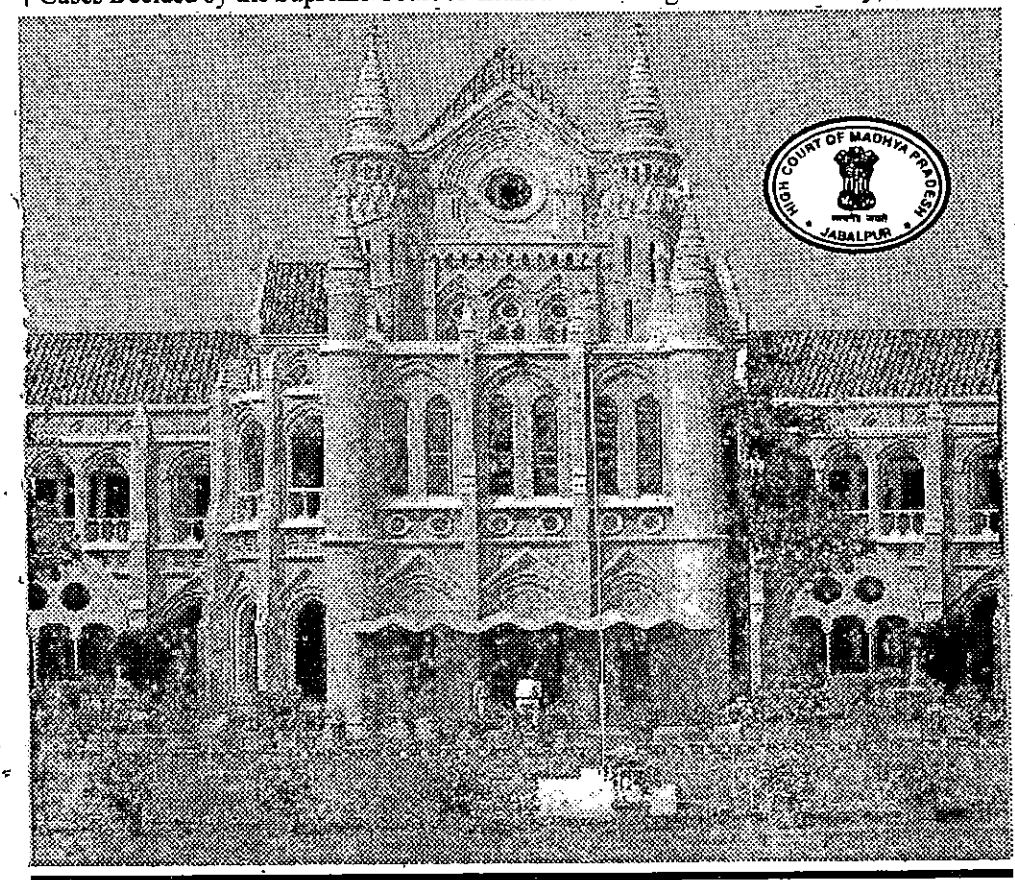

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TABLE OF CASES REPORTED

SUPREME COURT OF INDIA

	Pages
Chaturbhuj v. Sita Bai	193
M/s Rahul Builders v. M/s Arihant Fertilizers & Chemical	189
Union of India v. Ramesh Singh Rajput	197

HIGH COURT OF M.P.

WRIT APPEAL

Appellate Authority/Transport Commissioner M.P. v. The Divisional Manager M.P. Rajya Parivahan Nigam	199
Naval Singh v. Collector	204
Ramanuj Tiwari v. M.P. State Co-operative Tribunal	216
State of M.P. v. Mahendra Kumar Sharma	208
Vinod Kumar Shukla v. State of M.P.	212

WRIT PETITION

Heeralal Baria v. M.P. State Electricity Board	221
M.L.Gole v. M.P.Electricity Board	246
Prakash Chandra Purohit v. The Transport Commissioner	234
Rajaram Ahirwar v. State of M.P.	236
Raj Kishore Jha v. State of M.P.	240
Sharad Oswal v. Madhya Pradesh Poorva Kshetra Vidyut Vitran Company Ltd.	226
Sitaram Vyas v. State of M.P.	243

CONTEMPT PETITION

Dr. Jyoti Simlot v. M.M.Uppadhyaya	249

APPELLATE CIVIL

Arun Kumar Patel v. Smt. Terasi Saket	282
Ashok v. K.K. Saxena	285
Biharilal v. Pannalal	300
Dinkar Joshi v. Nitin Tiwari	307
Dr. V.K. Verma v. Dawoodi Bohra Masjid Committee	314
Haribar Singh v. Mst. Dilau	268
Jhanak v. Santosh @ Monu	310
Kalindi Mohan v. Bank of Maharashtra	316
Mahant Shyamdas Guru Mohandas v. Lalaram S/o.Munnalal Kori	257
New India Insurance Co. Ltd. v. Santosh Prajapati	322
Raj Singh v. Anil Kumar	292
Smt. Akilabee v. Shyamkumar	279
Smt. Jalisa Begum v. Jagdish Sahu	295
Smt. Kapsi Yadav v. Pradeep @ Bablu	289
Smt. Shashi Agrawal v. Ramchandra Agrawal	271
Smt. Varsha v. Uttaranchal Rajya Parivahan Nigam	304
The New India Assurance Co. Ltd. v. Nandram	325

The Oriental Insurance Company v. Smt. Kantidevi 275
United India Insurance Co.Ltd. v. Umed Kunwarbai 251

APPELLATE CRIMINAL

Abhay v. State of M.P. 373
Ayyub v. State of M.P. 343
Bhaddu v. State of M.P. 363
Dashrath v. State of M.P. 360
Fayyum v. State of M.P. 327
Jandel Singh v. State of M.P. 396
Mangilal v. State of M.P. 381
Mithilesh v. State of M.P. 333
Nannu v. State of M.P. 346
Radheshyam v. State of M.P. 354
Sanjay Gour v. State of M.P. 390
Sohail Ali v. State of M.P. 351

MISCELLANEOUS CRIMINAL CASE

Ajit Kumar v. State of M.P. 400
M/s SSR Pirodia v. Union of India 408
Manoj v. State of M.P. 404

INDEX

Absconding - Absconding by itself is not conclusive either of guilt or of a guilty conscience. ...390

Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(e) - *Bonafide* Requirement - Respondent/Landlord wants to shift to city for getting better medical treatment for his aged grand mother and providing better educational facilities to children - Held - Once *Bonafide* need is established neither tenant nor Court can dictate terms to landlord or act as rationing authority - Appellate Court rightly granted decree on the ground of *Bonafide* requirement.

RAJ SINGH v. ANIL KUMAR, I.L.R. (2008) M.P. ...292

Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(i) - Acquisition of accommodation suitable for residence of tenant - Alternative accommodation in the name of wife of tenant - No evidence to show that tenant cannot live in the said accommodation - Landlord/respondent entitled for decree of eviction under Section 12(1)(i) also - Cross-objection filed by respondent allowed..292

Act, 1860-45 : *vide* Penal Code, Indian
Act, 1881-26 : *vide* Negotiable Instrument Act
Act, 1891-18 : *vide* Bankers Books Evidence Act
Act, 1908-5 : *vide* Civil Procedure Code
Act, 1923-8 : *vide* Workmen's Compensation Act
Act, 1940-10 : *vide* Arbitration Act, Indian
Act, 1949-10 : *vide* Banking Regulation Act

Act, 1958-20 : *vide* Probation of Offenders Act
Act, 1960-17 : *vide* Co-operative Societies Act, M.P., 1961
Act, 1961- 41: *vide* Accommodation Control Act, M.P.
Act, 1961-43 : *vide* Income Tax Act, Indian
Act, 1963-36 : *vide* Limitation Act, Indian
Act, 1971-70 : *vide* Contempt of Courts Act
Act, 1973-2 : *vide* Criminal Procedure Code, 1974
Act, 1985-61 : *vide* Narcotic Drugs and Psychotropic Substances Act
Act, 1988-59 : *vide* Motor Vehicles Act
Act, 1994-1 : *vide* Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P., 1993

Arbitration Act, Indian (10 of 1940) - Sections 16, 28 - Extension of time - Matter referred to arbitrators and they entered upon reference - Completed arbitration and passed award on 8-3-1982 - Respondents even after expiry of period prescribed for giving award, appeared, took part in proceedings before arbitrators and never objected to arbitration proceedings - Trial Court refused to make award Rule of Court and held the same to be ineffective and void - Held - Arbitration Proceedings should not be unduly prolonged - As parties were taking part willingly in the proceedings before arbitrator without a demur and had all along been willing to extend time - It is a fit case for extension of time - Accordingly time extended for giving award and award dated 8-3-1982 deemed to be given in time.

ASHOK v. K.K. SAXENA, I.L.R. (2008) M.P. ... 285

Bankers Books Evidence Act, (18 of 1891) - Sections 2(8), 4 - Mode of proof of entries in Banker's Book - Manager of Plaintiff Bank proved statement of account - Nothing could be extracted in cross examination of the witness to create doubt in respect of maintenance of account as provided under the Act - Nothing irregular shown by appellant that loan accounts were not maintained properly - No discrepancy in respect of maintenance of account.

KALINIDI MOHAN v. BANK OF MAHARASHTRA ... 316

Banking Regulation Act, (10 of 1949) (As inserted by Banking Law (amendment) Act 1984) - Section 21A - Rate of interest - Agreement provides that bank shall be entitled to change rates of interest from time to time - Section 21A of Act, provides that rates of interest charged by banking companies not to be subject to scrutiny by Courts - Contention that interest being excessive and de hors the term of agreement, without substance - Appeal dismissed. ...317

Burden of proof - In criminal case - Prosecution is required to prove its case beyond all reasonable doubt and has to stand on its own leg - Can't take benefit of weakness of defence - Blood present on the trouser and Shirt of appellants - it is the burden of prosecution to prove that the blood is human blood and how it connects the appellants with crime - Trial Court wrongly shifts the burden on appellants/accused. ...360

Central Civil Services & Civil Posts (Upper Age Limits for Direct

Recruitment) Rules 1998 - Respondent applied for the post of cook and furnished. date of birth as 17.3.1978 - Found within age limits and was selected - School record shows date of birth 17.3.1977 - Though selected but appellant declined to appoint him as cook on ground of false declaration of age - Respondent's O.A. allowed by CAT holding that he is entitled to relaxation in age under the rules - High Court also has not consider the plea of non applicability of rules - S.C. held as there was no pleading and reference about the rules before CAT or H.C. - Therefore Orders of CAT and H.C. are unsustainable and are quashed.

UNION OF INDIA v. RAMESH SINGH RAJPUT, I.L.R. (2008) M.P....197

Civil Procedure Code (5 of 1908) - Order 3 Rule 4 - Advocate witness - Whether Counsel can subsequently appear as a witness - Held - Advocate accepting, brief and conducting matter knowing full well that he is likely to be cited as witness on material point - He cannot subsequently withdraw from suit and appear as witness.

JHANAK v. SANTOSH @ MONU, I.L.R. (2008) M.P. ... 310

Civil Procedure Code (5 of 1908) - Order 30 Rule 4(1),(2), Order 1 Rule 10 - Suit by or against firm - Legal representatives of deceased partner - Impleadment of - Suit filed against defendant who is only surviving Partner - Rule 4(1) of Order 30 carves out exception to provision of Section 45 of Contract Act - Not necessary to join legal representative of deceased partner as a party to the suit. ...317

Civil Procedure Code, (5 of 1908) - Order 41 Rule 5, Order 41 Rule 5 (3)(c) - Stay by Appellate Court - Respondent filed suit for declaration that he has 2/3rd share in property, partition, separate possession and mesne profits - Suit was decreed holding respondent has 2/3rd share in property and also for separate possession but suit for mesne profits dismissed - 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.

SMT. SHASHI AGRAWAL v. RAM CHANDRA AGRAWAL, I.L.R. (2008), M.P. ... 271

Civil Services (Classification, Control and Appeal), Rules, M.P. 1996 - Rules 9(1), 12 - Divisional Commissioner is empowered by Governor to impose minor penalties specified in clauses (i) to (iv) of Rule 10, therefore, he is disciplinary authority in respect of class I and II officers within meaning of Rule 9(1) - Order of suspension passed by Divisional Commissioner is not without jurisdiction.

VINOD KUMAR SHUKLA v. STATE OF M.P., I.L.R. (2008) M.P. ...212

Civil Services (Classification, Control and Appeal), Rules, M.P. 1996- State Government's circular dated 15/2/1999 that Divisional Commissioner has no

power to place class I and II officers under Suspension - Contrary to the statutory Rules. ...212

Constitution of India - Article 14 - Contract - Judicial Review - Imposition of new conditions before opening of tenders - Respondents invited tenders for supply of various items including Distribution Transformers - Petitioners submitted their tender forms - Before opening of tender forms corrigendum issued by respondents imposing further condition that tenderer would be eligible to submit bid only if he had capital of Rs. 8.5 crores approximately - Petitioners are small scale industries - Challenged imposition of additional condition being arbitrary, and malafide and has been issued with a view to oust small scale industries - Held - Illegality , Irrationality, 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., I.L.R. (2008) M.P. ...226

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. ...227

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, I.L.R. (2008) M.P. ... 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, I.L.R. (2008) M.P. ...246

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., I.L.R. (2008) M.P. 240

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.

DR. JYOTI SIMLOT v. M.M. UPPADHYAYA, I.L.R. (2008) M.P. ...249

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, I.L.R. (2008) M.P. ...216

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, I.L.R. (2008) M.P. ...193

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., I.L.R. (2008) 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. ...334

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., I.L.R. (2008) 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., I.L.R. (2008) M.P. ...343

Criminal Procedure Code, 1973 (2 of 1974), Section 389, Indian 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., I.L.R. (2008) M.P. ... 351

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., I.L.R. (2008) M.P. ...400

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., I.L.R. (2008) M.P. ...360

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., I.L.R. (2008) M.P. 243

Homicidal death - Proof - Can be proved by examining the autopsy surgeon. ...360

Income Tax Act, Indian (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.

M/S SSR PIRODIA v. UNION OF INDIA, I.L.R. (2008) M.P. ...408

Limitation Act, Indian (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.

DR.V.K. VERMA v. DAWOODI BOHRA MASJID COMMITTEE, I.L.R.(2008) M.P. ...314

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. ...279

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.

SMT. KAPSI YADAV v. PRADEEP @ BABLU, I.L.R. (2008) M.P. ... 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, I.L.R. (2008) M.P. ...300

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.

THE ORIENTAL INSURANCE COMPANY v. SMT. KANTIDEVI, I.L.R. (2008) M.P. ...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, I.L.R. (2008) M.P....282

Motor Vehicle 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, I.L.R. (2008) M.P..322

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. ...307

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, I.L.R. (2008) M.P. ... 307

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. ...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.

SMT. AKILABEE v. SHYAMKUMAR, I.L.R. (2008) M.P. ...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. ...311

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.

SMT. VARSHA v. UTTARANCHAL RAJYA PARIVAHAN NIGAM, I.L.R. (2008) M.P. — ...304

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 S/o MUNNALAL KORI, I.L.R. (2008) M.P. ... 257

Motor Vehicles Act, (59 of 1988) , Section 166, Mohammedan Law, Section 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.

SMT. JALISA BEGUM v. JAGDISH SAHU, I.L.R. (2008) M.P. ... 295

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.

THE NEW INDIA ASSURANCE CO. LTD. v. NANDRAM PRAJAPATI, I.L.R. (2008) M.P. ...325

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, I.L.R. (2008) M.P. 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, I.L.R. (2008) ...208

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., I.L.R,. (2008) M.P. ... 346

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. ...346

Negotiable Instrument 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. ...189

Negotiable Instrument 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, I.L.R. (2008) M.P. ...189

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., I.L.R. (2008) 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, I.L.R. (2008) M.P. ... 204

Penal Code, Indian (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. ...363

Penal Code, Indian (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., I.L.R. (2008) M.P. ..363

Penal Code, Indian (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. ...374

Penal Code, Indian (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. ...374

Penal Code, Indian (45 0f 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., I.L.R. (2008) M.P. ...373

Penal Code, Indian (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., I.L.R. (2008) M.P. ...390

Penal Code, Indian (45 of 1860) - Section 302 - Recovery of knife - Knife seized from open field - Seizure of knife in pursuance of disclosure statement not proved. ...390

Penal Code, Indian (45 of 1860) - Section 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. ...327

Penal Code, Indian (45 of 1860) - Sections 302 read with 149 - Constructive liability - It is not necessary to prove the overt act of accused - But once the prosecution chooses to give particulars of the overt acts and said description is found demonstratively

false, it makes it doubtful that the person was on the spot and had participated in the incident. ...327

Penal Code, Indian (45 of 1860), Sections 302 or 302/34 - Appellant No. 1 alleged to have fired at deceased - No firearm injury was found by doctor - No ballistic expert report that Weapon had actually been fired - Appellant No. 1 fired any shot at deceased not proved.

FAYYUM v. STATE OF M.P., I.L.R. (2008) M.P. ...327

Penal Code, Indian (45 of 1860) - Section 302 or 304 - Murder or Culpable Homicide not amounting to murder - Excess land fallen to the share of accused in family partition which was being demanded by complainant and deceased - Deceased assaulted by accused persons by means of Farsi, Ballam, Karpa and lathi - One injury on forehead and remaining 28 injuries were found on different parts of body of deceased along with 5 fractures - Held - Looking to genesis of occurrence as well as evidence of witnesses that deceased was using his hands and legs as shield to stop blows, merely Doctor has not stated that injuries would in ordinary manner sufficient to cause death, ipso facto would not dilute the case of prosecution - The real intention of appellants was to cause injuries on the vital organs of deceased - No offence lesser to Section 302 of I.P.C. is made out - Appellants rightly convicted by Trial Court under Section 302/149 of I.P.C. - Appeal dismissed.

MANGILAL v. STATE OF M. P., I.L.R. (2008) M.P. ...381

Penal Code, Indian (45 of 1860) - Section 304(1) - Culpable Homicide not amounting to murder - Appellant causing injury by ballam on head of deceased - Oral testimony supported by medical evidence - Evidence of eye witnesses found trustworthy - Conviction of appellant under Section 304(1) I.P.C. proper - Appeal dismissed....354

Penal Code, Indian (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., I.L.R. (2008) M.P. ...396

Penal Code, Indian (45 of 1860) - Sections 376, 302, 201 - Rape and Murder - Circumstantial Evidence - Witnesses stated that appellant was putting lungi of brown colour - Fabric threads seized from place of incident - Lungi seized from the house of appellant on his memorandum - As per FSL report fabric threads were found to be of lungi - Held - This is material clinching circumstance to fasten the guilt upon accused.

MITHILESH v. STATE OF M.P., I.L.R. (2008) M.P. ...333

Penal Code, Indian (45 of 1860) - Sections 376, 302 and 201 - Rape and

murder - Deceased a 13 years old girl and her brother were in agricultural fields - Younger brother met with appellant while he was returning home - Appellant told brother that he will take his sister towards river and he should not disclose to any body - Younger brother ran back and informed deceased - Deceased told him to call grand father and hide herself in standing crop of wheat - Hue and cry heard by some witnesses who saw that appellant was lying on a girl - Grand father also came to spot and called deceased number of times - On next day dead body of deceased was found in the river - Ante mortem injuries were found on the body of deceased - Injuries were also found on the body of accused - Fabric threads also seized from spot which were lateron found to be that of lungi belonging to appellant - Deceased was subjected to rape - Conviction of appellant affirmed - Appeal dismissed. ...334

Penal Code, Indian (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. ...343

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. ...354

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. ...216

Words and Phrases -

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, I.L.R. (2008) M.P. ... 199

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, I.L.R. (2008) M.P. ...251

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, I.L.R. (2008) M.P. ... 268

I.L.R. [2008] M. P., 189
SUPREME COURT OF INDIA
Before Mr. Justice S.B. Sinha & Mr. Justice H.S. Bedi
2 November, 2007

M/s RAHUL BUILDERS ... Appellant*
Vs.
M/s ARIHANT FERTILIZERS AND CHEMICAL & anr. ... Respondents

(A) Negotiable Instrument 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. (Para 8)

(B) Negotiable Instrument 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.

Cheque not honoured for a sum of Rs. 1,00,000/-. In demand notice appellant demanded entire outstanding amount Rs. 8,72,409/-. There was no specific demand for payment of cheque amount. Notice is not found as per statutory requirements. On such notice complaint is not maintainable. (Paras 10 & 13)

Cases Referred :
(2000) 2 SCC 380, (2003) 8 SCC 300.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **S.B. SINHA, J** :–Failure on the part of the appellant to serve a proper notice strictly in terms of proviso appended to Section 138 of the Negotiable Instruments Act (for short "the Act") whether would lead to quashing of a criminal proceedings initiated by II Additional Sessions Judge, Neemuch on a complaint made by the appellant herein is the question involved in this appeal which arises out of a judgment and order dated 22.11.2004 passed by the High Court of Madhya Pradesh in Misc. Criminal Case No. 2924 of 2004.

2. Appellant is a partnership firm. Respondent No. 1 entered into a contract with it for construction of a building and factory premises. Appellant executed the said contract. It submitted bills for execution of contractual work for a sum of Rs. 26,46,647/-. Respondent No. 1 had made payments of Rs. 17,74,238/- and a balance of Rs. 8,72,409/- was said to be outstanding. A cheque for a sum of Rs. 1,00,000/- drawn on Federal Bank Limited, Indore was issued by Respondent No. 1 in favour of the appellant. Upon presentation of the said cheque, it was not honoured on the ground that Respondent No. 1 had closed its account with the bank. A notice dated 31.10.2000 was sent by it to Respondent No. 1 stating:

> "...Your cheque No. 693336 dated 30/4/2000 for Rs. 1,00,000/- has also been returned unpassed by the bank authorities with the plea that A/C No. 1461 has already been closed. Hence the undersigned is now free to take up any legal step against you to get the amount of my pending bills.

* Cr. A. 525/2005

In view of the above, you are requested to remit the payment of my pending bills within 10 days from the date of receipt of this letter otherwise suitable action as deemed fit will be taken against you."

3. As despite receipt of the said notice, Respondent No. 1 did not make any payment, a complaint petition was filed on 11.12.2000. An application was filed by Respondent No. 1 for rejection of the said complaint inter alia on the ground that the notice issued by the appellant was not a valid one. The said application was rejected. A revision application filed thereagainst before the District and Sessions Judge, Neemuch was also dismissed.

4. The High Court, however, by reason of its impugned order, in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure (Code), has quashed the criminal proceedings pending against it holding:

(i) 15 days' notice having not been served upon Respondent No. 1, the same was not valid in law.

(ii) The complainant by reason of the said notice having demanded a sum of Rs. 8,72,409/- as against the cheque which was for a sum of Rs. 1,00,000/- only, the notice was vague and did not serve the statutory requirements of Provisos (b) and (c) of Section 138 of the Act.

5. Mr. Sushil Kumar Jain, learned counsel appearing on behalf of the appellant submitted that the High Court committed a serious error in passing the impugned judgment so far as it failed to consider:

(i) Section 138 of the Act does not postulate a 15 days' notice;

(ii) Non-payment of the amount of cheque being Rs. 1,00,000/- being a part of the demand sum of Rs. 8,72,409/-, no exception thereto could be taken.

6. Mr. Sanjeev Sachdeva, learned counsel appearing on behalf of Respondent No. 1, on the other hand, supported the judgment contending that the notice in question does not sub-serve the requirements of Section 138 of the Act.

7. Relevant portion of Section 138 of the Act reads as under:

"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 provision of this Act , be punished with imprisonment for a term which may extend to one year, 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) * * *

(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 fifteen 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."

8. Section 138 does not speak of a 15 days' notice. It contemplates service of notice and payment of the amount of cheque within 15 days from the date of receipt thereof. When the statute prescribes for service of notice specifying a particular period, it should be expressly stated. In absence of any such stipulation, it is difficult to hold that 15 days' notice was thereby contemplated. The High Court, therefore, was not correct in arriving at the aforementioned finding.

9. We have noticed hereinbefore the notice dated 31.10.2000 issued by the appellant to Respondent No. 1. An information thereby was only given that the cheque when presented was returned "unpassed" by the bank authorities on the plea that the account had been closed. It was averred that in such a situation the complainant was free to take any legal steps against the accused to get the amount of his pending bills. By the operative portion of the said notice, the respondent was called upon to remit the payment of his pending bills, otherwise suitable action shall be taken.

10. Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". Such a notice has to be issued within a period of 30 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Respondent No. 1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills, i.e., Rs. 8,72,409/-. The noticee was to respond to the

said demand. Pursuant thereto, it was to offer the entire sum of Rs. 8,72,409/-. No demand was made upon it to pay the said sum of Rs. 1,00,000/- which was tendered to the complainant by cheque dated 30.04.2000. What was, therefore, demanded was the entire sum and not a part of it.

11. Mr. Jain relied upon a decision of this Court in *Suman Sethi v. Ajay K. Churiwal and Another* [(2000) 2 SCC 380] wherein it was stated:

> "8. It is a well-settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "said amount" there is also a claim by way of interest, cost etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages et c. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad.
>
> 9. This Court had occasion to deal with Section 138 of the Act in Central Bank of India v. Saxons Farms 3 and held that the object of the notice is to give a chance to the drawer of the cheque to rectify his omission. Though in the notice demand for compensation, interest, cost etc. is also made the drawer will be absolved from his liability under Section 138 if he makes the payment of the amount covered by the cheque of which he was aware within 15 days from the date of receipt of the notice or before the complaint is filed." [Underlining is ours for emphasis]

As therein, some other sums were indicated in addition to the amount of cheque, it was, therefore, not held to be a case where the dispute might be existing in respect of the entire outstanding amount.

12. On this aspect of the matter, we may consider *K.R. Indira v. Dr. G. Adinarayana* [(2003) 8 SCC 300] wherein this Court upon noticing *Suman Sethi* (supra) stated the law, thus:

> "...However, according to the respondent, the notice in question is not separable in that way and that there was no specific demand made for payment of the amount covered by the cheque. We have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount. nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary

is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which exposes the drawer for being proceeded against under Section 138 of the Act..."

13. As in the instant case, no demand was made for payment of the cheque amount, we are of the opinion that the impugned judgment cannot be faulted.

14. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly.

Appeal dismissed.

I.L.R. [2008] M. P., 193

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice Aftab Alam

27 November, 2007

CHATURBHUJ ... Appellant*

Vs.

SITA BAI ... Respondent

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. (Para 8)

Cur.adv.vult.

J U D G M E N T

The Judgment of the Court was delivered by **Dr. ARIJIT PASAYAT , J.** :–Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court, Indore Bench, dismissing the revision petition filed by the appellant in terms of Section 482 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.'). The challenge before the High Court was to the order passed by learned Judicial Magistrate, First Class, Neemuch, M.P. as affirmed by the learned Additional Sessions Judge, Neemuch, M.P. The respondent had filed an application under Section 125 of Cr.P.C. claiming maintenance from the appellant. Undisputedly, the appellant and the respondent had entered into marital knot about four decades back and for more than two decades they were living separately. In the application it was claimed that she was unemployed and unable to maintain herself. Appellant had retired from the post of Assistant Director of

*Cr.A. No. 1627/2007

Agriculture and was getting about Rs.8,000/- as pension and a similar amount as house rent. Besides this, he was lending money to people on interest. The appellant claimed Rs.10,000/- as maintenance. The stand of the appellant was that the applicant was living in the house constructed by the present appellant who had purchased 7 bighas of land in Ratlam in the name of the applicant. She let out the house on rent and since 1979 was residing with one of their sons. The applicant sold the agricultural land on 13.3.2003. The sale proceeds were still with the applicant. The appellant was getting pension of about Rs.5,700/- p.m. and was not getting any house rent regularly. He was getting 2-3 thousand rupees per month. The plea that the appellant had married another lady was denied. It was further submitted that the applicant at the relevant point of time was staying in the house of the appellant and electricity and water dues were being paid by him. The applicant can maintain herself from the money received from the sale of agricultural land and rent. Considering the evidence on record, the trial Court found that the applicant-respondent did not have sufficient means to maintain herself.

3. Revision petition was filed by the present appellant. Challenge was to the direction to pay Rs.1500/- p.m. by the trial Court. The stand was that the applicant was able to maintain herself from her income was reiterated. The revisional court analysed the evidence and held that the appellant's monthly income was more than Rs.10,000/- and the amount received as rent by the respondent-claimant was not sufficient to maintain herself. The revision was accordingly dismissed. The matter was further carried before the High Court by filing an application in terms of Section 482 Cr.P.C. The High Court noticed that the conclusions have been arrived at on appreciation of evidence and, therefore, there is no scope for any interference.

4. Section 125 Cr.P.C. reads as follows:

> "125. (1) If any person having sufficient means neglects or refuses to maintain
>
> (a) his wife, unable to maintain herself, or
>
> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) his father or mother, unable to maintain himself or herself, a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:
>
> Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance,

until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation : For the purposes of this Chapter,–

(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

["(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.";]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's allowance [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an 4 [allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient

reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

5. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in *Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors.* (AIR 1978 SC 1807) falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950 (in short the 'Constitution'). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in *Savitaben Somabhai Bhatiya v. State of Gujarat and Ors.* (2005 (2) Supreme 503).

6. Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case there is no dispute that the appellant has the requisite means.

7. But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent-wife was earning some income. That is not sufficient to rule out application of Section 125 Cr.P.C. It has to be established that with the amount she earned the respondent-wife was able to maintain herself.

8. In an illustrative case where wife was surviving by begging, would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 Cr.P.C. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In *Bhagwan v. Kamla Devi* (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

9. In the instant case the trial Court, the Revisional Court and the High Court have analysed the evidence and held that the respondent wife was unable to maintain

herself. The conclusions are essentially factual and they are not perverse. That being so there is no scope for interference in this appeal which is dismissed.

---------- *Appeal dismissed.*

I.L.R. [2008] M. P., 197
SUPREME COURT OF INDIA
Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice Aftab Alam
14 December, 2007

UNION OF INDIA & ors. ... Appellants*
Vs.
RAMESH SINGH RAJPUT ... Respondent

Central Civil Services & Civil Posts (Upper Age Limits for Direct Recruitment) Rules 1998 - Respondent applied for the post of cook and furnished date of birth as 17.3.1978 - Found within age limits and was selected - School record shows date of birth 17.3.1977 - Though selected but appellant declined to appoint him as cook on ground of false declaration of age - Respondent's O.A. allowed by CAT holding that he is entitled to relaxation in age under the rules - High Court also has not consider the plea of non applicability of rules - S.C. held as there was no pleading and reference about the rules before CAT or H.C. - Therefore Orders of CAT and H.C. are unsustainable and are quashed. (Paras 12, 13)

Cur.adv.vult

J U D G M E N T

The Judgment of the Court was delivered by DR. ARIJIT PASAYAT J. :–Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Madhya Pradesh High Court, dismissing the writ petition filed by the appellants.

3. Factual background facts in a nutshell is as follows:

The appellant No.2 herein invited applications for several posts including the post of Cook by Employment/ Recruitment Notice published in the Employment News dated 19-25th October, 2002. The upper age limit in regard to unreserved category candidate was mentioned as 25 yrs. Respondent furnished his date of birth as 17.3.1978 and on that basis he was selected. The School Certificate and other records showed the date of birth as 17.3 1977. Respondent claimed that he did not suppress any facts and he disclosed all the material facts in regard to his date of birth and had also filed an affidavit stating that his date of birth was 17.3.1978 and he had sought for correction of date of birth in the School Records. However, as he was found to be over 25 years, with reference to the date of birth in the School Records, though selected, he was not appointed.

Feeling aggrieved by his non-appointment, though selected, the Respondent herein filed O.A. No.322/2003 before the Central Administrative Tribunal, Jabalpur Bench (in short CAT) seeking a direction to the appellants herein to appoint him as Cook. One of the grounds urged by him by amending the applications was that the Central Civil Services and Civil Posts (Upper Age Limits for Direct Recruitment) Rules, 1998 ('Rules for short) which came into force on 1.4.1999

*C.A. No. 5953/2007

had increased the upper age limit for recruitment by the method of □Direct Open Competitive Examination" to the Central Civil Services and Civil Posts specified in the relevant Service/Recruitment Rules, by two years. He contended that he was entitled to the benefit of said increase and if two years was added, he would fulfill the age recruitment even if the date of birth is taken as 17.3.1977.

4. CAT allowed the application holding that the Rules applied to the post for Cook for which the respondent had applied and the applicant was entitled to relaxation by two years under the said rules and if such age relaxation is accorded, his selection would be valid.

5. Appellant questioned the correctness of the CATs order by filing a writ petition which came to be dismissed by the High Court of the impugned order.

6. Appellants' stand before the High Court was that the said rules applied only to recruitment through direct competitive examination conducted by the Union Public Service Commission (in short UPSC) and the Staff Selection Commission (in short SCC). The recruitment in Indian Air Force is not through Central Agency but by a Board constituted by the Commanding Officer of the Station/Units and, therefore, the Rules did not apply.

7. The High Court found that the recruitment was by direct recruitment though it was not by the UPSC/SCC but authority under the Central Government. Therefore, the CAT rightly held that the Rules were applicable. The High Court found no substance in the plea about the false declaration of age and non-applicability of the Rules.

8. In support of the appeal, learned counsel for the appellant submitted that the admitted position is that according to his own affidavit, he has mentioned his date of birth to be 17.3.1978 and in the application form on the basis of the matriculation certificate it was mentioned as 17.3.1977. CAT accepted that the correction of date of birth could have been done only by moving an appropriate application before the concerned authorities or the Education board. Having so observed, the CAT held that this case is of relaxation.

9. It was contended that since the respondent himself did not claim any relaxation at any stage, and gave false declaration about his age, therefore, the view of the CAT and the High Court is unsustainable.

10. Learned counsel for the respondent on the other hand submitted that there was no wrong declaration. In fact, in the form and the affidavit both the dates were indicated.

11. From the record it appears that the authority did not issue any appointment order to the respondent on the ground that he gave a false date of birth. Stand of the respondent before CAT was that it appears from the application filed before it is that the date of birth of the respondent is 17.3.1978. In an annexure he claimed it to be 17.3.1978. The appellants knew about this date and, therefore, held him to be qualified candidate and, therefore, he was interviewed by the Selection Committee and found suitable. Having proceeded in that manner it was not open to the appellants to deny appointment.

12. It appears that the CAT itself accepted that the question of correcting date

of birth was not within the domain of the appellants and it was open to the respondent to move appropriate authority in that regard. Having said so, CAT held that there was scope for relaxation. There were no pleadings in that regard. As a matter of fact, there is no reference even to the relaxation aspect in the application before CAT. For the first time such stand was taken during the hearing before the CAT. The High Court unfortunately did not consider this aspect.

13. Therefore, the orders of the CAT and the High Court are unsustainable and are quashed. It will be open to the respondent to move to the authority for relaxation if he is so advised. It shall be open to the authorities to pass appropriate orders in accordance with law. We do not express any opinion about the acceptability or otherwise if prayer for relaxation is made.

14. The appeal is allowed to the aforesaid extent without any order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 199

WRIT APPEAL

Before Mr. Justice Abhay Gohil & Miss Justice Sheela Khanna

1 November, 2007

APPELLATE AUTHORITY/TRANSPORT COMMISSIONER, M.P. & Ors. ... Appellants*

Vs.

THE DIVISIONAL MANAGER M.P. RAJYA PARIVAHAN NIGAM ... Respondent

Words and Phrases - 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. (Para 17)

Cases Referred :

AIR 2007 SC 839, AIR 1991 SC 1676, AIR 1990 SC 85, AIR 2001 SC 1723, AIR 1992 SC 103, AIR 2000 SC 811, 1998 (1) MPLJ 214.

S.B. Mishra, Addl. Advocate General with *Vivek Khedkar,* G.A. for the appellants.

M.C. Gupta with *R.D. Agrawal,* for the respondent.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by ABHAY GOHIL, J. :–This order shall govern the disposal of W.A.No.554/07, 559/07 and 560/07 as they arise out of the orders passed on common grounds as common question of law is involved in all these three appeals.

*W.A. No. 554/2007 (Gwalior)

2. State has filed all these Writ Appeals under Section 2(i) of Madhya Pradesh Uchcha Nyalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, against the order passed in W.P.No.2563/07 on 31.07.2007, in W.P.No.542/07 on 25.4.2007 and in W.P.No.1504/07 on 1.5.2007.

3. The brief facts of the case are that the respondent M.P.Rajya Parivahan Nigam is engaged in running the transport business. The bus involved in W.A.No.554/07 was checked and seized on 9.5.2006 and fine was imposed on 15.5.2006 under the provisions of Madhya Pradesh Motoryaan Karadhan Adhiniyam, 1991. The amount of fine was deposited on 16.5.2006, against which an appeal was filed before the Appellate Authority i.e. Transport Commissioner, Gwalior and by the order dated 28.3.2007 appeal was dismissed, against which Writ Petition was filed and by order dated 31.7.2007 Writ Petition has been allowed.

4. In W.A.No.559/07, the vehicle was checked and seized on 9.9.2005 and the fine was imposed under the provisions of Madhya Pradesh Motoryaan Karadhan Adhiniyam, 1991. The amount of fine was deposited on 9.9.2005, against which an appeal was filed before the Appellate Authority i.e. Transport Commissioner, Gwalior and the same was decided on 4.4.2006, against which Writ Petition was filed and by order dated 25.4.2007 Writ Court allowed the Writ Petition.

5. In W.A.No.560/07, the vehicle was checked and seized on 29.10.2005 and fine was imposed under the provisions of Madhya Pradesh Motoryaan Karadhan Adhiniyam, 1991. The amount of fine was deposited on 29.10.2005, against which an appeal was filed before the Appellate Authority i.e. Transport Commissioner, Gwalior and by the order dated 6.2.2007 appeal was dismissed, against which Writ Petition was filed and by order dated 1/5/2007 Writ Petition has been allowed.

6. There is no dispute that there was amendment in the year 2004 in Madhya Pradesh Motoryaan Karadhan Adhiniyam of 25 of 1992 and explanation 7 as amended by Adhiniyam 2004 was added and by amendment No.1 of 2005 the rate of tax was increased from Rs.1000 to Rs.1500/- per seat, in which the number of passengers were found more than the permitted capacity or the vehicle was plying without permit.

7. In the case of *Hardeo Motor Transport v. State of M.P.* (AIR 2007 SC 839), the Hon'ble Supreme Court declared the clause (g) of Entry IV of the First Schedule of the Madhya Pradesh Motoryan Karadhan Adhiniyam, 1991 as amended by Madhya Pradesh Motoryan Sansodhan Adhiniyam, 2004 read with Explanation (7) of the First Schedule as unconstitutional. The aforesaid judgment was brought into the notice of the learned Writ Court in all the aforesaid three Writ Petitions and the learned Writ Court after considering the fact that the Supreme Court has declared the penalty imposed as unconstitutional, quashed the order passed by the authorities concerned for imposing the penalty of Rs.1500/- per seat. It was also directed that the amount of penalty deposited by the petitioner i.e. at the rate of Rs.1500/- per seat be refunded back to the petitioner. In all the three matters, the Writ Court has passed the similar orders, against which the State has filed these three Writ Appeals.

8. In all the three Writ Appeals, we have heard Shri S.B.Mishra, Additional Advocate General for the State and Shri M.C.Gupta with Shri R.D.Agrawal, Advocates for the respondent. The submission of Shri S.B.Mishra, learned

Additional Advocate General for appellant/State is that operation of the judgment in the case of *Hardeo Motor Transport* (supra) is prospective and if any penalty is recovered, no order can be passed for the refund of the same as no direction has been issued by the Supreme Court for the refund of the penalty. In support of his contention he cited the decision in the case of *Orissa Cement Ltd. Vs. State of Orissa* (AIR 1991 SC 1676) and *India Cement Ltd. Vs. State of Tamil Nadu* (AIR 1990 SC 85) and also submitted that under the doctrine of prospective overruling as considered by the Supreme Court in the case of *M/s Somaiya Organics (India) Ltd. Vs. State of Uttar Pradesh* (AIR 2001 SC 1723), the learned Single Judge was not justified in directing the refund of the amount of penalty. He also placed reliance on the provisions of Section 6 of the General Clauses Act, 1897 and also clause (c) and (d) of Section 10 of the M.P.General Clauses Act, 1947 and submitted that the effect of the repeal of a particular law is that the action already taken shall not be revived and the repealed Act shall not affect any amount of penalty already recovered.

9. *Per contra,* Shri M.C.Gupta, learned counsel for the respondents submitted that though the effect of the decision in the case of *Hardeo Motor Transport* (supra) is prospective, but it will apply on the pending proceedings, for that he placed reliance on the decision in the case of *Federation of Mining Assocns. of Rajasthan Vs. State of Rajasthan* (AIR 1992 SC 103) and also placed reliance on the decision in the case of *Kolhapur Canesugar Works Ltd. Vs. Union of India* (AIR 2000 SC 811) that without a saving clause in favour of pending proceedings it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue and he also placed reliance on a decision in the case of *Sangeeta Travels Vs. State of M.P.* [1998 (1) MPLJ 214] and submitted that the order of refund as passed by the learned Single Judge is perfectly justified as the proceedings were pending, the order was challenged in appeal and thereafter in Writ Petition and in the meantime the aforesaid provisions were declared unconstitutional, therefore the order passed by the learned Single Judge is perfectly justified and no interference is called for therein.

10. In the case of *Federation of Mining Association* (supra), the Supreme Court after considering the decision in the case of *India Cement* (supra) and *Orissa Cement* (supra) has held as under :-

> 8. Counsel for the respondents has, however, rightly pointed out that the declaration of invalidity of the levies should only be prospective and not retrospective. Both in *India Cement* (AIR 1990 SC 85) as well as in *Orissa Cement cases* (AIR 1991 SC 1676) (supra), this Court has, for reasons discussed therein, declared similar legislations invalid only prospectively. In paragraphs 72 and 73 of the judgment in *Orissa Cement case* (supra), it has been held that the levy of such tax in a State should be declared to be unconstitutional only with effective from the date of the first judgment which declares the legislation to be invalid and not earlier. In the present case, since the High Court has upheld the levy and the levy is being declared unconstitutional only by this order, we direct that our declaration will take effect only from

> the date of this judgment. In other words, any tax collected under the statute so far need not be refunded by the State Government and if any amount of tax remains to be paid in respect of earlier periods, it will have to be paid by the assessee. However, as and from the date of this judgment, the impugned tax imposed by the Act in question will not be enforceable.

The Supreme Court has further held that that the declaration will take effect only from the date of this judgment. Therefore, it is clear that the decision of the Supreme Court will be applicable from the date of its declaration as held above.

11. Now the question for consideration in these appeals is when the order passed by Taxing Officer imposing penalty was under challenge, in some cases appeals were pending and in some cases writ petitions were filed and pending, during this period the relevant provisions of imposing penalty were declared unconstitutional by the Supreme Court as stated supra and on that ground the learned Single Judge allowed the writ petitions, set aside the order of imposing penalty and directed refund of the amount of penalty deposited by the petitioner, whether such an order passed by Writ Court in the facts and circumstances of the case is justified or not.

12. There is no dispute that in *Hardeo Motor Transport* (supra), the Supreme Court has declared the aforesaid penalty provision as ultra vires and unconstitutional, judgment was pronounced on 19.10.2006, therefore it is clear that from the date of declaration of the aforesaid provision as unconstitutional, neither the penalty can be imposed nor penalty clause can be enforced.

13. In a case where respondents have challenged the orders passed by the Taxing Officers regarding imposition of penalty in appeals and during the pendency of appeal if the law is declared ultra vires, then as per the settled principle, the orders of penalty were not liable to be enforced and as a result its effect would be that in pending matters the court was entitled to order for the refund of the same. Therefore, the result is that the party which has challenged the order was entitled to get the benefit of the declaration of the law as unconstitutional and was entitled to obtain the benefit in pending proceedings.

14. Learned counsel for the appellant has cited various decisions as stated supra but they are all related with the levy of tax and in such matters the Apex Court has held that the declaration of invalidity of levies should only be prospective and not retrospective. Though the principle is the same but those decisions are not related to the refund of penalty. In any of the decision cited supra question of penalty was not under consideration before the Supreme Court that the benefit can not be granted by the High Court when the order was challenged before it and none of the parties have cited any decision that such a question can not be considered by the High Court in a pending proceeding where the order is under challenge.

15. In this case the question of setting aside of penalty has been raised. There is difference between "levy of tax" and "imposition of penalty". Though the word "penalty" has not been defined either under the General Clauses Act, 1897 or under the M.P.General Clauses Act, 1957, but its dictionary meaning is :

Penalty means -

> "Punishment imposed on a wrongdoer, especially in the form of imprisonment or fine, Though usu. For crimes, penalties are also sometimes imposed for civil wrongs. Excessive liquidated damages that a contract purports to impose on a party that breaches. If the damages are excessive enough to be considered a penalty, a Court will usu."
>
> "A penalty is a sum which a party..... agrees to pay or forfeit in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach."
>
> "Penalty is a liability composed as a punishment on the party committing the breach of contract."

Therefore, as per the definition under comman parlance, the penalty is defined as a punishment or sum of money imposed by statute, to be paid as a punishment for the commission of a certain offence and is a punishment imposed by law or contract for doing or failing to do something that it was the duty of a party to do. Therefore, in this case primarily it denotes towards the punishment for breach of a particular law.

16. There is no dispute that if the order imposing penalty was under challenge and petitions were filed and were pending in the High Court, the High Court was empowered to examine the effect of invalidity and was also empowered to waive the penalty.

17. As discussed above and emerged from the legal position, it is clear that by the declaration of the penalty provisions of the Motor Vehicles Act as unconstitutional by the Supreme Court in *Hardeo Motor Transport* (supra), which was passed on 19.10.2006, the amount of penalty is neither chargeable nor recoverable. If the orders passed by the Taxing Officer were under challenge in appeal, the appellate authority ought to have considered the effect of the aforesaid decision and if the same was not considered, the High Court was fully justified in considering the same in the Writ Petitions, which were filed challenging the orders passed by the Taxing Officer as well as the Appellate Authority. When the law was declared unconstitutional or ultra vires, the orders of imposing penalty were illegal and the effect of the declaration of the law as unconstitutional would be that it's effect can be considered in the pending proceedings and while considering the order passed by the Taxing Officer, the High Court can consider the effects of invalidity and grant benefit of the same to the parties whose proceedings are pending. There is nothing like a saving clause and there is no bar that the benefit of unconstitutionality can not be granted to the pending proceedings where orders are under challenge. This argument of the learned Additional Advocate General that under Section 6 of the General Clauses Act, the order of imposition of penalty can not be reviewed as the action is protected under the General Clauses Act and shall not affect any amount of penalty already recovered can not be accepted, because the order of imposing penalty was under challenge before the appellate authority and subsequently in writ petitions and had not attained finality. The position

would be different under the law when there shall be no challenge to those orders. Therefore, it was open to the High Court to consider the question of unconstitutionality and to give affect of the same to the pending matters.

18. Therefore, it is held that the learned Single Judge has rightly granted the benefit of the aforesaid decision to the respondents and has rightly quashed the aforesaid orders and directed for refund of the amount of penalty. Thus, we do not find any ground to interfere in the Writ Appeals filed by the State. Consequently, all the three Writ Appeals are dismissed. Parties to bear their own costs.

Appeals dismissed.

I.L.R. [2008] M. P., 204

WRIT APPEAL

Before Mr. Justice S.K. Kulshrestha & Mrs. Justice Manjusha P. Namjoshi

20 November, 2007

NAVAL SINGH ... Appellant*

Vs.

COLLECTOR, KHARGONE and Ors. ... Respondents

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. (Para 8)

Anil Trivedi, for the appellant

A.S. Kutumbale, Additional Advocate General with *Manish Joshi,* for the respondent nos. 1,2 & 3.

C.L. Yadav with *Avinash Yadav,* for the respondent no. 4.

Cur.adv.vult.

O R D E R

By this appeal under Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam,2005, the appellant assails the order dated 26.07.2007 passed by the learned Single Judge in Writ Petition No.4011/07, by which the said writ petition against the order of the Collector dated 10.07.2007 (Annexure P/1) has been dismissed.

*W.A. No. 524/2007 (Indore)

2. The facts of the case relevant for the purposes of the decision of this appeal lie in a narrow compass. According to the petitioner, he was an elected Sarpanch of Gram Panchayat Ahirkheda, Tehsil Bhikangaon, Distt. Khargone consisting of total 21 members including the petitioner. It was alleged that on 15.2.2007 15 Panchas of the said Gram Panchayat moved a motion of No Confidence as provided by Rule 3 of the Madhya Pradesh Panchayat (Gram Panchayat Ke Sarpanch Tatha Up-Sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President Tatha Vice-President Ke Virudh Avishwas Prastav) Niyam, 1994. On receipt of the said proposal under Sub Rule 3 of Rule 3, after completing the formalities laid down in the said rule, the prescribed authority respondent No.3 fixed 20.8.2007 for meeting for consideration of the said No Confidence Motion. It is not disputed that in the said meeting initially all the 20 Panchas voted against the No Confidence Motion by putting cross (x) in the ballot paper and it was, therefore, announced that the said No Confidence Motion had failed. However, the Panch present started clamouring and protesting against the resolution on the ground that they were misled into believing that for supporting the No Confidence Motion, they were required to put a cross (x) and not tick (✓) as laid down in Rule 5(5) of the said rules.

3. Considering that the law and order situation was worsening, respondent No.3 Presiding Officer set aside the first process of election and conducted the meeting anew for consideration of the said motion. In this meeting convened on the very day, all the Panchas present voted in favour of the No Confidence Motion by putting tick (✓) on the ballet papers. It was against this motion of No Confidence, in the subsequent meeting, that the appellant preferred a dispute before the Collector in accordance with Sub Section 4 of Section 21 of the M.P.Panchayat Raj Avam Gram Swaraj Adhiniyam,1993. After hearing the parties, the Collector set aside the proceedings of both the meetings held on 28.2.2007 and directed that fresh meeting be held for consideration of the No Confidence Motion. It is this order Annexure P/1 to the petition, which was challenged before the learned Single Judge. Learned Single Judge has observed that there was no infirmity in the order passed by the Collector and it was apparent that Collector had adopted a fair procedure when voting was held twice, on the same day.

4. We have heard the learned counsel for the parties and perused the record.

5. The controversy involved centers round the construction, import and meaning of Sub Section 4 of Section 21 of the Act and the provision made in the rules. It would, therefore, be advantageous to first refer to the provision contained in Section 21 of the Act which reads as follows :-

> Section 21 – No-Confidence motion against Sarpanch and Up-Sarpanch :-
>
> (1) On a motion of no-confidence being passed by the Gram Panchayat by a resolution passed by majority of not less than three fourth of the panchas present and voting and such majority is more than two third of the total number of Panchas constituting the Gram Panchayat for the time being, shall cease to hold office forthwith.
>
> (2) Nothwithstanding anything contained in this Act or the rules made thereunder a Sarpanch or an Up-Sarpanch shall not preside over a

meeting in which a motion of no-confidence is discussed against him. Such meeting shall be convened in such manner as may be prescribed and shall be presided over by an officer of the Government as the Prescribed Authority may appoint. The Sarpanch or the Up-Sarpanch, as the case may be, shall have a right to speak at, or otherwise to take part in, the proceeding of the meeting.

(3) No-confidence motion shall not lie against the Sarpanch or Up-Sarpanch within a period of -

(i) One year from the date on which the Sarpanch or Up-Sarpanch enter their respective office.

(ii) Six months preceding the date on which the term of office of the Sarpanch or Up-Sarpanch, as the case may be, expires;

(iii) One year from the date on which previous motion of no-confidence was rejected.

(4) If the Sarpanch or the Up-Sarpanch, as the case may be, desires to challenge the validity of the motion carried out under sub-section (1), he shall, within seven days from the date on which such motion was carried, refer the dispute to the Collector who shall decide it, as far as possible, within thirty days from the date on which it was received by him, and his decision shall be final.

6. It is not disputed that the Collector has exercised the power contained in Sub Section 4 of Section 21. The said Sub Section authorises the Collector to decide the dispute referred by the Sarpanch or Up-Sarpanch affected by the No Confidence Motion. It is, therefore, clear that the power can not be exercised at the instance of any party other than the Sarpanch and Up-Sarpanch affected by the No Confidence Motion carried successfully against him. In the present case, the occasion to file a dispute arose on account of the subsequent voting in which the No Confidence Motion moved against the Sarpanch (appellant herein), was passed. However, no steps were taken by any party to challenge the motion passed in the earlier part of the day. The question that arises for consideration is as to whether the respondent No.3 acting as a Presiding Officer could have arrogated the function to set aside the motion passed in the earlier part of the day in the first meeting held for consideration of the No Confidence Motion which, on account of voting in the first meeting, failed. A survey of the aforesaid rules would show that upon an application filed by not less than 1/3rd of the total number of elected members of the concerned Panchayat, the prescribed authority shall satisfy himself about the admissibility of the notice with reference to Section 21(3), 28(3) and 35(3), as the case may be, and shall fix the date, time and place for the meeting of the Gram Panchayat, Janpad Panchayat or Zila Panchayat, as the case may be, which shall not be later than 15 days from the date of receipt of the said notice. The manner in which the members of the Panchayat shall cast vote has been laid down in Rule 5(5) which reads as under :-

On the conclusion of the debate on the motion, the Presiding Officer

shall call the members present in the meeting one by one and shall give them ballot paper duly signed by him to indicate its authenticity, to cast his vote for or against the motion. The member who wants to vote in favour of the motion shall affix the symbol (✓) and the member who wants to vote against the motion shall affix the symbol 'X'. After the member has recorded his vote, he shall fold the ballot paper to maintain secrecy and put it in the ballot box kept on the table of the Presiding Officer.

7. Once the manner for casting vote in favour and against is statutorily laid down, it cannot be said that the Panchayat members present in the Panchayat were misled into a belief that for voting in favour of the No Confidence they were required to put cross (x) and not tick(✓).

8. This apart, Presiding Officer did not have any power to adjudicate whether the first meeting was a nullity on account of misgiving or misconception on the part of the members. Under these circumstances, the subsequent meeting held by the Presiding Officer on the same date under the specious plea that the law and order situation was worsening was illegal even if it is believed that there arose a law and order situation on account of the result of the first meeting. The Presiding Officer did not have any power either under Section 21 of the Act or the aforesaid Avishwas Prastav Niyam, 1994 to set aside the result of the first meeting and to convene another meeting for consideration of the motion. If the Panchas were aggrieved by the pressure exerted or deception practised in the first meeting for consideration of the No Confidence Motion, they were at liberty to approach such forum as was available against the said alleged illegality.

9. In the above factual matrix, we are of the considered view that the learned Single Judge has not considered the grievance of the petitioner in the context of the relevant provision of law. More so, when the Collector did not have the power to go behind the motion challenged by the Sarpanch.

10. This appeal is accordingly allowed and the order passed by the Collector Annexure P/1 to the petition is quashed.

11. Ex-consequentia the result of the meeting held subsequently in which the Motion of No Confidence was carried unanimously is quashed. However, we make it clear that the persons aggrieved by the result of the first meeting shall be at liberty to assail the same before the appropriate forum. The appeal is allowed with no orders as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 208
WRIT APPEAL

Before Mr. Justice Abhay Gohil & Mr. Justice A.P. Shrivastava
22 November, 2007

STATE OF M.P. & Ors. ... Appellants*
Vs.
MAHENDRA KUMAR SHARMA ... Respondent

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. (Para 8)

Cases Referred :

AIR 1966SC 668, (1993) 1 SCC 17, (1998)2 SCC 663, (1999) 9 SCC 546.

Brijesh Sharma, G.A. for the appellants/State
M.P.S. Raghuvanshi, for the respondent

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by ABHAY GOHIL J.:–This Writ Appeal has been filed by the State under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya(Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005 against the order dated 27.2.2007 passed by the learned Single Judge in W.P. No.579/2004(S).

2. The only grievance of the appellants/State is that the learned Single Judge has committed illegality in giving a direction to grant of out of turn promotion to the respondent w.e.f. 27.5.2003. The learned Single Judge, instead, ought to have directed the Screening Committee to reconsider the case of the respondent for promotion.

3. There is no dispute about the facts of the case that on 1.12.2002 the respondent took active part in the Anti-Dacoity Operation with a gang headed by Hanni @ Hanif Musalman as In-charge of the Police Station Jigana District Datia and thereafter there was an encounter with the gang and the respondent took active part in the encounter with the gang leader Hanni @ Hanif Musalman

*W.A. No. 613/2007 (Gwalior)

in which he was killed. It was further the case that under the Regulation 70-A of the M.P.Police Regulations of the Police Manual on taking active part in the distinguished Anti-Dacoity Operation, any officer is entitled for President's Police Medal for gallantry or he can be considered for promotion. Since the case of the respondent was strongly recommended by the departmental officer but was not considered and was turned down for grant of out of turn promotion by Screening Committee, though without assigning any reason, therefore, the submission of Shri Brijesh Sharma is that the State has filed this appeal on this legal point of principle that the writ Court should only direct for consideration of the case by the Government and should not give direction that he be treated as promoted out of turn with effect from 27.5.2003 and in support of his submission, learned Government Advocate placed reliance on a decision in the case of *Management of Brooke Bond India(P) Ltd. Vs. Their Workmen,* reported in AIR 1966 SC 668, in which it was held that:

> "Generally speaking promotion is a management function; but it may be recognized that there may be occasions when a tribunal may have to interfere with promotions made by the management where it is felt that persons superseded have been so superseded on account of mala fides or victimisation. Even so after a finding of mala fides or victimisation, it is not the function of a tribunal to consider the merits of various employees itself and then decide whom to promote or whom not to promote. If any industrial tribunal finds that promotions have been made which are unjustified on the ground of mala fides or of victimisation, the proper course for it to take is to set aside the promotions and ask the management to consider the cases of superseded employees and decide for itself whom to promote, except of course the person whose promotion has been set aside by the tribunal."

He also placed reliance on a decision in the case of *Indian Airlines Corporation Vs. Capt. K.C. Shukla and others,* reported in (1993) 1 SCC 17, in which the Supreme Court has held that the High Court cannot substitute its opinion and devise its own method of evaluating fitness of a candidate for a particular post. Not that it is powerless to do so and in a case where after removing the illegal part it is found that the officer was not promoted or selected contrary to law it can issue necessary direction.

4. In reply, Shri M.P.S.Raghuvanshi, learned counsel for the respondent submitted that under the facts and circumstances of the case, the High Court is empowered to pass such an order with a view to do justice with the party. He submitted that if by Annexure-R/1 dated 27.5.2003 Screening Committee has not taken proper decision and denied the right of out of turn promotion to the respondent, then certainly Court may pass suitable orders for his promotion directly in appropriate cases, therefore, the order passed by learned writ Court is justified. Learned counsel for the respondent also placed reliance on a decision of the Supreme Court in the case of *Indian Bank Vs. K. Usha and another,* reported in (1998) 2 SCC 663, in which it was held that in the background of this fact that the name of the respondent for compassionate appointment was rejected and the

Supreme Court has held that the High Court was perfectly justified in issuing mandamus to the appellant-Bank once the main defence of the appellant was found to be unsustainable. In the case of *State of Bihar Vs. Dr. Braj Kumar Mishra and others*, reported in (1999) 9 SCC 546, the Supreme court has considered the similar situation and has held as under :-

> "7. It is true that normally the court, in exercise of its power under Articles 226/227 of the Constitution of India, after quashing the impugned order should remand the matter to the authority concerned particularly when such authority consists of experts for deciding the issue afresh in accordance with the directions issued and the law laid down by it but in specified cases, as the instant case, nothing prevented the Court from issuing directions when all the facts were admitted regarding the eligibility of Respondent 1, and his possessing the requisite qualifications. Remand to the authorities would have been merely a ritual and ceremonial. Keeping in mind the lapses attributable to the Commission which had failed to take appropriate action despite recommendation made in favour of Respondent 1, the learned Single Judge as also the Division Bench of the High Court felt it necessary to declare Respondent 1 promoter with effect from 1-2-1985. We do not find any illegality or error of jurisdiction."

5. After hearing learned counsel for the parties, we have considered the facts of the present case. Admittedly, the respondent was working on the post of Sub-Inspector on 1.12.2002 and he was also in-charge of Police Station Jigana, District Datia. He received an information with regard to operation by a notified dacoits gang headed by Hanif Musalman, who was a notified dacoit of T-5 and a reward of Rs.25,000/- was declared on him. The respondent along with the Superintendent of Police Mr.K.P.Khare and other members of the Police reached on the spot and ultimately there was an encounter with the gang leader Hanif Musalman. In the encounter, Hanif Musalman was killed by the fire made particularly by Mr. Mahendra Kumar Sharma. The case of the respondent for out of turn promotion under Clause-70-A of the M.P.Police Regulation was recommended by the S.P. to the D.I.G., D.I.G. had also recommended the case to the Inspector General of Police, who had also recommended and ultimately the matter was referred to the Screening Committee. It is also important to mention here that the D.I.G. as well as I.G. of the Police both also recommended that the Superintendent of Police Mr.K.P.Khare be awarded Presidential medal for gallantry and on the recommendation of the Department, the medal was awarded to the Superintendent of Police, but the Screening Committee summarily turned down the request for grant of out of turn promotion by order dated 27.5.2003 without assigning any reason.

6. We have seen the recommendations of the Superintendent of Police, Datia (Annexure-R/2) recommendation by I.G., Chambal Range(Annexure-R/3) and the report of the ministerial inquiry dated 13.1.2003(Annexure-P/5), Superintendent of Police Datia has mentioned that Mahendra Kumar Mishra was along with him at the time of encounter and he supported him shoulder to shoulder and put his life

into peril and was continuously involved in firing on the dacoit and as a result of continuous firing, Hanif Musalman, gang leader of T-5 was shot dead. He was fully devoted to the cause and exhibited tremendous courage. It was he, who fired on the dacoit. It was submitted that earlier in the similar matter when the three other dacoits of the same gang were shot dead by the police officers, the police officers, those who were involved in Anti-Dacoit Operations were awarded out of turn promotion. But in this case the Committee has simply rejected the claim without assigning any reason. We have perused the Regulation 70-A which reads as under:-

> "70. S.I.- Promotion of.- The system of promotions in the subordinate executive ranks will be as laid down in the supplement to the madhya Pradesh Police Gazette dated 5-10-1960 as given in appendix 'A'.
>
> 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 dacoit 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 Director General of Police. The number of Officers promoted under this Regulation shall not exceed 10 percent."

7. From the aforesaid Regulation, it is clear that if a person is not otherwise found unsuitable for promotion, he can be granted out of turn promotion if he was involved in anti-dacoit operations. Therefore, there is no dispute that in the aforesaid encounter which was held on 1.12.2002. Respondent-Mahendra Kumar Mishra took an active part and acted courageously and shot dead the T-5 gang leader Hanif Musalman and was entitled for out of turn promotion on the aforesaid ground. On the same ground if the benefit was extended to the other police officers, the respondent was also entitled for the same. Therefore, we are of the view that learned members of the Screening Committee have wrongly discarded the case of the respondent without assigning any reason whereas it was obligatory on the part of the Committee to assign reasons for doing so. Therefore, in such circumstances, learned Single Judge was justified in quashing the aforesaid resolution(Annexure-R/1) dated 27.5.2003 passed by Screening Committee.

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 circumstance 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 cannot be any embargo on the powers of the High Court to issue such a directions. In this case under the circumstances brought on record and explained in the order, learned Single Judge has already directed to promote the respondent w.e.f. 27.5.2003. Therefore, we do not find any ground to interfere in such direction nor such a direction is contrary to law. However, it is made clear that at the time of issuing promotion order the respondent shall be free to consider that the respondent is not otherwise unsuitable for promotion.

9. Consequently, this writ appeal is disposed of accordingly..

Appeal disposed of accordingly.

I.L.R. [2008] M. P., 212
WRIT APPEAL

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

28 November, 2007

VINOD KUMAR SHUKLA ...Appellant *

Vs.

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

(A) Civil Services (Classification, Control and Appeal), Rules, M.P. 1996 - Rules 9(1), 12 - Divisional Commissioner is empowered by Governor to impose minor penalties specified in clauses (i) to (iv) of Rule 10, therefore, he is disciplinary authority in respect of class I and II officers within meaning of Rule 9(1) - Order of suspension passed by Divisional Commissioner is not without jurisdiction. (Para 5)

(B) Civil Services (Classification, Control and Appeal), Rules, M.P. 1996 - State Government's circular dated 15/2/1999 that Divisional Commissioner has no power to place class I and II officers under Suspension - Contrary to the statutory Rules. (Para 6)

Dilip Pandey, for the appellant

Rahul Jain Deputy Government Advocate for the respondents

Cur.adv.vult.

*W.A. No. 1790/2007 (Jabalpur)

O R D E R

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :–The appellant is a Sub-Engineer working in the RES Division at Satna in the State of Madhya Pradesh. By an order dated 3.10.2007 passed by the Divisional Commissioner, Rewa, the appellant has been placed under suspension in contemplation of disciplinary proceedings. Aggrieved, the appellant filed W.P. No.14889/2007(S) before this Court challenging the order of suspension and by an order dated 26.10.2007 the learned Single Judge while admitting the writ petition directed that the interim relief shall be considered after the respondents file the reply. Aggrieved by the order dated 26.10.2007 of the learned Single Judge in W.P. No.14889/2007(S), the appellant has filed this appeal.

2. Mr. Dilip Pandey, learned counsel for the appellant submitted that the learned Single Judge should have stayed the order of suspension passed by the Divisional Commissioner, Rewa while admitting the writ petition because the order of suspension is without jurisdiction. He submitted that the State Government in the circular dated 15.2.1999 in Annexure A/2 has clarified that Divisional Commissioner has no power to place Class-I and Class-II officers under suspension.

3. Mr. Rahul Jain, learned Deputy Government Advocate, on the other hand, submitted that under Rule 9(1) of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter called as 'the Rules'), the appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the Governor by general or special order, may place a Government servant under suspension where a disciplinary proceeding against him is contemplated or is pending. He submitted that under sub-rule (2) of Rule 12, the Governor by a general or special order may specify an authority to be the disciplinary authority for the purposes of imposing penalties in Rule 10 of the Rules and in exercise such powers under sub-rule (2), the State Government has issued an order published in the notification dated 13.8.1997 by which the Governor of Madhya Pradesh has empowered all Divisional Commissioners of the State to impose the penalties specified in clause (i) to (iv) of Rule 10 of the Rules on Class I and Class II officers (except the officers of the Judicial Services and the Police Department) of the State Government posted within their respective Divisions. He submitted that since the Divisional Commissioner is the disciplinary authority empowered to impose penalties specified in clauses (i) to (iv) of Rule 10 of the Rules, as such disciplinary authority is also empowered under Rule 9 to place a Government servant under suspension where disciplinary proceedings against him is contemplated.

4. Rule 9(1) and 12 of the Rules are quoted herein below :

> "9.(1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the Governor by general or special order, may place a Government servant under suspension -
>
> (a) where a disciplinary proceeding against him is contemplated or is pending, or

(b) where a case against him in respect of any criminal offence is under inventilation, inquiry of trial :

[Provided that a Government Servant shall invariably be placed under suspension when a challan for a criminal offence involving corruption or other moral turpitude is filed against him:]

Provided further that where the order of suspension is made by an authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made.

12. Disciplinary authorities. - (1) The Government may impose any of the penalties specified in rule 10 on any Government servant.

(2) Without prejudice to the provisions of sub-rule (1), but subject to the provisions of sub-rule (3), any of the penalties specified in rule 10 may be imposed on -

(a) a member of State Civil Service by the appointing authority or the authority specified in the Schedule in this behalf or by any other authority empowered in this behalf by a general or special order of the Governor;

(b) a person appointed to a State Civil post by the authority specified in this behalf by a general or special order of the Governor, or by the appointing authority or the authority specified in the Schedule in this behalf.

(3) Notwithstanding anything contained in this rule :-

(a) no penalty specified in clauses (v) to (ix) of rule 10 shall be imposed by authority subordinate to the appointing authority:

[Provided that the High Court shall have the power to impose all the penalties except penalties as specified in clause (vi) (so far as it relates to reduction in rank i.e. post of service), and clauses (vii) to (ix) of rule 10];

(b) where a Government servant who is a member of a service, is temporarily appointed to any or post, the authority competent to impose on such government servant any of the penalties specified in clauses (v) to (ix) of rule 10 shall not impose any such penalties unless it has consulted such authority, not being an authority subordinate to it, as would have been competent under sub-rule (2) to impose on the Government servant any of the said penalties had he not been appointed to such other service or post.

Explanation:- Where a Government servant belonging to a service or holding to a service or holding a State civil post of any class, is promoted, whether on probation or temporarily to the service or civil post of the next higher class, he shall be deemed for the purposes of this rule to belong to the service of, or hold the State civil post of such higher class.

5. The marginal title of Rule 12 is "Disciplinary authorities" and sub-rule (2) of Rule 12 states that on members of State Civil Service or a person appointed to a State Civil post, penalties specified in Rule 10 may be imposed either by the appointing authority or by the authority specified in the schedule or by any other authority empowered in this behalf by a general or special order of the Governor. Thus the Governor can by a general or special order empower any authority to impose any of the penalties specified in Rule 10. By the order published in the notification dated 13.8.1997, the Governor has empowered all Divisional Commissioner to impose penalties specified in clauses (i) to (iv) of Rule 10 of the Rules on Class-I and Class-II officers of the State Government posted within their respective jurisdiction. Since the Divisional Commissioner has power to impose penalties specified in clauses (i) to (iv) of Rule 10 on Class-I and Class-II officers in the State posted within his jurisdiction, he is the disciplinary authority in respect of such Class-I and Class-II officers within the meaning of Rule 9(1) of the Rules and he can place a Government servant who is a Class-I and Class-II officer posted within his jurisdiction where disciplinary proceeding is initiated or contemplated against him.

6. This being the provision under the Statutory Rules, any executive circular issued by the State Government contrary to the Statutory Rules will not make the position any different. Rather we find on reading of the circular dated 15.2.1999 of the State Government in Annexure A/2 on which reliance has been placed by Mr. Pandey that it has been clarified therein that Divisional Commissioner is disciplinary authority for the purposes of imposing penalties under Rule 10 (i) to (iv) of the Rules. This could mean that the Divisional Commissioner is not a disciplinary authority for the purposes of imposing major penalties specified in Rule 10(v) to 10(ix). There is nothing in Rule 9 of the Rules to show that a Government servant can be placed under suspension only where it is proposed to impose major penalties specified in clauses (v) to (ix) of Rule 10 and that a Government servant cannot be placed under suspension for imposition of minor penalty under clauses (i) to (iv) of Rule 10. Since Rule 9 gives wide power on the appointing authority or disciplinary authority or any other authority empowered in that behalf by the Governor by general or special order to place a Government servant under suspension where the disciplinary proceeding is initiated or contemplated irrespective of the penalties that will be awarded in the disciplinary proceedings, any of the aforesaid authorities can place a Government servant under suspension where disciplinary proceedings against him is initiated or contemplated.

7. For the aforesaid reasons, we do not find any merit in the writ appeal and we dismiss the same. It will however be open for the appellant to raise all issues other than the issue that we decided before the learned Single Judge in the writ petition.

Appeal dismissed.

I.L.R. [2008] M. P., 216
WRIT APPEAL

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

14 January, 2008

RAMANUJ TIWARI ... Appellant*

Vs.

M.P. STATE CO OPERATIVE TRIBUNAL & Ors. ... Respondents

(A) Co-operative Societies Act, M.P., 1960 (17 of 1961) - Sections 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. (Para 9)

(B) 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. (Para 12)

Cases Referred :

AIR 1958 SC 255, AIR 2008 MP 22.

Ankit Saxena, for the appellant

Piyush Dharmadhikari, for the respondent No.4.

Cur.adv.vult.

O R D E R

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :–This is an appeal against the order dated 17.9.2007 passed by learned single Judge in W.P. No.12054/07(S) under Section 2(1) of Madhya Pradesh Uchcha Nayayalaya (Khand Nayaypeeth Ko Appeal) Adhiniyam, 2005.

2. The facts briefly are that the appellant was working as Deputy Manager with respondent No.4 Cooperative Society and was posted as District Marketing Officer in the year 1983 in District Raigarh. On 14.6.1985, he was suspended and charge-sheeted and a departmental enquiry was conducted against him and thereafter he was served with an order of termination on 4.1.1994. Aggrieved by the order of termination, the appellant filed an appeal before the Board of Directors of the respondent No.4 Cooperative Society and the Board of Directors quashed the order of termination and instead imposed a penalty of withholding of two

*W.A. No. 1781/2007

increments with cumulative effect, but the Managing Director of the Cooperative Society did not allow the appellant to join his duties. Aggrieved, the appellant filed a dispute under Section 55(2) of the Madhya Pradesh Cooperative Societies Act, 1960 (for short **'the Act'**) before the Registrar, Cooperative Societies and the Registrar exercising his power under Section 55(2) of the Act appointed Deputy Registrar, Cooperative Societies as his nominee to decide the dispute. The Deputy Registrar, Cooperative Societies by order dated 8.7.2005 directed the respondent No.4 Cooperative Society to comply with the direction of Board of Directors of the Cooperative Society. Since the Deputy Registrar did not give direction regarding back wages, the appellant filed an appeal before the Registrar, Cooperative Societies under Section 78(1) of the Act claiming back wages. The appeal was transferred to the Additional Registrar, who, by order dated 27.1.2006 affirmed the order of Deputy Registrar. The appellant then filed second appeal before the M.P. State Cooperative Tribunal (for short **'the Tribunal'**) which was registered as S.A. No.74/2006. An objection was raised by the respondent No.4 before the Tribunal that the Deputy Registrar had no jurisdiction to decide the dispute under Section 55(2) of the Act and the Tribunal held that the Deputy Registrar did not have jurisdiction under Section 55(2) of the Act and quashed the order passed by the Deputy Registrar. Aggrieved, the appellant filed writ petition W.P. No.12054/2007(S) in this Court and by the impugned order dated 17.9.2007 the learned single Judge upheld the view taken by the Tribunal that under Section 55(2) of the Act the Deputy Registrar had no jurisdiction to decide the dispute.

3. Mr. Ankit Saxena, learned counsel for the appellant submitted that the language of Section 55(2) of the Act is clear that a dispute regarding disciplinary action taken by a society can be decided by the Registrar or "any officer appointed by him not below the rank of Assistant Registrar" and therefore the Tribunal has come to an erroneous conclusion that the Registrar could not appoint a Deputy Registrar to decide the dispute. He submitted that the Tribunal appears to have taken a view that it is only the Registrar or the Joint Registrar who can decide the dispute under Section 55(2) of the Act because of the notification No. F-5-1-1999-XV-1-A, dated 26th July, 1999 issued under Section 3(2) of the Act by the State Government directing that all powers conferred with the Registrar under the Act and the rules made under the Act shall be exercised by the Joint Registrar, Cooperative Societies. He submitted that by a notification issued under Section 3(2) of the Act, the State Government cannot restrict the power of the Registrar expressly and specifically conferred by Section 55(2) of the Act to appoint "any officer not below the rank of Assistant Registrar" to decide a dispute regarding terms of employment, working conditions and disciplinary action taken by a society.

4. Mr. Piyush Dharmadhikari, learned counsel appearing for the respondent No.4, on the other hand, submitted that Sections 3(2) and 55(2) have to be harmoniously construed and if these two provisions harmoniously construed then the Registrar can only appoint a Joint Registrar of Cooperative Societies in terms of the notification dated 26th July, 1999 issued by the State Government under Section 3(2) of the Act to exercise its power under Section 55(2) of the Act. He further submitted that by another notification No.F-5-1-1999-XV-1-C, dated 26th July, 1999 issued under Section 3(2) of the Act the State Government has directed

that powers conferred on Cooperative Societies by the Sections of the Act specified in column (2) of First Schedule to the notification shall be exercised by the Assistant Registrar of Cooperative Societies in the State to the extent as specified in column (3) and within the area as specified in column (4) of the said Schedule. He submitted that it is thus clear that only Assistant Registrar of the particular area as mentioned in the Schedule to the notification can exercise the power under Section 55(2) of the Act. He submitted that Schedule to the said notification shows that powers of the Registrar under the Act can be exercised by the Assistant Registrar in respect of all Cooperative Societies except financial banks and societies whose area of operation extend beyond the limits of his jurisdiction. He further submitted that the area of the operation of the respondent No.4 extends beyond the limits of jurisdiction of the Deputy Registrar who decided the dispute.

5. There can be no dispute over the proposition that provisions of an Act have to be read harmoniously. As Venkatarama Aiyar, J puts it in *Venkataramana Devaru vs. State of Mysore,* AIR 1958 SC 255 at p. 268 - "The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is what is known as a rule of harmonious construction".

6. But harmonious construction does not mean that one of the provisions of an Act will be reduced to a "dead letter" because to harmonise is not to destroy. There may be, for example, some general provisions and specific provisions in an Act and general provisions cannot be interpreted in such a manner so as to override the specific provision altogether. As explained in 'Principles of Statutory Interpretation' by Justice G.P. Singh as under :

> "A familiar approach in all such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific. The question as to the relative nature of the provisions general or special has to be determined with reference to the area and extent of their application either generally or specially in particular situations. The principle is expressed in the *maxims Generalia specialibus non derogant,* and *Generalibus specialia derogant.* If a special provision is made on a certain matter, that matter is excluded from the general provision."
>
> (Page 141 of 11th Edition 2008)

Thus, if a special provision has been made in certain matter, that matter be excluded from general provision otherwise the general provision may have the effect of destroying special provision altogether.

7. Applying this principle of statutory interpretation to the interpretation of the Act in the present case, Section 3(2) of the Act is a general provision and reads as follows:

> 3. Registrar and other officers.-(2) The officers appointed to assist the Registrar shall, within such areas as the State Government may specify, exercise such powers and perform such duties

conferred and imposed on the Registrar by or under this Act as the State Government may, by special or general order, direct:

Provided that no officer other than the Additional Registrar or the Joint Registrar shall be directed to exercise the powers to hear appeals under section 78.

Hence Section 3(2) of the Act empowers the State Government to issue a special or general order directing that the powers of the Registrar can be exercised and duties of the Registrar can be performed by officers appointed to assist the Registrar within such areas which State Government may specify. It is in exercise of such powers under Section 3(2) of the Act that the notification No.F.5-1/99-XV-I-A, dated 26th July, 1999 has been issued by the State Government directing that all the powers conferred on the Registrar under the Act and the rules made there under shall be exercised by Joint Registrar of Cooperative Societies within the State of Madhya Pradesh. Again it is in exercise of such powers under Section 3(2) of the Act that the State Government has also issued notification No.F.5.1.99-XV-I-D, dated 26th July, 1999 directing that the powers conferred on the Registrar of Cooperative Societies, Madhya Pradesh, shall be exercisable by the Assistant Registrar of the Cooperative Society in the State to the extent to be specified in column (3) of the Schedule to the notification and within the area as specified in column (4) of the schedule.

8. But there is yet another specific provision in Section 55(2) which reads thus:

55(2) Where a dispute, including a dispute regarding terms of employment working conditions and disciplinary action taken by a society, arises between a society and its employees, the Registrar or any officer appointed by him not below the rank of Assistant Registrar shall decide the dispute and his decision shall be binding on the society and its employees:

Provided that the Registrar or the officer referred to above shall not entertain the dispute unless presented to him within thirty days from the date of order sought to be impugned:

Provided further that in computing the period of limitation under the foregoing proviso, the time requisite for obtaining copy of the order shall be excluded.

If we were to hold that by virtue of the notifications issued under Section 3(2) of the Act, it is only the Joint Registrar who could exercise the powers of the Registrar under Section 55(2) of the Act in the entire State of Madhya Pradesh or it was the Assistant Registrar of the area concerned who was to exercise the powers under Section 55(2) of the Act, then the express special provision in Section 55(2) of the Act to the effect that "any officer appointed by the Registrar not below the rank of Assistant Registrar" could hear the dispute of the nature described therein would be rendered nugatory. In other words, the interpretation suggested by Mr. Dharmadhikari would give full effect to Section 3(2) of the Act but would destroy the express specific provisions in Section 55(2) of the Act empowering the Registrar

to appoint an officer not below the rank of Assistant Registrar to decide the dispute relating to terms of employment, working condition and disciplinary action taken by the cooperative societies.

9. In our considered opinion, therefore, Section 55(2) of the Act is specific provision made by the legislature authorizing the Registrar to appoint any officer not below the rank of Assistant Registrar to decide the dispute of the nature mentioned under Section 55 of the Act and this specific express provision made by the legislature has to be read independently of Section 3(2) of the Act and in any case the State Government by a special or general order cannot override such express specific provision made by the State Legislature in Section 55(2) of the Act.

10. Mr. Dharmadhikari next submitted that under the proviso to sub-section (1) of Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, an appeal against an order passed by the learned Single Judge under Article 227 of the Constitution is expressly barred and that under sub-section (1) of Section 2 an appeal is only available against an order passed by the learned Single Judge under Article 226 of the Constitution only. He submitted that a reading of the impugned order would show that the learned Single Judge has passed the order under Article 227 of the Constitution and therefore no appeal as such to a Division Bench is available under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

11. As we have noted above, the challenge before the learned Single Judge by the appellant was to the view taken by the Tribunal that under Section 55(2) of the Act the Registrar could not authorize the Deputy Registrar to decide a dispute relating to disciplinary action taken by the Cooperative Society against the appellant and the ground taken by the appellant in the writ petition before learned Single Judge is that the said view is an error in law. An error of law made by a Tribunal can be corrected by the High Court under Article 226 of the Constitution and we find on a reading of the writ petition that it was filed not only under Article 227 but also under Article 226 of the Constitution. In our view therefore the impugned order passed by the learned Single Judge is the order under Article 226 of the Constitution and an appeal against the impugned order was available to the Division Bench under the Adhiniyam of 2005. We are supported by the judgment delivered by Special Bench of this Court in *Manoj Kumar vs. Board of Revenue and others,* AIR 2008 MP 22.

12. The appeal is allowed and the impugned order of the learned Single Judge is set aside and the matter be remanded to the Tribunal for decision on merits. The Tribunal will decide the case expeditiously, preferably within six months from the date of receipt of a copy of this order.

Appeal allowed.

I.L.R. [2008] M. P., 221
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
17 July, 2007

HEERALAL BARIA ... Petitioner *
Vs.
M.P. STATE ELECTRICITY BOARD & Anr. ... Respondents

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.

Accordingly this petition is allowed and the respondent Board is directed to re-consider the said application of compassionate appointment in view of the policy dated 30.1.97 which was prevalent at the time of death and on the date of submission of application. (Para 14)

Cases Referred :

2007(2) Supreme 519, W.P. No. 5245/2002, 2000SCC (L&S) 767, 2005 SCC (L&S) 590, W.P. No. 6404/2004, (2007) 4 SCC 778, (2006) 7 SCC 350, AIR 1978 SC 851.

L.C. Patne, for the petitioner.
P.B.S. Nair, for the respondents.

Cur.adv.vult.

ORDER

J.K. Maheshwari, J. :–This petition is filed challenging the order dated 27.1.2006 Annexure P/10 passed by the respondent Board denying compassionate appointment on the basis of the circular dated 30.1.97 and 1.9.2000 and for the reasons narrated in the order impugned.

2. It is the case of petitioner, that his father Kaniram Baria was in the employment of respondent Board, as Line Attendant Grade II, and died on 13.9.99 during the course of employment. It is further his case that he is the eldest member of the family having six brothers, sisters and widow, however, being a member of the S.T.category and having passed the 8th class examination, an application to grant of compassionate appointment was submitted by him on 19.9.99. The said application was not considered by the Board, however, a writ petition bearing No.2922/2005(S) filed, which was and disposed of vide order dated 14.9.2005, with a direction, to decide the application. Thereafter respondent Board has rejected the said application vide order Annexure P/10 dated 27.1.2006, relying the subsequent policy dated 1.9.2000; whereby, the grant of compassionate

*W.P. No. 1453/2006(s) (Indore)

appointments are estopped due to difficult financial position of Board; and because the family of the deceased received Rs.15,000/- of Ex-gratia, Rs.77,000/- of GIS, Rs.1,50,766/- of gratuity and Rs.57,668/- towards GPF. The Board has also directed to pay annuity Rs.350/- per month in addition to family pension. Such an action of the Board and the order impugned is under challenge in this petition.

3. Learned counsel, Shri Patne, submits that the application for grant of compassionate appointment ought to have been considered in the light of the circular of the Board dated 30.1.97 because on the date of submission of the application i.e.19.9.99 the said policy was in existence and pevelant, however, denial of compassionate appointment in view of the subsequent policy dated 1.9.2000 is against the settled position of law. To butress his submission, reliance has been placed on the judgment of the Supreme Court in the case of *Abhishek Kumar Vs. State of Haryana and others*, reported in 2007(2) Supreme 519, wherein it is held in the case of compassionate appointment, consideration ought to be in terms of the rule/instructions prevailing, when the appointment is sought for.

4. Shri Patne, learned counsel has also relied upon the judgment of this Court delivered on 4.8.2003 in W.P.No.5245/2002 *(Smt.Anupama @ Sadhna Pawar Vs. Chairman, M.P.State Electricity Board and others)*. It is submitted by him that in the above judgment, identical question was involved, and the claim was rejected by the M.P.S.E.B. in reference to the policy dated 1.9.2000, however, following the Division Bench judgment in case of *T.Swami Daas Vs. Union of India and others*, reported in 2002(3) MPLJ 242, this Court has quashed the order of rejection, and issued the direction to consider his application, afresh in the light of the policy, which was in existence on the date of application. The said order of learned Single Judge was challenged by M.P.S.E.B.in L.P.A., which was dismissed by the Division Bench; and held that scheme dated 1.9.2000 was issued subsequent to the death of deceased and the contention of the Board, which is based upon later policy can not be accept. The order of the Single Bench and the Division Bench was challenged before the Supreme Court in Special Leave Petition, which was also dismissed. Thereafter, Smt.Anupama @ Sadhna Pawar was given compassionate appointment on 23.11.2005, and she is working. However, it is urged that petitioner may also be allowed similar benefit without any discrimination, at par to Smt.Anupama @ Sadhna.

5. Learned counsel has further placed the reliance on judgment of the Supreme Court in the case of *Balbir Kaur and another Vs. Steel Authority of India Ltd.and others*, reported in 2000 SCC (L&S) 767 and *Govind Prakash Verma Vs. Life Insurance Corporation of India and others*, reported in 2005 SCC (L&S) 590 and submitted that on account of receiving service benefits, by the family of the deceased, denial of compassionate appointment is not proper. However, in view of the aforesaid, it is urged that order impugned Annexure P/10 passed by the respondents is liable to be quashed and the respondents may be directed to re-consider his case for compassionate appointment in view of the judgment of *Anupama @ Sadhna Pawar* (supra) and to direct respondent Board to grant him similar benefit.

6. Per contra, Shri P.B.S.Nair, learned counsel appearing for the respondent

Board has filed the reply and stated that because of the Board has issued a policy dated 1.9.2000 Annexure R/1 expressing their inability to grant compassionate appointment due to difficult financial condition; and simultaneously in terms of Circular Annexure R/2 dated 30.1.89, if widow is getting annuity, then petitioner shall not be entitled for the compassionate appointment. Mr. Nair has placed reliance on a judgment of this Court in W.P.No.6404/2004 *(Smt.Pushpalata Soni Vs. Chairman, M.P.E.B.and others)* decided on 30.11.2004. On the basis of the said judgment it is urged that this Court has declined to interfere in the matter of grant of compassionate appointment, if family of the deceased employee has received annuity voluntarily in addition to pension. He submits that in the abovesaid judgment this Court has observed, if the person has accepted to receive the amount of annuity, then it is inapposite to putforth the claim of compassionate appointment. It is observed that under the policy dated 30.1.89, if the Board has thoughtfully and appropriately used its discretion by extending the benefit of annuity, claim of compassionate appointment, under the said policy is not pemissible. However, in view of the judgment of the Single Bench of this Court, it is submitted by him that the controversy involved in the present case is fully covered by the said judgment, however, this petition may be dismissed.

7. Shri Nair has further placed reliance on the judgment of the Supreme Court in the case of *State Bank of India and another Vs. Somvir Singh,* reported in (2007) 4 SCC 778, whereby the Apex Court has held that the appointment on compassionate ground is an exception from the general rule, because recruitment to public services has to be made in a transparent and accountable manner, providing opportunity to all eligible persons to compete and participate in the selection process. Such appointments are required to be made on the basis of open invitation of applications and on merit. The dependants of the deceased employees, died in harness, do not have any special or additional claim to public services, other than any one conferred, if any, by the employer by way of instructions. The claim for compassionate appointment and the right, if any, is traceable only by the scheme, executive instructions or rules framed by the employer in the matter offering employment on compassionate grounds. In view of the said observations of the Supreme Court it is submitted by Shri Nair that petitioner do not have any indefisable right to claim compassionate appointment, after receiving annuity under the scheme dated 30.1.89. The reliance has also been placed in the case of *Union Bank of India and others Vs. M.T.Latheesh*, reported in (2006) 7 SCC 350, wherein it is held that issuing a direction by the High Court for grant of compassionate appointment without noticing the scheme, instructions or rules prevailing, is amounting to open a Pandora box to litigants. In view of the aforesaid, prayer is made by Mr. Nair, to dismiss this petition.

8. I have heard learned counsel appearing for the parties and taken note of the judgments relied upon by learned counsel appearing to either side. Prior to dealing with the question of law it is necessary to see the ground of rejection, or reason mentioned in order impugned Annexure P/10. The reading of the said orderl indicates that; the Board has considered the policy dated 30.1.97 and 1.9.2000. It has taken note that in facts and circumstances and in view of existing policy, grant of compassionate appointment is refused with the observation that

his case may be looked into as and when the Board will restart the compassionate appointment. Thus it is clear that the application of petitioner has been rejected in view of policy prevailing on the date of decision. It is further apparent that the order impugned of denial of appointment, is not based upon the policy for payment of annuity dated 30.1.89. If the decision banks upon the said policy; then it was not required to observe by Board, that his case may be re-considered as and when the Board shall restart the compassionate appointment. Thus defence putforth, in the return filed by respondents Board is just opposite or dubious to the reasons assigned in the impugned order Annexure P/10. The tenability of the order is required to be seen by the reasons assigned in the order. The guidance may be taken by the judgment of the Apex Court in the case of *Mahinder Singh Gill Vs. The Chief Election Commissioner,* reported in AIR 1978 SC 851, whereby it is made clear that when a statutory functionary, makes an order based on certain grounds, its validity must be judged by the reasons so mentioned in order and it cannot be supplimented by fresh reasons in the shape of affidavit or otherwise.

9. I have also perused both the policy dated 30.1.89 and 30.1.97 and on going through the same, it is clear that policy dated 30.1.97 has been issued in supersession to all the earlier policies of Board issued forl grant compassionate appointment. The policy dated 30.1.97 makes it clear that grant of compassionate appointment to the family member of the deceased shall be considered and decided according to the terms and conditions specified therein. The reading of condition No.5 indicates that payment of annuity is sine qua non to the member of the said family on found if they are ineligible, or not applied, or denied of compassionate appointment. The last para of the said policy further indicates that immediate after death of the employee till grant of compassionate appointment, the amount of annuity shall be continuously paid. Thus it is clear while rejecting the claim of compassionate appointment by the order impugned Annexure P/10 the Board has not referred the earlier policy of annuity dated 30.1.89. In view of the above discussion, payment of annuity to the family of the deceased is not the impediment or debar them to get compassionate appointment. Even if annuity is received by them voluntarily their claim for grant of compassionate appointment may be considered in the light of the policy dated 30.1.97.

10. The judgment of this Court relied by Mr.Nair in the case of *Puspalata* (supra) is based upon the old policy of the payment of annuity dated 30.1.89; undisputedly, it has now been superceded, by the subsenquent policy dated 30.1.97. The perusal of the facts of the said judgment, makes it clear to me, that the subsequent policy dated 30.1.97 has not been brought to the notice of this Court, however, the said judgment, is based upon the superceded policy of the Board, and distinguishable on facts, and do not cover up the controversy involved in this case.

11. It is seen from the record that the order of rejection to grant the compassionate appointment is based upon the circular dated 1.9.2000 Annexure R/1, though deceased died on 13.9.99 and the application was submitted on 19.9.99. As per the material available before me, it is apparent that the policy dated 30.1.97 was in existence at the time of death on the date of submitting the application for compassionate appointment, therefore, his case ought to have considered in the

light of the policy dated 30.1.97 and his application cannot be rejected on the basis of subsequent policy dated 1.9.2000. In fact that asaid policy was not in existence on the date of submission of application. However, in view of the ratio of the judgment of the Apex Court in the case of *Abhishek Kumar* (supra) impugned order of rejection of the application of compassionate appointment, on the basis of subsequent policy is not proper. The view taken by the Apex Court is followed by this Court in the case of *Smt.Anupama @ Sadhna* (supra), wherein the M.P.S.E.B.was the contesting respondent. It is relevant that the judgment of *Smt.Anupama @ Sadhana* is uphled upto the Apex Court and ultimately Smt.Anupama @ Sadhna was appointed on compassionate ground on 23.11.2005 even after the judgment of Smt.Pushpalata Soni (supra), relied upon by Shri P.B.S.Nair. However, on finding support from the Division Bench judgment of this Court which is upheld upto the Supreme Court, I am of the considered view that the rejection of claim of petitioner, to grant him compassionate appointment relying on subsequent policy dated 1.9.2000 is contrary to the settled position of law.

12. In view of the arguments as putforth before this Court, it is also required to be dealt with whether grant of service benefits to the widow of the deceased employee may deprive, the member of the deceased's family to claim compassionate appointment. On goingh through the judgment of the Apex Court in the case of *Govind Prakash Verma* (supra) and *Balbir Kaur* (supra), it is apparent that merely receiving the service benefits by the family members of the deceased employee, shall not be a ground for refusal of compassionate appointment. In that view of the matter, it is apparent that the rejection of the claim of the petitioner by the order impugned Annexure P/10 is contrary to the settled position of law.

13. In view of the discussion made hereinabove, the judgment of *State Bank of India and another* (supra) is having no application because in the said judgment Apex Court has observed that compassionate appointment cannot be claimed as a matter of right, no iota of doubt can come in the mind to accept such preposition of law. But in the said judgment and exception has been carved out, that consideration may be made, if any, under the scheme, executive instructions or under the rules framed by the employer. In the present case because, the employer has framed policy dated 30.1.97 in supercession of all other policies, however, right of consideration for grant of compassionate appointment under the said policy accrues to the members of the family of deceased. In the facts of this case it is apparent that consideration has not been properly made by the Board in the light of the policy dated 30.1.97; and his claim is rejected on the basis of the policy dated 1.9.2000, which was into existence on the date of application; in fact such policy was issued after about one year of submitting the application. Therefore, the argument as putforth by Mr.Nair cannot be accepted and the judgments relied upon having no application in the facts of this case. *Similarly, the other judgment of Union Bank of India and others* (supra) is also having no application to the facts and circumstances of the present case. Because in instant case claim of petitioner, for compassionate appointment has been rejected in view of the subsequent policy.

14. In view of the foregoing discussion, I am of the considered view that rejection

of the application for compassionate appointment vide Annexure P/10 dated 27.1.2006 is contrary to the policy dated 30.1.97 and it is based upon a subsequent policy dated 1.9.2000, hence liable to be quashed. Accordingly this petition is allowed and the respondent Board is directed to re-consider the said application of compassionate appointment in view of the policy dated 30.1.97 which was prevalent at the time of death and on the date of submission of application. The respondent Board is directed to look into the the case of Smt.Anupama @ Sadhna, and to grant at par benefits to petitioner. The aforesaid exercise be completed by the respondent Board within a period of three months from the date of communication of this order. Accordingly this petition is allowed and in the facts and circumstances of the case there is no order as to costs.

Petition allowed

I.L.R. [2008] M. P., 226
WRIT PETITION
Before Mr. Justice Abhay M. Naik
29 October, 2007

SHARAD OSWAL & ors. ... Petitioners *
Vs.
MADHYA PRADESH POORVA KSHETRA VIDYUT VITRAN COMPANY LTD. & anr. ... Respondents

A. Constitution of India - Article 14 - Contract - Judicial Review - Imposition of new conditions before opening of tenders - Respondents invited tenders for supply of various items including Distribution Transformers - Petitioners submitted their tender forms - Before opening of tender forms corrigendum issued by respondents imposing further condition that tenderer would be eligible to submit bid only if he had capital of Rs. 8.5 crores approximately - Petitioners are small scale industries - Challenged imposition of additional condition being arbitrary, and malafide and has been issued with a view to oust small scale industries - Held - Illegality , Irrationality, 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.

Grounds on which an administrative action is subject to control by judicial review can be classified as under:

> (i) "Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
>
> (ii) Irrationality, namely, Wednesbury unreasonableness.
>
> (iii) Procedural impropriety."

*W.P. No. 10565/2007 (Jabalpur)

In the case in hand, tenders were invited for supply of various items including distribution of transformers of various capacities ranging from 63 KVA to 315 KVA. Last date of for submission and opening of bid was 25.7.2007. Respondents are stated to have acquired lesson/wisdom from the conduct on the part of the suppliers in past. Few illustrations in the matter of supply on the part of petitioners no. 1, 3,9 and 13 are described in paragraph 3 of the return. They have not been denied or refuted by the petitioners. Thus, to ensure smooth and sufficient supply of the transformers, respondents have prescribed certain conditions in the N.I.T. by way of corrigendum. They cannot be said to have committed illegality. Object of issuance of tender is to get a proper person for minimum money who may execute the work order in time in proper and efficacious manner. Accordingly, the respondents no. 1 and 2 are not found to have committed any illegality in issuing the corrigendums dated 24.7.07 (Annexure P/2) and dated 7.9.07, in view of the magnitude of the tender, if, it is required for ensuring the timely supply of the transformers. (Paras 9 & 10)

B. 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.

In the present case, it was the Association itself which took initiative and submitted a representation. Accordingly, after acceptance of the points raised by the Association, if the conditions of N.I.T. are further relaxed by issuing a corrigendum, there does not arise a question of contempt of court or causing obstruction in the course of justice. It was the Association of S.S.I. Units which participated in deliberations and instigated the respondents to settle the conditions. This court vide order dated 9.8.07 has not stayed the consideration of the tenders. Thus, it cannot be said that by issuing corrigendum any kind of interference in the course of justice was made. (Para 12)

Cases Referred

AIR 1996 SC 11, AIR 1955 Andhra 156, (2004) 4 SCC 19, (2005) 4 SCC 435,

Alok Aradhe with *Siddharth Gulati* and *K.P. Kushwaha,* for the petitioners,

A.P. Shroti, for the respondents.

O R D E R

ABHAY M. NAIK, J. :–Petitioners are proprietors of various registered small-scale industries. They are engaged in manufacturing and supply of transformers to respondent no. 1. They were awarded contracts from time to time for supplying the transformers to respondent no. 1 as per the terms and conditions of N.I.T.

2. Respondent no. 2 is Executive Director of respondent no. 1 who invited tenders for supply of various items including distribution transformers of various capacity ranging from 63 KVA to 315 KVA vide N.I.T. contained in Annexure P/1. Tenders are required to be submitted into two parts namely technical bid and price bid. Last date of submission and opening of bid was 25.7.2007 in respect of the distribution transformers. Date of opening of price bid was fixed as 10.8.2007.

A corrigendum as contained in Annexure P/2 was issued on 24.7.2007 i.e. a day before opening of the tender by which certain conditions and criteria were added in clause 10 which deals with basic qualification of the bidders. It was provided by Annexure P/2 that a tenderer would be eligible to submit the bid only if he had a capital of Rs.8.5 crores approximately. This apart, a further condition was imposed that the bidders income statement should show average annual sales in supply of material and equipment for last three years. This amount approximately comes to Rs.6.5 crores. It was clearly mentioned in the corrigendum that in case tenderer does not fulfill the aforesaid criteria, his tender shall be rejected.

3. In the writ petition, it is stated that there are about 90 small scale industries in the State of M.P. which are engaged in manufacturing and supply of transformers to the respondent no. 1. It is further stated that on account of prescription of the aforesaid condition by corrigendum, marked as Annexure P/2 about 90 small scale industries engaged in manufacturing transformers will be excluded from participating in the process of tender. They are entirely dependent on respondent no. 2 for their survival as respondent no. 1 is a sole purchaser of transformers in the State of M.P. No such condition was ever prescribed in the past. Moreover, a practice has been prevalent in the respondents' company that entire quantity of supply was never allotted to a single individual and instead several tenderers used to be asked to supply the tendered quantity at the rates quoted by lowest tenderer. Entire quantity had never been allotted to a single individual including the lowest one. It is stated further that the imposition of condition by corrigendum (Annexure P/2) was for extraneous consideration and is arbitrary and *malafide*. This is also violative of the policy formulated by the Government of India giving preference to small scale industries. Once the qualification is prescribed by the NIT, the same cannot be altered to the disadvantage of tenderers even by way of corrigendums.

4. Respondent nos. 1 and 2 submitted their joint return refuting thereby the claim of the petitioner. It is contended that individual petitioners in the capacity of proprietor/partner of the small scale units are not eligible to participate in the tender process, therefore, this petition is mis-conceived and is liable to dismissal. On merits, it is stated that the tenders were invited in March, 2006. Relevant extract of the document containing basic qualification of bidder is marked as Annexure/R. Conditions prescribed vide Annexure P/2 were not earlier there in the tender documents. Due to inadequate check on commercial/financial capabilities of the tenderer, the answering respondent company could not meet the requirement of the DTRs in the year 2006-2007. A statement showing the details of the demand and the supply made by the petitioner nos. 1 3, 9 and 12 is on record as Annexure R/1 which goes to show that as against the order of supply of 100 DTRs of 100 KVA, petitioner no. 1 made a supply of 25 DTRs which were rejected due to failure in random testing at Central Power Research Institute, Bhopal. Similarly, the petitioner no. 3 did not complete the contractual formalities and further did not commence the supply against the order of supply of 25 DTRs of 100 KVA. Petitioner nos. 9 and 12 also failed to make supply as per the supply order. Necessary action for non-supply of transformers is being taken against them. Statement showing details of the demand and the supply made by all bidders pursuant to the tender issued in March, 2006 is on record as Annexure R/3 which

shows that supply was not made as per the work order and only 10.62% of the total requirement was met. Taking it into consideration the subject corrigendum dated 24.7.2007 was issued including thereby twofold amendment in the eligibility criteria to the effect that bidder must offer to supply minimum 25% of the total quantity and should have experience of supply of 25% of the tender value i.e. 260 lacs. The object of the corrigendum was to ensure the supplies of DTRs effectively during forthcoming agricultural season. Thus, there is no infirmity in the tender process and does not call for any kind of interference. It has been denied that the respondent no. 1 is the only buyer of the transformers in the State of M.P. There are other 2 Distribution Companies namely, M.P. Madhya Kshetra Vidyut Vitran Company Ltd. Bhopal and M.P. Pashchim Kshetra Vidyut Vitran Company Ltd. This apart, Generation companies, transmission companies, Railways, MES (Military Engineering Services), Irrigation Department, Private entrepreneurs including hotels, colonizers, hospitals also purchase transformers as per their requirement.

5. Another bench of this court was pleased to grant an interim order that finalization of the bids shall not be made until further orders. Thereafter, the petitioners and respondents submitted additional pleadings in the nature of rejoinder and additional return.

6. Learned counsel for the parties have been heard in the light of pleadings and documents on record.

7. Certain important developments took place during pendency of the present writ petition. Industries Association Govindpura, Bhopal made a representation, dated 6.8.07 against the corrigendum contained in Annexure P/2. This was submitted a day before opening of the tender. A request was made by the Association to amend the financial situation, availability of financial resources and minimum quantity to be quoted on the plea that 85 SSI Units of M.P. cannot participate if corrigendum contained in Annexure P/2 is followed strictly. This representation is on record as Annexure A/1. After consideration of the representation it was decided that financial criteria and minimum quantity quoted should be reduced from 25% to 10%. Accordingly, a fresh corrigendum dated 7.9.07 has been issued stipulating thereby :-

> "(1) FINANCIAL CRITERIA:- The purchaser will take account of the following financial criteria to verify the qualifications of the lowest evaluated bidder. These criteria shall be evaluated on a pass-fail basis only:-
>
> (a) Financial Situation:- The audited financial statements of accounts for the last three(3) years submitted by bidder shall be evaluated. The bidder's balance statement for the last year of audited accounts should show that it has positive net worth. The bidders' income statement should show average annual sales in supply of material and equipments for the last three years that are more than 10% of the tender value (Rs. 2605.00 Lakh).
>
> (b) Availability of Financial Resources:- The documents submitted by the bidder, including the audited financial accounts, must

demonstrate that the bidder has adequate working capital available to undertake this contract, which will be equal to at least 15% of the tender value (Rs.2605.00 Lakh). If the bidder's working capital is inadequate, the bidder should supplement this with a Banker's letter confirming the availability of a line of credit such that the bidder's available working capital plus line of credit are in total at least 15% of the tender value (Rs.2605.00 Lakh).

(2) MINIMUM QUANTITY TO BE QUOTED: The tenderer should quote at least 10% of total tendered quantity (considering at ratings). Accordingly, please indicate the rating wise quantity offered in Schedule-IV Part-"B" Commercial Information" (Page No. 23/28 of Annexure-II) after creating a new column at sr. No. 15 failing which offer will be rejected out rightly."

Accordingly, it is stated by the respondents that the tender conditions are not arbitrary, irrational and unreasonable.

8. In turn, it has been stated by the petitioners by way of amendment that the action of respondents in issuing a fresh corrigendum dated 7.9.07 is not justified. It intrudes into the power of judicial review. During pendency of the writ petition, the petitioner could not have interfered in the process of adjudication by way of issuing corrigendum dated 7.9.07. Both the impugned corrigendums have been issued with a view to create monopoly of the large scale units and oust the small scale industries like the petitioners. Earlier also two of the biggest manufacturers of the transformers namely M/s Tesla Transformers and M/s Rama Krishna had offered supply of 12000 transformers each to the respondents whereas it was materialized only to the extent of 170 and 1400 transformers respectively. Thus, it cannot be contended that the conditions imposed by the corrigendum were to ensure proper and smooth supply of transformers.

9. Question mainly involved in the present petition is whether the conditions of N.I.T. could have been changed by corrigendum and to what extent a tenderer has a right to dictate with regard to the terms and conditions of N.I.T. While dealing with the matter of tender, Hon'ble Supreme Court of India in the case of *Tata Cellular Vs. Union of India* (AIR 1996 SC 11) has held that a tender is an offer. It is something which invites and is communicated to notify acceptance. Following are the requisites of a valid tender for broad scene.

1. "It must be unconditional.
2. Must be made at the proper place.
3. Must conform to the terms of obligation.
4. Must be made at the proper time.
5. Must be made in proper form.
6. The person by whom the tender is made must be able and willing to perform his obligations.
7. There must be reasonable opportunity for inspection.
8. Tender must be made to the proper person:
9. It must be of full amount."

Grounds on which an administrative action is subject to control by judicial review can be classified as under:

(i) "Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety."

Following principles have been deduced by the Apex Court in the matter of tender.

(1) "The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be failure.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts but must be free from arbitrariness not affected by bias or actuated by malafides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

Thus, the terms of N.I.T. are not open to be scrutinized by the courts unless they are vitiated on account of parameters prescribed by the Apex Court in the aforesaid case.

10. In the case in hand, tenders were invited for supply of various items including distribution of transformers of various capacities ranging from 63 KVA to 315 KVA. Last date of for submission and opening of bid was 25.7.2007. Respondents are stated to have acquired lesson/wisdom from the conduct on the part of the suppliers in past. Few illustrations in the matter of supply on the part of petitioners no. 1, 3,9 and 13 are described in paragraph 3 of the return. They have not been denied or refuted by the petitioners. Thus, to ensure smooth and sufficient supply

of the transformers, respondents have prescribed certain conditions in the N.I.T. by way of corrigendum. They cannot be said to have committed illegality. Object of issuance of tender is to get a proper person for minimum money who may execute the work order in time in proper and efficacious manner. Accordingly, the respondents no. 1 and 2 are not found to have committed any illegality in issuing the corrigendums dated 24.7.07 (Annexure P/2) and dated 7.9.07, in view of the magnitude of the tender, if, it is required for ensuring the timely supply of the transformers. It was found necessary that the bidder must have the capital of Rs. 8.5 crores approximately and that the supply of material and equipment of the tenderers must have more than 25% of the tender value and the respondent no. 2 was within his powers to add conditions in the tender document by way of corrigendum.

11. Further, after consideration of the representation of the Association, annual sales during past three years have been brought down from 25% to 10%. Similarly, the working capital available to undertake the contract has been brought down to 15% of the tender value. Minimum quantity which can be quoted by the tenderers has also been brought down from 25% to 10%. This is after deliberation with the Association. Thus, *prima-facie* there seems to be no illegality in changing the terms which obviously are beneficial to the tenderers.

12. Shri Alok Aradhe, learned senior advocate placed much reliance on the following passage quoted from the decision rendered in the case of *D. Jones Shield Vs. N. Ramesam and others* (AIR 1955 Andhra 156), "It may also be mentioned that this court will take a serious view, if public officers of responsibility act in such a manner as to obstruct the course of justice or disobey to implement the orders of court, for such acts will undermine the prestige of courts and set a bad example to the public".

In the present case, it was the Association itself which took initiative and submitted a representation. Accordingly, after acceptance of the points raised by the Association, if the conditions of N.I.T. are further relaxed by issuing a corrigendum, there does not arise a question of contempt of court or causing obstruction in the course of justice. It was the Association of S.S.I. Units which participated in deliberations and instigated the respondents to settle the conditions. This court vide order dated 9.8.07 has not stayed the consideration of the tenders. Thus, it cannot be said that by issuing corrigendum any kind of interference in the course of justice was made.

13. Shri Aradhe, learned senior counsel for petitioners referring to the decision of Hon'ble Supreme Court rendered in the case of *Directorate of Education and others Vs. Educomp Datamatics Ltd. and others* (2004) 4 SCC 19 contended that the corrigendums are liable to be quashed. It has been held in the aforesaid case that the courts will not interfere merely on the ground that some other terms in the tender would have been fair, wiser or logical.

14. Hon'ble Supreme Court in the case of *Global Energy Ltd. and another Vs. Adani Exports Ltd. and others* (2005) 4 SCC 435 has clearly held that the principle is well settled that the terms of the invitation to tenders are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as

they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. In the present case tenderers were required by the corrigendum dated 24.7.07 to submit the bid to the capital of Rs.8.5 crores approximately and that the tenderers who have average annual sales in supply of material and equipment for the last three years that are more than 25% of the tender value. After consideration of the representation of the industries association, minimum quantity quoted has been reduced from 25% to 10 %. Similarly, work capital has also been reduced to 15% of the tender value. This has been decided after due deliberations as revealed in Annexure A/3. Thus, there does not seem to be any bias or malice in issuing the corrigendum dated 7.9.2007. The respondents allowed the association to negotiate with regard to the terms of the tender and the same were prescribed by second corrigendum to the benefit of bidders. It makes amply clear that the disputed terms of the terms were not actuated by any arbitrariness, malafide or bias. Equally, they have not been introduced to oust the small scale industries. However, if, certain terms and conditions are mentioned by way of corrigendum in order to secure smooth and continuous and timely supply of transformers, respondents are not found at any fault. They have got a right to ensure that only financially sound bidders come forward and make a proper and timely supply of transformers.

15. In a case of *Directorate of Education and others Vs. Educomp Datamatics Ltd. and others* (AIR 2004 SCW 1505) it has been held:-

> "It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or *mala fide*."

16. In view of the aforesaid discussions, I do not find that corrigendums in question have been issued with an ulterior motive of ousting the S.S.I. Units like the petitioners. There is no material on record to infer that the conditions were added by way of corrigendums to exclude the petitioners. On the contrary, respondents having entertained the representation of the Association of S.S.I. Units by lowering down the terms and conditions of financial criteria and minimum quantity to be quoted in the tender are found to have acted with a proper and rational attitude. Respondents are definitely having a right to ensure proper, efficient and timely supply of the transformers and equipments and were within their rights to add suitable and proper conditions in the N.I.T. before the date of submission and opening of the tenders. Thus, I do not find any arbitrariness, discrimination or malafide in issuance of the corrigendums in question.

17. In the result, I do not find any force in the writ petition and the same being devoid of substance is hereby dismissed. However, without order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 234
WRIT PETITION
Before Mr. Justice S. K. Seth
22 November, 2007

PRAKASH CHANDRA PUROHIT ... Petitioner *
Vs.
THE TRANSPORT COMMISSIONER & two ors. ...Respondents

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. (Para 6)

Case Referred :

2007 AIR SCW 556.

Cur.adv.vult.

ORDER

S.K. SETH, J. :–This order shall also govern the disposal of W.P. No. 5544/2006 as the facts and issues involved in both writ petitions are similar. For the sake of convenience, relevant facts are noticed from the above writ petition.

2. Petitioner, at the relevant time, held an All India Permit in Form M.P.M.V.R.-54 (T.V.P.) for an Omni Bus (Video-Coach) bearing registration No. M.P.39/F 0007. In the morning of 4.7.2005 said vehicle was checked and seized vide Panchnama and seizer memo Annexure P-2 and P-3 respectively. Thereafter proceedings were initiated under Section 16 of the M.P. Motoryan Karadhan Adhiniyam, 1991 and a notice was served upon petitioner to show cause against recovery of penal tax @ Rs. 1500 per seat amounting to Rs. 52,500/- as if the vehicle was plying without permit. Petitioner submitted reply to the show cause notice but the Taxation Authority being unsatisfied with the reply, ordered petitioner to pay Rs. 52,500/- as penal tax vide Annexure P-7. It seems that against Annexure P-7, petitioner directly filed a writ petition (WP No. 288/05) in this Court. Said WP was disposed off on 18.9.2005 Annexure P-8. Pursuant to aforesaid order, petitioner preferred an appeal. By the order impugned, appeal preferred by the petitioner was dismissed by Appellate Authority, respondent No. 1. Hence this writ petition.

3. Petitioner himself argued his case and submitted that in absence of breach of statutory provisions or permit conditions, not only the seizure of the vehicle, but also the levy of penal tax was bad in law. He invited attention to the list of passengers drawn up at the time of checking and seizure of the vehicle in support of contention that all passengers were traveling from Machalpur to Indore and in between no

*W.P. No. 5542/06 (Indore)

passenger was picked up or set down during the journey. Therefore, it could not be said that the vehicle was plying without permit and without payment of tax. Per contra, learned Government Advocate appearing for respondents justified the levy of penal tax.

4. After having heard arguments at length, we are of the view that both writ petitions deserve to be allowed.

5. It is now well settled that the Motor Vehicle Act, 1988 and rules made thereunder are self contained complete code. The Parliament while enacting the Motor Vehicle Act, 1988 however refrained from indicating any principle of taxation and field was left open to State Legislatures by virtue of Entry 57 of State List of VIIth Schedule to the Constitution. The State Government for the said purpose, enacted the M.P. Motoryan Karadhan Adhiniyam, 1991. Section 3 is the charging section and provides for levy of tax on every motor vehicle used or kept for use within the State at the rates specified in the First Schedule. The Schedule was amended by the M. P. Motoryan Karadhan (Sanshodhan) Adhiniyam 2004. Sub-item (g) of Item IV relating to Public Service Vehicle was amended in the following terms :-

"(g) Motor plying without permit	:
A. Vehicle permitted to carry up to 12 passengers (excluding driver)	Rs.1000.00 per seat per month in accordance with the entire registered seating capacity.
B. Vehicle permitted to carry more than 12 passengers (excluding driver)	Rs.1500.00 per seat per month in accordance with the entire registered seating capacity."

6. At the instance of holders of contract carriage permit the validity of the aforesaid amendment read with Explanation 7 of the First Schedule came up for consideration of Supreme Court in *Hardeo Motor Transport Vs. State of M.P.* reported in 2007 AIR SCW 556. Their Lordships of the Supreme Court after exhaustive analysis of the case law, declared the clause (g) of entry IV of the First Schedule as amended by M.P. Motoryan Karadhan Sanshodhan Adhiniyam, 2004 read with Explanation (7) of the First Schedule unconstitutional. It is not in dispute that petitioner also holds a contract carriage permit. It is not case of the respondents that he has not paid the tax or he was plying his vehicle on unauthorized route. It is only by virtue of Clause (g) as amended by the Sanshodhan Adhiniyam, read with Explanation (7) of the First Schedule respondents had initiated the action for levy of penalty. Since the provisions have been declared unconstitutional, therefore the impugned order is unsustainable and deserves to be quashed. In the result the writ petition is allowed however, without any orders as to costs. Let a copy of this order be retained in record of the W.P. No. 5544/2006.

7. Order accordingly.

Order passed accordingly.

I.L.R. [2008] M. P., 236
WRIT PETITION

Before Mr. Justice Abhay M. Naik

30 November, 2007

RAJARAM AHIRWAR .... Petitioner*

Vs.

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

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, 1961 prohibits 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.

It does not contain a restriction that if the name of intending voter is already entered in the electoral roll of village such a person would not be entitled to seek enrollment as voter in the election of Municipal Council. Proviso to this section prohibits a person from getting registered in electoral roll for more than one ward or for any ward more than one. It is not the case of the petitioner that the name of respondent no. 3 was already entered in the voter list of Shivaji Ward or any other ward. This being so, the petitioner did not incur disqualification from getting his name entered in the voter list of Shivaji Ward. Section 31 of the Municipalities Act lays down disqualification of voters. It nowhere provides that a person whose name is not already entered in the voter list of any of the wards of Municipal Council would stand disqualified from contesting municipal election on the ground that his name is already entered in the voter list of the village. Petitioner did not choose to prefer objections regarding the aforesaid. This being so, it cannot be said that respondent no. 3 had incurred any kind of disqualification and was not consequently competent to hold the office. (Para 10)

Vivek Rusia, for the petitioner
A.P. Shroti, for the respondent No.2,
N.S. Kale with *Kapil Patwardhan,* for the respondent No.3
Pranay Verma, for intervenor

Cur.adv.vult.

ORDER

ABHAY M. NAIK, J. :–This petition has been preferred for issuance of writ of quo warranto mainly with the allegations that the petitioner is a voter enrolled in Shivaji ward, Bina, District Sagar. Election of Janpad Panchayat, Sagar took place in the year 1999. Name of respondent No.3 was entered in the voter list of

*W.P. No. 1890/2005 (Jabalpur)

Gram Panchayat Lakhahar as revealed in the supplementary voter list marked as Annexure/P-2. He contested election for Janpad Panchayat, Sagar and was elected from Village Lakhahar. Copy of voter list was issued by the Election Officer, Sagar on 9.2.2000 wherein the name of respondent No.3 appears at serial no.17 of the voter list of Shivaji ward, Bina.

2. On declaration of election of Nagar Parishad, Bina, respondent No.3 submitted his resignation to the Zila Panchayat, Sagar on 24.9.2004 whose copy is on record as Annexure/P-4. At the time of submission of nomination form for election of Nagar Parishad, Bina, respondent No.3 submitted his nomination form disclosing his name as Mahesh Kumar S/o Ram Lal, R/O Shivaji Ward, Bina. This was submitted alongwith affidavit, copy thereof is Annexure/P-7. An objection was taken by one Sunil Kumar Sahu on 6.11.2004 to the effect that the name of father of respondent No.3 is Panna Lal Rai and his name was not recorded in the voter list of Shivaji Ward within the Nagar Parishad limits of Bina. An objection was also raised that the name of respondent No.3 is already entered in the voter list of Gram Panchayat and therefore his name could not have been entered in the voter list of Nagar Parishad, Bina. This objection was not accepted. It is stated in the writ petition that respondent No.3 was elected as President of Nagar Parishad, Bina despite absence of his name in the voter list. Mahesh Rai S/o Panna Lal is different from Mahesh Kumar S/o Ram Lal recorded in the voter list of Nagar Parishad, Bina at serial no.54 (Annexure/P-3). To substantiate the aforesaid, marksheet of Pre Secondary School Examination has been placed on record as Annexure/P-10 which reveals that father's name of respondent no.3 is Panna Lal Khangar. Respondent No.3 is scheduled caste person and he submitted a Caste Certificate to the aforesaid effect as contained in Annexure/P-12. Accordingly, it is stated that Mahesh S/o Ram Lal was elected as President of Nagar Parishad, Bina and not respondent No.3 with his father's name as Pannalal. Accordingly, it is Mahesh S/o Ram Lal and not the respondent No.3 with father's name as Panna Lal who was elected as President of Nagar Parishad, Bina. Thus, it is contended that he is occupying the office of President without any entitlement and is liable to quit the said office usurped by him unauthorisedly.

3. In sum and substance, the contention of the learned counsel for the petitioner is that the name of respondent no. 3 was entered in the electoral roll of Gram Panchayat Lakhahar and he was not entitled to get enrolled as voter in the electoral roll of Shivaji Ward within the limits of Municipal Council, Bina. Further, father's name of respondent no. 3 being Pannalal and not Ramlal, he has no right to occupy the office of President of Municipal Council, Bina. On the basis of aforesaid main contention this petition has been preferred for the following relief:-

> "7.1. That by issuance of writ in the nature of quo-warranto this Hon'ble Court may kindly be pleased to direct the respondent no. 3 to show his entitlement and legal authority to hold the office of President, Nagar Parishad, Bina, District Sagar.

4. In the return, it has been contended as a preliminary objection that the election of respondent No.3 can be questioned only through an election petition and a writ petition for issuance of writ of quo warranto cannot be legally entertained. This apart the allegations contained in the writ petition have been denied in toto.

5. Shri Vivek Rusia, learned counsel for the petitioner, Shri A.P. Shroti, learned counsel for respondent no. 2, Shri N.S. Kale, learned Sr. counsel for respondent no. 3 and Shri Pranay Verma, learned counsel for intervenor argued at length and their arguments have been duly considered in the light of the legal provisions applicable to the present case.

6. Shri Vivek Rusia, learned counsel for the petitioner contended that the name of the petitioner was already entered in the voter list of Janpad Panchayat, Sagar which took place in the year 1999. Election was contested by respondent no. 3 who was elected as member from village Lakhahar. After the elections of Municipal Council, Bina were declared in the year 2004, respondent no. 3 submitted his nomination form with his father's name as Ramlal. It is stated that Mahesh Rai S/o Pannalal is different from Mahesh Kumar S/O Ramlal and accordingly, respondent no. 3 is different than the person who submitted his nomination form for contesting the election for the post of member of Municipal Council from Shivaji Ward, Bina District Sagar. This point may not detain this court any longer because a criminal case bearing S.T. No.112/97 was filed against the brother of respondent no. 3 as revealed in Annexures R/3 and R/4 which *ex facie* goes to show that Pannalal was also known as Ramlal. Government of M.P. had registered a case after a due police investigation against brother of respondent no. 3 describing him as son of Pannalal alias Ramlal. Thus, the contention that Pannalal and Ramlal were two persons is not *ex facie* acceptable. This could have been established only in the election petition wherein an opportunity for evidence and cross examination is permitted.

7. Though learned counsel for the parties have argued at length about the maintainability of writ of quo warranto in the matter yet I do not feel it necessary to discuss the same in the light of succeeding paragraphs.

8. According to the petitioner's contention the name of respondent no. 3 was entered into the electoral roll of village Lakhahar in 1999 and, thereafter, he made an application for entering his name into the electoral roll of Shivaji Ward within the limits of Municipal Council, Bina. Placing reliance of Section 5 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as "the Panchayat Act" for brevity), it is contended that the petitioner was disqualified from getting his name entered in the voter list of Shivaji Ward. Before appreciating this contention, it is necessary to examine section 5 which reads as under:-

> "5. Registration of voters of a village- Every person who is qualified to be registered in the Assembly roll relatable to a village or whose name is entered therein and is ordinarily resident within village shall be entitled to be registered in the list of voters of that village:
>
> Provided that-
>
> (a) no person shall be entitled to be registered in the list of voters for more than one village;
>
> (b) no person shall be entitled to be registered in the list of voters if he is registered in the electoral roll relating to any other local authority.

Explanation-

1. The expression "ordinarily resident" shall have the meaning assigned to it in Section 20 of the Representation of the People Act, 1950 (No. 43 of 1950) subject to the modification that reference to "Constituency" therein will be construed as a reference to "village".

2. A person shall be disqualified for registration in the list of voters of a village if he is disqualified for registration in the Assembly roll.

Perusal of the aforesaid section makes it clear that a person whose name is entered into the electoral roll relating to any other local authority is not entitled to be registered in the list of voters of the village. It nowhere provides for vice versa position. It means that by virtue of this provision a person is not prevented from getting his name entered in the electoral roll of Municipal Council, if his name is already registered in the electoral roll of the village. Therefore, by virtue of aforesaid provision, election of respondent no. 3 as a member of Municipal council, Bina is not affected at all.

9. Petitioner has prayed for writ of quo-warranto with regard to election of the respondent no. 3 as councilor of Municipal Council, Bina and this being so, latter's rights will be examined in the light of M.P. Municipalities Act, 1961. Section 30 of the said Act prescribes qualifications of voters and registration as follows:-

30. Qualification of voters and their registration:- Subject to the provisions of Section 31, every person who-

(a) is not less than eighteen years of age on the 1st day of January of the year in which the electoral roll for a ward is prepared or revised;

(b) is ordinarily resident in the ward within the meaning of Section 20 of the Representation of People Act, 1950 (No. 43 of 1950) subject to the modification that reference "area comprised in ward"; and

(c) is otherwise qualified to be registered in the Assembly roll relatable to the ward;

shall be entitled to be registered in the electoral roll of that ward:

Provided that-

(i) no person shall be entitled to be registered in the electoral roll for more than one ward;

(ii) no person shall be entitled to be registered in the electoral roll for any ward more than one;

It does not contain a restriction that if the name of intending voter is already entered in the electoral roll of village such a person would not be entitled to seek enrollment as voter in the election of Municipal Council. Proviso to this section prohibits a person from getting registered in electoral roll for more than one ward or for any ward more than one. It is not the case of the petitioner that the name of

respondent no. 3 was already entered in the voter list of Shivaji Ward or any other ward. This being so, the petitioner did not incur disqualification from getting his name entered in the voter list of Shivaji Ward. Section 31 of the Municipalities Act lays down disqualification of voters. It nowhere provides that a person whose name is not already entered in the voter list of any of the wards of Municipal Council would stand disqualified from contesting municipal election on the ground that his name is already entered in the voter list of the village. Petitioner did not choose to prefer objections regarding the aforesaid. This being so, it cannot be said that respondent no. 3 had incurred any kind of disqualification and was not consequently competent to hold the office. Section 20 of the Municipalities Act provides for election petition. State Government has also made election rules for the purpose of Municipal Council which are known as the Madhya Pradesh Nagarpalika Nirvachan Niyam, 1994. Further, M.P. Municipalities (Election petition) Rules, 1962 have also been framed. They clearly go to show that the election of respondent no. 3 may be challenged under the provisions of M.P. Nagarpalika Nirvachan Niyam, 1994 and M.P. Municipalities (Election petition) Rules, 1962.

10. Considering these rules and other relevant provisions of law it may safely be held that it is not contemplated under law that a person entered in the name of voter list of village, is disqualified from contesting the election of councilor in due manner. The petitioner, if, so advised, may indeed file an election petition in the matter in accordance with law.

11. Learned counsel for both the parties have taken much pains in citing various authorities but none of them deals with the specific provision in issue. So, I do not wish to burden this order with those citations.

12. Since, I have not found substance and merits in the writ petition, this court is not required to decide about the maintainability of the writ petition for issuance of writ of quo-warranto in the facts and circumstance of the case.

13. Writ petition, accordingly stands dismissed.

No order as to costs. *Petition dismissed.*

I.L.R. [2008] M. P., 240
WRIT PETITION
Before Mr. Justice Abhay M. Naik
3 December, 2007

RAJ KISHORE JHA ... Petitioner *
Vs.
STATE OF M.P. & ors. ....Respondents

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

*W.P. No. 14635/2003 (Jabalpur)

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. (Para 2)

Case Referred :

AIR 1991 SC 2010.

D.K. Dixit with *Manoj Mishra,* for the petitioner,
Om Namdeo, G.A. for the respondents

Cur.adv.vult.

O R D E R

ABHAY M. NAIK, J. :–Applicant/petitioner was initially appointed in the year 1991 on the post of Block Development Officer in the Department of Panchayat and Rural Development, Government of M.P. Certain complaints were received against the petitioner in the year 1995-96. After due enquiry punishment of stoppage of one increment for two years with non-cumulative effect has been awarded to him by respondent no. 1 vide order dated 1.8.1997 marked as Annexure A/1. The appeal, preferred against the same, was dismissed by the Deputy Secretary of Panchayat and Rural Development Department vide order dated 17.12.1998 contained in Annexure A/2. In the meantime, D.P.C. was held to consider the promotion of Block Development Officers to the post of Additional Assistant Development Commissioner on 28.8.1998. Pursuant thereto the impugned promotion order vide Annexure A/4 was passed on 31.12.1998 promoting thereby certain juniors including respondent no. 4. Orders Annexures A/1 and A/2 were challenged initially before the M.P. State Administrative Tribunal at Jabalpur in O.A. No. 158/00 whereas the order of promotion contained in Annexure A/4 has been challenged in O.A. No. 450/00 giving rise to the present writ petition. Return was submitted in O.A. No. 158/00 whose copy is on record as Annexure R/1. In paragraph 2 it has been clearly mentioned that the applicant's name was not placed before D.P.C. for consideration as he was undergoing punishment at the relevant time when the D.P.C. met. Thus, D.P.C. was admittedly held on 28.8.1998 when the appeal against Annexure A/1 was pending before the Appellate Authority. In such situation the authorities ought to have been adopted the sealed cover procedure as prescribed by the Hon'ble Supreme Court in the case of *Union of India etc. Vs. K.V. Jankiraman etc.* AIR 1991 SC 2010.

Since the order of punishment had not attained finality when the D.P.C. met, it was obligatory on the part of the respondents to adopt the sealed cover procedure as held by the Hon'ble Supreme Court in paragraph 6 of its order which reads as under:-

> "6. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the

charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc., does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it would not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows:

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2) .....

(3) .....

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before;"

There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion No. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions."

2. Further, it may be seen that the orders contained in Annexures A/1 and

A/2 i.e. punishment order and appellate order have been quashed by this court on 11.3.2005 in W.P. No. 14541/03 (Old O.A. No. 158/00). Copy of this order is also on record. Thus, the reasons for which the petitioner's name was not placed before the D.P.C. stood vanished on account of quashment of Annexures A/1 and A/2. Such quashment will have the effect of wiping out the allegations for which the disciplinary proceeding was initiated against him which further entitles him to be considered for promotion to the post of Additional Assistant Development Commissioner. Had D.P.C. adopted the sealed cover procedure such a sealed cover could have been opened and implemented. Since the D.P.C. did not consider the petitioner's name for promotion and he became entitled to be considered on account of quashment of Annexure A/1 and A/2. His case deserved to be considered even on 28.8.1998 though through sealed cover procedure. After quashment, he fully became entitled to be considered for promotion to the aforesaid post. Since he was not considered at the relevant time and has become now fully entitled, his case for promotion deserves to be considered by review D.P.C.

3. In the result, the writ petition deserves to succeed and is accordingly allowed. Respondents are directed to convene the review D.P.C. within a period of three months from the date of receipt of certified copy of this order for consideration of the petitioner for promotion to the post of Additional Assistant Development Commissioner. Needless to say that consequential benefits would follow the outcome of the review D.P.C.

Petition, accordingly, stands allowed. No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 243
WRIT PETITION
Before Mr. Justice Abhay M. Naik
4 December, 2007

SITARAM VYAS ...Petitioner*
Vs.
STATE OF M.P. & ors. ....Respondents

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. (Para 9)

S.B. Agnihotri, for the petitioner,
Om Namdeo, G.A. for the respondents.

Cur.adv.vult.

O R D E R

ABHAY M. NAIK, J. :–This petition is before the court on account of transfer

*W.P. No. 24390/2003 (Jabalpur)

of original application submitted before the M.P. State Administrative Tribunal, Jabalpur.

2. Case of the petitioner/applicant is that he retired as Teacher from School Education Department of Government of M.P. on 31.8.1993 on account of attaining the age of superannuation at 60 years of age. He had Provident Fund Account bearing no. E.D.N. M.P. 15688. After his retirement, the petitioner submitted an application in prescribed proforma for releasing the amount of G.P.F. Respondent no. 2, Accountant General's Office vide its letter dated 4.3.1994 informed respondent no. 4 (Block Development Officer) Seoni Malwa that an overpayment to the tune of Rs.15878/- was made to the petitioner which may be recovered from him. Petitioner was not simultaneously informed. However, he obtained a copy of the aforesaid letter on 18.12.1994 when he visited the Office of respondent no. 2. It is stated by the petitioner that respondent no. 2 did not regularly send the details of Provident Funds Account. In the account slip of 1992-93, a sum of Rs.33,576/- was shown to be payable to the petitioner towards G.P.F. Petitioner had not obtained any loan from G.P.F. account and no loan could have been shown as due against the petitioner. It is, thus, stated in the petition that balance money to the tune of Rs.15878/-was not due from the petitioner towards any kind of loan. However, it forms part of money deposited as GPF. Thus, it has been prayed that the petitioner is entitled to the G.P.F. amount alongwith interest.

3. Respondents/State has adopted the return of respondent no. 2 which is on record. Apart from the plea of limitation, it has been contended that at the time of processing for final payment of G.P.F. amount it was found that excess withdrawals were made by the petitioner. Accordingly, there was a minus balance of Rs.15,878/- in petitioner's G.P.F. account which included interest upto August, 1993 which was and is recoverable from the petitioner. Accounts Officer, Hoshangabad was requested to make the recovery. Accordingly, it is contended that this petition has no substance and the same deserves to be dismissed.

4. Learned counsel for the petitioner contended that the petitioner has not obtained any loan from the employer and is not liable to make refund. Instead, he is entitled to GPF money lying in his G.P.F. account. In the alternative, it is contended that the petitioner is not liable to pay interest on the amount allegedly withdrawn by him in excess.

5. Shri Om Namdeo, learned Government Advocate contended that the petitioner having made excess withdrawals from his G.P.F. account is liable to repay the same alongwith interest.

6. Considered the contention in the light of the record and provisions of M.P. General Provident Fund Rules.

7. It may be seen from Annexure A/1 that the petitioner had earlier instituted civil suit no. 50-A/96 for declaration that he was entitled to a sum of Rs.15878/- with interest from his G.P.F. account on account of his superannuation on 31.8.93. This issue was decided on merits against the petitioner with a clear finding that he is not entitled to recover Rs.15878/- towards provident fund from the State Government. Although the suit was held to be not maintainable in view of the

provisions of Administrative Tribunal Act yet it is equally true that the issue on merits was decided against the petitioner as is apparent from Annexures A/1 and A/2 which are the copies of judgment and decree regarding dismissal of the plaintiff's suit on merits as well as for want of jurisdiction. Since the suit was dismissed for want of jurisdiction, finding on merit cannot be harnessed into operation. However, in view of the dismissal of the suit it was quite obligatory on the part of petitioner to place on record the complete facts and proof regarding his entitlement to recover Rs.15878/- from his provident fund account. It is quite clear from the petition that the petitioner has nowhere in specific averred that he had not overdrawn from his G.P.F. account. Respondent has placed on record the statement of G.P.F. account of the petitioner as Annexures R/1 and R/2. Petitioner has failed to refute or controvert the statement of account by way of rejoinder. Thus, the details of the G.P.F. contained in Annexures R/1 and R/2 will be deemed to be not disputed by the petitioner and it would be deemed to be further admitted to the petitioner that he has made overdrawals from his G.P.F. account.

8. Sub rule 7 of Rule 14 of the M.P. General Provident Fund Rules reads as under:-

> "(7). In case a subscriber is found to have drawn from the fund an amount in excess of the amount standing to his credit on the date of the drawal, the overdrawn amount, irrespective of whether the overdrawal occurred in the course of an advance or a withdrawal or the final payment from the fund, shall be repaid by him with interest thereon, in one lump sum, or in default, be ordered to be recovered, by deduction in one lump sum, from the emoluments of the subscriber. If the total amount to be recovered is more than half of the subscriber's emoluments, recoveries shall be made in monthly instalments of moieties of his emoluments till the entire amount together with interest, is recovered. For this rule, the rate of interest to be charged on overdrawn amount would be 2½% over and above the normal rate of Provident Fund balances under sub-rule (1). The interest realised on the overdrawn amount shall be credited to the Government account under the distinct sub-head "Interest on overdrawn from Provident Fund".

From the aforesaid, it is ample clear that the amount of overdrawals would attract interest and the respondents have not committed any illegality in charging interest on the excess amount withdrawn by the petitioner from his G.P.F. Account.

9. As regards interest it may be seen that the State Government is liable to pay to the credit of the account of a subscriber interest at such rate as may be determined for each year. Thus, there is a statutory provision which obliges the State Government to pay interest to the subscriber of the G.P.F. If the Government is made liable to pay the interest, there is no reason why the subscriber would not pay interest on the amount of overdrawals. There cannot be one-way traffic in the matter of interest. If the Government employee i. e. subscriber of G.P.F. may compel the State Government to pay interest on the G.P.F. amount, he would be equally responsible to pay the same at the prescribed rate after making overdrawals.

This being so, the alternative prayer for exoneration from interest is also not liable to be accepted.

10. Resultantly, the writ petition has no substance and the same is hereby dismissed.

No order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 246
WRIT PETITION
Before Mr. Justice R.S. Jha
6 December, 2007

M.L. GOLE ... Petitioner*
Vs.
M.P. ELECTRICITY BOARD & ors. ...Respondents

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.

Annexure R-3 dated 15-4-1996 by which the Madhya Pradesh State Electricity Board (General Service) Regulations, 1952 have been amended provides that the minimum service for promotion to the higher grade is 5 years and the minimum grading for grant of promotion is 3 'B' and 2 'C' in the last 5 years. The words "preceding 5 years" mentioned in Annexure R-2 and the words "last 5 years" mentioned in the 'Minimum Grading in Annual Confidential Report' column of Annexure R-3 are clear indicators of the fact that the authorities are required to consider the record of the the past 5 years immediately preceding the date on which the Departmental Promotion Committee is convened for considering cases of promotion and by no stretch of imagination can it be held to mean the period of 5 years preceding the date the person becomes eligible for grant of promotion on completing 15 years of service. (Para 7)

P.R. Bhave with *Bhanu Yadav,* for the petitioner
Priyank Choubey, for the respondents

Cur.adv.vult.

ORDER

R.S. JHA, J. :–The petitioner has filed this petition praying for quashing communication dated 06-06-2000 by which his representation against grant of

*W.P. No. 6195/2000 (Jabalpur)

time bound promotion has been rejected as well as communication dated 11-08-2000 by which his representation against adverse remarks for the period ending 31-3-1999 has been rejected and has further prayed that he be granted the benefit of the time bound promotion scheme on the post of Assistant Engineer with effect from 7-10-1999 and place him just below one Shri Kamlesh Kumar Dubey in the seniority list.

2. The case of the petitioner is that he was initially appointed as a Diploma Trainee in the year 15-3-1978 and was thereafter regularized on the post of Junior Engineer on 15-06-1979 in the establishment of the respondents. On 7-5-1999, the respondent/Board issued and published a time bound promotion scheme which provided for grant of benefit to such Junior Engineers who had completed 15 years of service by giving them promotion on the post of Assistant Engineer subject to their fulfillment of the criteria prescribed for promotion on the post of Assistant Engineer. It is further provided in the said scheme that this promotion would only entitle the person concerned to designation and benefits but his duties and function would remain that of Junior Engineer and that he would be granted promotion by absorption on the post of Assistant Engineer as and when vacancies in that cadre arise.

3. It is submitted by the learned counsel for the petitioner that the petitioner completed 15 years of service in the year 1994, however, his case along with others for grant of benefit under the time bound promotion scheme was considered in the Departmental Promotion Committee which met in the year 1999. In the meanwhile, the petitioner had been served with an adverse entry for the period 1998-1999 and was graded 'D' in the said year and in view of the promotion criteria prevailing in the department, the petitioner was denied the benefit of the time bound promotion scheme as he was not found fit by the committee on account of the fact that he had been awarded 'D' grade in the year 1998-99.

4. The petitioner filed a representation against the denial of benefit under the time bound promotion scheme as well as another representation against the adverse entry relating to the period 1998-99. Both the said representations have been rejected vide impugned orders dated 6-6-2000 and 11-8-2000 respectively and, therefore, the petitioner has approached this Court by filing the present petition.

5. It is submitted by the learned counsel for the petitioner that as per the time bound promotion scheme the petitioner had completed 15 years of service in the year 1994 and, therefore, his service record of the 5 years preceding 1994 should have been considered for the purposes of ascertaining his fitment for grant of benefit under the time bound promotion scheme whereas the respondents have considered his service record of the period of 5 years preceding the date on which the Departmental Promotion Committee met i.e. 5 years preceding the year 1999, as a result of which the 'D' grade adverse entry awarded to him in the year 1998-99 was taken into consideration resulting in denial of benefit under the time bound promotion scheme to the petitioner. The second contention of the learned counsel for the petitioner is that the adverse entry awarded to the petitioner was totally unjustified and the impugned order rejecting his representation against the said adverse entry is non-speaking one and, therefore, the adverse entry as well as the rejection deserves to be set aside.

6. Clauses 1 and 3 of the time bound promotion scheme dated 7-5-99 filed as Annexure P-2, which are relevant for the purpose of the present petition read as under:-

> "1. A Junior Engineer (JE) who has completed 15 years of service including training period should be promoted to the post of Assistant Engineer (AE) subject to fulfillment of criteria of promotion.
>
> 3. In the event of vacancies arising at the level of AE either on account of promotion/retirement or on creation of posts, he would be absorbed against the regular vacancies of AE."

7. From a perusal of the above it is apparent that a Junior Engineer on completion of 15 years of service including training period is entitled to grant of promotion on the post of Assistant Engineer subject to his fulfilling the criteria of promotion. The criteria prescribed for promotion has been filed by the respondents along with the return as Annexures R-2 and R-3. Paragraph 3 of the circular dated 10-3-1975 filed by the respondents as Annexure R-2 prescribes the procedure to be followed for promotion and lays down that the cases of all eligible candidates should be considered for promotion by reviewing their confidential reports for the preceding 5 years and that out of five years Confidential Report, the candidates must have minimum grading of 3 'B' and 2 'C' for becoming eligible for promotion to the next higher post. Annexure R-3 dated 15-4-1996 by which the Madhya Pradesh State Electricity Board (General Service) Regulations, 1952 have been amended provides that the minimum service for promotion to the higher grade is 5 years and the minimum grading for grant of promotion is 3 'B' and 2 'C' in the last 5 years. The words "preceding 5 years" mentioned in Annexure R-2 and the words "last 5 years" mentioned in the 'Minimum Grading in Annual Confidential Report' column of Annexure R-3 are clear indicators of the fact that the authorities are required to consider the record of the the past 5 years immediately preceding the date on which the Departmental Promotion Committee is convened for considering cases of promotion and by no stretch of imagination can it be held to mean the period of 5 years preceding the date the person becomes eligible for grant of promotion on completing 15 years of service. I am inclined to say so as neither promotion nor the benefit under the time bound scheme can be claimed or granted as of right on completing the requisite number of years of service but can be awarded only in case the employee is found fit by the Departmental Promotion Committee as is evident from a perusal of Paragraph 1 of Annexure R-2 filed by the petitioner which clearly states in so many words, that the same procedure which is prescribed for making promotions would be applicable for the purpose of grant of benefit under the time bound promotion scheme.

8. In view of the above, I find no merit in the contention of the learned counsel for the petitioner that the record of the preceding five years that can be considered for the grant of benefit under the time bound promotion scheme relates to and is restricted to a period of five years preceding the date the person completes fifteen years of service even though his case is considered subsequent to the completion of the said period and I am of the considered opinion that the consideration of the record of the preceding 'five years' clearly means five years preceding the date on which the departmental promotion committee is convened.

9. The next contention of the learned counsel for the petitioner is that the impugned order dated 11.8.2000 rejecting the petitioner's representation against the adverse remarks recorded for the period 1998-99 deserves to be quashed as no reasons whatsoever have been mentioned therein.

10. Apparently, the adverse remarks for the relevant period were communicated to the petitioner vide communication dated 2.6.99 and the petitioner was given due opportunity to represent against the said adverse entries. The petitioner vide its detailed representation dated 8.5.2000 approached the authorities for setting aside the said adverse entries and the authorities placed the representation of the petitioner before the Regional Review Committee constituted as per the regulations and instructions prevailing in the establishment of the respondents which has been filed by the petitioner along with the petition as Annexure P-13. The Review Committee duly examined the petitioner's representation and submitted its recommendations to the effect that the adverse remarks deserve to be maintained. The procedure for examination of representation against adverse entries that has been provided in the establishment of the respondents is that a Review Committee constituted by the Board examines the representation and conveys its decision to the head of the office under whom the employee is working and, therefore, apparently the representation of the petitioner was not considered by any individual officer or authority and rejected without assigning any reason, as alleged by the petitioner, but was placed before the Review Committee. The petitioner has not made any allegations to the effect the prescribed procedure for dealing with the representation was not followed or that all the members of the committee were either biased or were in any other way motivated against the petitioner and, therefore, in the circumstances, I am of the considered opinion that a community decision by a Review Committee constituted as per the procedure prescribed cannot be found fault with specifically when it has in so many words examined the opinion of the reporting authority along with the service record of the petitioner and found no fault with the adverse entries recorded by them and has infact agreed with the adverse remarks recorded in the confidential report for the period ending 30-03-1999.

11. In view of the above, I do not find any merit in the petition which is accordingly dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 249
CONTEMPT PETITION
Before Mr. Justice S.K. Seth
13 November, 2007

DR. JYOTI SIMLOT ... Petitioner*
Vs.
M.M. UPADHYAYA & Ors. ... Respondents

Contempt of Courts Act (70 of 1971) - Section 12 - Contempt Jurisdiction must be exercised with scrupulous care only when a clear case beyond reasonable

*Cont. Petition 482/2007 (Indore)

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.' (Paras 3 & 6)

Cur.adv.vult.

ORDER

S.K. SETH, J. :– This petition has been filed for directions against respondents that they should comply with the order of this Court and decide the representation of the petitioner, and further allow her to appear in PG Degree Course Examination, and respondents be punished for non-compliance of the order passed by this Court on 10.5.2007.

2. Relevant facts are as under. Applicant is employed as an Assistant Surgeon. She applied for admission to PG Course as an in-service candidate. In the Pre PG Test conducted by the Professional Examination Board, based upon her merit and ranking, she was offered admission in PG Diploma Course in Obstetrics and Gynecology. After accepting admission, applicant sought switch-over from PG Diploma to PG Degree Course. It was refused by the Director Medical Education vide communication dated 21.9.2005. Therefore, applicant filed W.P. No. 3965 of 2005. Said writ petition along with other connected petitions were decided by a common Order dated 10.5.2007. Applicant, thereafter preferred a representation on 23rd May, 2007 followed by a legal notice dated 27th July, 2007 before filing the present contempt application for taking action non-applicants.

3. After having heard learned counsel for the applicant at length, we do not find any merit and substance in this application.

4. Early man was free to act in any manner he liked. His will to do an act depended upon strength of his limbs. That instinct to prevail over another survives even today in every sphere of life. No society can exist without the laws and laws exist for the welfare of people. Laws have no meaning if they can not be enforced. Since time immemorial, judiciary has enjoyed prestige of the highest order. Slightest disrespect shown to the judiciary and disregard to its judgment and orders amounting to Contempt of Court has always been punishable under the prevailing laws of time. Contempt of Court (which has been irreverently termed "a legal thumbscrew") may be described to be a disobedience to the Court, an opposing or despising the authority, justice or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by process, order or degree of the Court. Before invoking the contempt jurisdiction, one must think twice because in a given fact situation, the contempt jurisdiction could also boomerang or recoil upon the person invoking such jurisdiction. The Contempt jurisdiction must be exercised with scrupulous care only when a clear case beyond reasonable doubt is prima facie made out. Now, in the aforesaid backdrop, we have to examine whether non-applicants have willfully disobeyed the order passed in W.P. No. 3965 of 2005 so as to render themselves liable for civil contempt?

5. Learned Single Judge while deciding the writ petition, in para 12 observed as under :-

> "As per policy of the state Government, it is for the petitioners to submit representation to the State Government narrating the circumstances under which they were not permitted to prosecute their studies for post graduate course and they have to content (sic) with diploma course. If such representation is submitted to the State Government, State Government shall consider their case treating it to be a special case and pass orders regarding further permission to prosecute postgraduate course. It is clarified that under the Admission Rules of Pre P.G. Examination, para 16(4) clearly specifies that a candidate admitted to a particular subject course and college will not be entitled for any change on any ground. In the circumstances of the case, it is not permissible under the rules to switch over from diploma course to postgraduate course. (Emphasis is added.)
>
> 13. As discussed above, petitions are without merit and are dismissed without any orders as to costs."

6. On a bare perusal of the penultimate paragraph of the Order, it is manifest that the Court was alive to fact that once a person is granted P.G. admission in particular subject, course, or college, switch-over was impermissible on any ground. Accordingly no merit was found in the writ petitions and all of them were dismissed. The underlined portion of the Order completely wipes out directions contained in earlier part of para 12 quoted above. In such a situation, non-applicants could not be blamed for not deciding the representation because that would be an exercise in futility. This could probably be one of the reasons for withdrawal of the earlier Contempt Petition moved by the applicant with a liberty to seek appropriate remedy. (See Order dated 14.9.2007 Ann.C/-4). We do not want to go further in this aspect of matter, except to record that this Court frowns upon such gross misuse of Contempt Jurisdiction to overreach the non-applicants in the matter of impermissible switch over from P.G. Diploma Course to P.G. Degree Course.

7. In the result, this petition fails and accordingly it is hereby dismissed summarily.

Petition dismissed.

I.L.R. [2008] M. P., 251
APPELLATE CIVIL

Before Mr. Justice A.M. Sapre & Mrs. Justice Manjusha P. Namjoshi

27 July, 2007

UNITED INDIA INSURANCE CO. LTD. ... Appellant*

Vs.

UMED KUNWARBAI & ors. ... Respondents

Workmen's Compensation Act, (8 of 1923) - Section 3 - Employer's liability for compensation - Deceased working as cleaner/helper on tractor/trolley of

*M.A. No. 3332/2005 (Indore)

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. (Para 9)

Case Referred :

2000 ACJ 801

S.V. Dandwate, for the appellant,
J.M. Punegar, for the respondent Nos. 1 to 4,
S. Verma, for the respondent No. 5.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **A.M. Sapre, J.** :–This is an appeal filed by Insurance Company under section 30 of Workmen's Compensation Act (for short **"the Act"**) against an award dated 17.08.2005 passed by Commissioner in case No.W.C.F.25/01.By impugned award, the Commissioner has partly allowed the claim petition filed by the respondents (claimants) under the Act and has accordingly awarded a total sum of Rs.3,89,000/ - to the claimants for the death of one Lakhan. Facts in brief are these.

2. On 12.09.99, Lakhan a cleaner/helper working on tractor/trolley bearing number MP-09-M-2509/2510 belonging to R1/NA-1 and in his employment on a monthly salary of Rs.4,000/-was going to the field of R-1 in night of 12.09.99 on the said tractor/trolley. It is at that point of time i.e. while he (Lakhan) was going on tractor/trolley alongwith one Santosh, some unknown miscreants came and attacked on Lakhan by sticks. The miscreants then looted money from Lakhan and put the tractor/trolley on fire. They then ran away. In this incident, Lakhan received severe injuries and later succumbed to them. It is this incident, which gave rise to filing of claim petition by the legal representatives of Lakhan (R-1 to 4) under the provision of Workmen's Compensation Act against R-5 (NA 2) i.e.- his employer and appellant herein (NA-2) i.e. Insurer of vehicle in question before Commissioner. It was alleged in the claim petition that accident in question occurred while deceased was in the employment of R-5/NA-2 (Jujhar Singh) and it arose during the course of his employment i.e. while he (deceased) was going on the tractor/trolley in his capacity as cleaner/helper of the vehicle in question. It was, therefore, alleged that claimants being deceased's legal representatives are entitled to claim compensation for the untimely death of Lakhan who died in the course of employment and arising out of employment. It was further alleged that since the accident in question occurred while the vehicle in question i.e. tractor/trolley was in use or/and involved in the incident and hence the claimants are entitled to claim compensation from the Insurer of the vehicle i.e. (appellant company) by taking

recourse to the provisions of Motor Vehicle Act as also under the provisions of Workmen's Compensation Act. The case was contested by the non-applicants i.e. Insured (NA-1) and Insurer (NA-2). Parties adduced evidence. By impugned award, the Commissioner, Workman Compensation partly allowed the claim petition of claimants. It was held that deceased was in employment of NA-1 (Insured) as cleaner/helper and was attending the vehicle belonging to NA-1 at the time of incident. It was held that accident in question occurred during the course of his employment as also arose out of his employment with NA-1 (Insured) and that too when vehicle in question was in use. The Commissioner then worked out the compensation payable to claimants for the death of workman under the provisions of Workmen's Compensation Act and finding that vehicle was insured with appellant, awarded compensation against both i.e. Insurer and Insured. It is against this determination made by Commissioner by impugned award, the Insurance Company i.e. NA-2/Insurer has filed this appeal.

3. Heard Shri S.V. Dandwate, Advocate for appellant and Shri J.M. Punegar, Advocate for respondent No.1 to 4 and Shri S. Verma, Advocate for respondent No.5.

4. Learned counsel for the appellant while assailing the legality of impugned award, contended that the manner, in which the accident is said to have occurred, does not attract the provisions of either Workmen's Compensation Act or Motor Vehicle Act. According to learned counsel, the evidence adduced by the parties would go to show that neither vehicle was involved nor deceased employer whereas the deceased was attacked by mob of some miscreants, which resulted in murder of deceased. Learned counsel, thus, contended that looking to the background in which deceased died, which can be safely construed as a case of murder, no case of any liability arising out of alleged accident can be fastened upon the Insurer of the vehicle i.e. appellant herein under any of the 2 Acts. In reply, learned counsel for respondent supported the impugned award.

5. Having heard the learned counsel for the parties and having perused the record of the case, we find no merit in this appeal.

6. The question as to whether death of Lakhan was a case of murder or a case of sheer accident causing death of Lakhan within the meaning of Motor Vehicle Act or Workmen's Compensation Act need examination on facts, evidence adduced and law governing the field.

7. The law on this subject came up for debate before the Supreme Court in *Rita Devi's case* reported in 2000 ACJ 801 *(Rita Devi Vs. New India Assurance Co.)*. In Rita Devi, a driver of Autorickshaw was found murdered by some unknown killer in the Autorickshaw which he used to drive. It is this incident, which gave rise to filing of claim petition by his legal representatives i.e. driver of Autorickshaw under section 163.A of the Motor Vehicle Act claiming compensation for his death. On these facts, the question arose before the Apex court as to whether claimants are entitled to claim compensation for the death of driver of Autorickshaw from the Insurer and Insured of the Autorickshaw under the provisions of Motor Vehicle Act ? and secondly whether murder in the given case can be regarded as "accident" within the meaning of the expression "death occurred

due to accident arising out of the use of motor vehicle." Answering the question in favour of claimants on the facts involved in that case and laying down the law on the subject, their lordship speaking through Hegde, J. held as under ;

> "10.-The question, therefore, is: can a murder be an accident in any given case ? there is not doubt that 'murder', as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But, there are also instances where murder can be by accident on a given set of facts. The difference between a 'murder' which is not an accident, and a 'murder' which is an accident depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder."
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> 11.-In *Challis V. London and South Western Railway Company,* 91905) 2 KB 154, the Court of Appeal held where an engine driver while driving a train under a bridge was killed by a stone willfully dropped on the train by a boy from the bridge, that his injuries were caused by an accident. In the said case, the court rejecting an argument that the said incident cannot be treated as an accident held:
>
> "The accident which befell the deceased was, as it appears to me, one which was incidental to his employment as an engine driver, in other words it arose out of his employment. The argument for the respondents really involves the reading into the Act of a proviso to the effect that an accident shall not be deemed to be within the Act, if it arose from the mischievous act of a person not in the service of the employer. I see no reason to suppose that the legislature intended so to limit the operation of the Act. The result is the same to the engine driver, from whatever cause the accident happened; and it does not appear to me to be any answer to the claim for indemnification under the Act to say that the accident was caused by some person who acted mischievously."
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> 12.-In the case of *Nisbet V. Rayne and Burn,* (1910) 1 IB 689, where a cashier, while traveling in a railway to a colliery with a large sum of money for the payment of his employer's workmen, was robbed and murdered. The Court of Appeal held:
>
> "That the murder was an 'accident' from the standpoint of the person who suffered from it and that it arose 'out or' an employment which involved more that the ordinary risk, and consequently that the widow was entitled to compensation under the Workmen's Compensation Act, 1906. In this case the court followed its earlier judgment in the case of *Challis V. London and South Western*

Railway Company, (1905) 2 KB 154. In the case of Nisbet, the court also observed that it is contended by the employer that this was not an 'accident' within the meaning of the Act, because it was an intentional felonious act which caused the death, and that the word 'accident' negatives the idea of intention. In my opinion, this contention ought not to prevail. I think it was an accident from the point of view of Nisbet, and that it makes no difference whether the pistol shot was deliberately fired at Nisbet or whether it was intended for somebody else and not for Nisbet."

13.-The judgment of the Court of *Appeal in Nisbet's case* (1910) 1 KB 689, was followed by the majority judgment by the House of Lords in the case of *Board of Management of Trim Joint District School V. Kelly,* 1914 AC 667.

14.-Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the Autorickshaw, was duty bound to have accepted the demand of fare paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the Autorickshaw and in the course of achieving the said object of stealing the Autorickshaw, they had to eliminate the driver of the Autorickshaw then it cannot but be said that the death so caused to the driver of the Autorickshaw was an accidental murder. The stealing of the Autorickshaw was the object of the felony and the murder that was caused in the said process of stealing the Autorickshaw is only incidental to the act of stealing of the Autorickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing the theft of the Autorickshaw.

8. Applying the principles laid down in the above case to the facts of the case in hand, we find that deceased was admittedly in the employment of NA-1 (R-5) as cleaner/helper and was working on vehicle involved in the incident which belongs to NA-2/R-5. It has also come in evidence of PW-1 that at the time of incident, deceased was actually on duty and was going with the tractor/trolley in question with one Santosh, when unknown miscreants made attempt to ransack the tractor, looted money from deceased, assaulted him, put the tractor to fire and then fled away from the scene.

9. In our view on facts as they emerge from evidence, a clear case of accident which resulted in death of Lakhan during the course of his employment and arising out of his employment with the use of vehicle in question is made out. In this case, the act of felony was robbery by miscreants. The ransacking was the object of felony and the beating was caused in the said process of robbery by miscreants to deceased. In other words, the cause of death was incidental to the act of Robbery committed by miscreants with the occupants of tractor/trolley i.e. deceased and Santosh. If the dominant's intention of the act of felony was to kill

deceased and Santosh then such killing would have been held as "murder simpliciter". However, in our view, the act of felony in this case was to commit robbery and its commission wherein the miscreants not only beat the deceased by Lathies and caused him serious injuries but also put the tractor to fire. Therefore, it has to be held that on the facts and circumstances of this case, the death of deceased (Lakhan) was caused accidentally in the process of committing the Robbery while he was going on tractor/trolley as helper/cleaner. We, thus, hold accordingly and uphold the finding of commissioner thereby making Insurer (appellant) and Insured (employer) liable to suffer the liability arising out of accident.

10. Coming to applicability of 2 Acts and award of compensation in such case, the answer can be found in para 15 of the decision rendered in *Rita Devi's case*, which reads as under;

> "15.-Learned counsel for the respondents contended before us that since the Motor Vehicles Act has not defined the word 'death' and the legal interpretations relied upon by us are with reference to definition of the word 'death' in *Workmen's Compensation Act*, the same will not be applicable while interpreting the word 'death' in *Motor Vehicles Act* because according to her, the objects of the two Acts are entirely different. She also contends on the facts of this case no proximity could be presumed between the murder of the driver and the stealing of the Autorickshaw. We are unable to accept this contention advanced on behalf of the respondents. We do not see how the objects of the two Acts, namely, the *Motor Vehicles Act* and the Workmen's Compensation Act are in any way different. In our opinion, the relevant object of both the Acts is to provide compensation to the victims of accidents. The only difference between the two enactment is that so far as the Workmen's Compensation Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapters X to XII of the Motor Vehicles Act is available to all the victims of accidents involving a motor vehicle. In this conclusion of ours, we are supported by section 167 of the *Motor Vehicles Act* as per which provision, it is open to the claimants either to proceed to claim compensation under the *Workmen's Compensation Act* or under the *Motor Vehicle Act*. A perusal of the objects of the two enactments clearly establishes that both the enactments are beneficial enactments operating in the same field, hence judicially accepted interpretation of the word 'death' in Workmen's Compensation Act is, in our opinion, applicable to the interpretation of the word death in the *Motor Vehicles Act* also."

11. In view of foregoing discussion, we are of the view that it was a case of accident and not that of murder simpliciter that resulted in death of Lakhan and since it arose out of his employment and during the course of his employment, Lakhan being workman and died while the vehicle in qua status was in use, the claimants were entitled to seek compensation under any of the 2 Acts holding the field. The claimants having chosen to file a claim petition under the provisions of

Workmen's Compensation Act, no fault can be found in the said approach as the same is in accord with the requirement of section 167 of Motor Vehicle Act, which provides for choosing of the fora out of two remedies available under these Acts having the same beneficial object.

12. Learned counsel for the appellant then made attempt to question the quantum of compensation determined by the Commissioner. We find no merit in this submission. In the first place, Company cannot challenge the quantum. Secondly and assuming that this being an appeal under Workmen's Compensation Act and hence the same can be challenged by the Company. We do not find any such infirmity or/and illegality in the same. An award of Rs.3,89,000/-for the death of a person aged-35 years and drawing a monthly salary of Rs.4,000/-cannot be said to be in any way excessive or against the provisions of Act. We, thus, uphold the determination made by Commissioner and concur with the same calling no interference.

13. As a consequent of foregoing discussion, the appeal is found to be devoid of any merit. It fails and is dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 257

APPELLATE CIVIL

Before Mr. Justice Dipak Misra & Mr. Justice A.M. Sapre

29 August, 2007

MAHANT SHYAMDAS GURU MOHANDAS ... Appellant*

Vs.

LALARAM & ors. ... Respondents

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. (Paras 29 & 30)

Cases Referred :

2007 (1) MPHT 25, AIR 1987 SC 1690, AIR 1977 Gujarat 195, AIR 1954 SC 282, 1980 SC 707, 1954 SC 606, 1977 KLT 303, 1994 (2) TAC 341, 1994 R.N. 130.

R. K. Vyas, for the appellant

A.K. Goyal, for the respondents

Cur.adv.vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J.:– In this appeal preferred under Section 173 of the Motor Vehicles Act, 1988 [for brevity 'the Act' substantiality and legal acceptability of the Award

*M.A. 159/1998 (Indore)

passed by the Additional Motor Accident Claims Tribunal, Sonkutch, District Dewas [for short 'the tribunal'] in Claim Case No.99/97 dated 30.09.1997 is called in question by the claimant/appellant [hereinafter referred to as 'the claimant'].

2. The facts which are imperative to be exposited for adjudication of this appeal, in essence, are that Mahant Harnamdasji was proceeding to Allahabad from Indore along with other Sadhus and his Guru Mahant Poorandas on 08.01.1995 in a Jeep bearing registration No.MP-09 H-4768. The first respondent, Lalaram, the driver of the Jeep due to his rash and negligent driving lost control over the vehicle as a consequence of which the same got dashed against a 'Palash' tree. In the accident Harnamdas breathed his last on the spot. One Devchandra sustained injuries and eventually expired on 15.01.1995 at Choithram Hospital, Indore.

3. The claimant, Mahant Shyamdas, initiated an action under Section 166 of the Act contending, inter alia, that he was the "Guru Bhai", the spiritual brother of deceased Harnamdas who was earning about Rs.20,000/-per year from donation and from performance of religious rites and rituals. It was put forth that the claimant had performed the funeral rites of said Harnamdas and immense loss had been caused to him inasmuch as he had lost his source of sustenance and also suffered mental agony. On the aforesaid base he claimed compensation for a sum of Rs.5,60,000/-.

4. The aforesaid claim of the claimant/appellant was resisted by the respondent insurer on the foundation that the claim put forth by the claimant was bound to founder as the application preferred by him was not maintainable, for the claimant is not the legal representative of deceased Harnamdas and further Harnamdas was a gratuitous passenger in the Jeep. That apart, a stand was taken that the driver had no license and there had been breach of terms and conditions of the policy.

5. On the basis of the pleadings on record, the tribunal addressed to the issues whether the accident had occurred due to the negligence of the driver of the vehicle in question and in the said accident the deceased died; whether the claimant could be treated as the legal representative and successor of the deceased; whether the terms and conditions of the insurance policy had been violated to absolve the insurer from the liability; and whether the claimant is entitled in law to get compensation and if so, what could be the resultant quantum.

6. On delineation on the aforesaid spectrums and in the backdrop of material brought on record, the tribunal came to hold that the accident had occurred due to the rash and negligent driving of the first respondent; that Mahant Harnamdas had died in the accident; that there had been no breach of terms and conditions of the policy; and that the claimant is the successor and legal representative of Harnamdas and hence, is entitled to compensation; that Harnamdas was sixty-eight years of age; that the claimant had not been able to prove any major damage caused to the Ashram of which said Harnamdas was the Mahant; that the appellant Mahant Shyamdas has suffered mental agony; and that he is entitled to receive Rs.50,000-00 towards compensation. Be it noted the Tribunal had also directed that the aforesaid amount would carry interest at the rate of 12% p.a. from 19.06.1995 till the date of payment.

7. Assailing the soundness of the award, it is contended by Mr. R. K. Vyas, learned counsel for the appellant that the award passed by the tribunal is absolutely faulty inasmuch as the tribunal has not computed the loss sustained by the claimant despite returning a finding that he was the legal representative of Guru Harnamdas, the deceased. It is his further submission that the tribunal has fallen into grave error by not considering the factum that deceased was earning Rs.20,000-00 per year and on that basis the tribunal would have been well advised to compute the compensation. It is propounded by Mr. Vyas that the tribunal has not granted any amount towards the mental agony, the rituals performed, the funeral rites carried out and all such other aspects and passed an award of Rs.50,000-00 on the ground of no fault liability which is impermissible in the obtaining factual matrix when the findings as regards the legal representative and entitlement have been recorded in favour of the claimant.

8. Mr. S. V. Dandwate learned counsel appearing for the third respondent, the insurer, submitted that the finding of the tribunal with regard to entitlement of the appellant is sensitively vulnerable and, therefore, the question of enhancement of compensation does not ensue. It is urged by him that the insurer has not thought it apposite to prefer any appeal as the tribunal has awarded a sum of Rs.50,000-00 on the bedrock of no fault liability but on a keener scrutiny it is quite vivid that the claimant has miserably failed to establish his right to get compensation under the Act. It is canvassed by Mr. Dandwate that the manner in which the concept of legal representative has been dealt with by the tribunal is far from being satisfactory and it does not deserve acceptance in the remotest way and hence, this Court should decline to interfere with the award for the purpose of enhancement. Learned counsel's further proponement is that the finding with regard to the status of the appellant being neither correct nor sound, the respondent-insurer, though has not preferred any appeal, can challenge it without filing the cross-objection and this Court should address itself on that score to put the controversy to rest.

9. To appreciate the rival submissions raised at the bar, we have bestowed our anxious consideration and scrutinized the award and the material brought on record.

10. Three questions emanate for consideration in this appeal. First, whether the tribunal is justified in treating the claimant as the legal representative of the deceased; second, whether this Court at this juncture can delve into and dwell upon the same; and third, whether the amount of compensation that has been awarded is just and proper under the provisions of the Act.

11. It is unnecessary to emphasize that the first two issues are interlinked and for the sake of putting the controversy to rest and to have the lis adjudicated in the completest sense, we are disposed to address to the facet of entitlement as the legal representative on merits. That apart, the learned counsel for the parties have also addressed us on the said score.

12. To have the apposite deliberation it is necessitous to refer to certain provisions of the Act. Section 166 reads as under :

> "166. **Application for compensation.**--(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made-

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

13. Section 168 of the Act is as follows:

"168. Award of the Claims Tribunal-

On receipt of an application for compensation made u/s 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of Section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:

Provided that where such application makes a claim for compensation u/s 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect such death or permanent disablement shall be disposed of in accordance with the provisions of chapter X.

(2) The claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of 15 days from the date of the award.

(3) When an award is made under this Section, the person who is required to pay any amount in terms of such award, shall within 30 days of the date of announcing the award by the Claims tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

14. On a perusal of the aforesaid provisions, it is luminiscent that compensation can be claimed by all or any of the legal representatives of the deceased and all the legal representatives are required to be impleaded as respondents and the tribunal has the duty to grant just compensation specifying the person or persons

to whom the compensation is payable in the case at hand the claimant in his application under Section 166 of the Act has asseverated that he is the Guru Bhai of deceased Harnamdas. He has deposed that he and Harnamdas are pupils of Guru Mahantdas and Mohandas and both of them are residing together at Sindwida Ashram. He has claimed cult inheritance by such assertion. Thus, in quintessentiality, the claimant has put forth his claim on the bedrock that he is in the category of brother of the deceased and, therefore, is entitled to compensation.

15. Section 166 of the Act came to be intrepreted by a Full Bench of this Court in *Smt. Bhagwati Bai and another vs Bablu @ Mukund and others* 2007 (1) MPHT, 25 (Full Bench), wherein the learned Chief Justice speaking for the Court has stated thus:

> " A reading of sub-section (1) (a) of Section 166 of the Motor Vehicles Act, 1988, would show that only a person who has sustained the injury, can file an application for compensation. Further a reading of sub -section (1)(d) of Section 166 would show that any agent duly authorised by the person injured can also file such application for compensation for injury suffered by such person. Sub-section (1) © of Section 166 provides that where death has resulted from the accident, all or any of the legal representatives of the deceased can file an application for compensation and sub-section (1)(d) of Section 166 provides that a legal representative of the deceased can also file claim where death has resulted from the accident. Thus, in a case of personal injury not resulting in deaths of the legal representative of such person who was injured and who dies subsequently not on account of accident but for some other reason cannot maintain an application for compensation for personal injury sustained in an accident under sub-section (1) of Section 166 of the Motor Vehicles Act, 1988."

16. Before we advert to the realm whether 'GURUBHAI' can be regarded as a brother for the purpose of maintaining a claim petition under Section 166 of the Act, it is appropriate to refer to a two Judge Bench decision of the Apex Court rendered in *Gujarat State Road Transport Corporation, Ahmedabad v/s Ramanbhai Prabhatbhai and another,* AIR 1987 SC 1690. In the aforesaid case, the question that emerged for consideration is whether the brother of a person who is killed in a motor vehicle accident can claim compensation in a proceeding instituted before a Motor Accident Claims Tribunal established under the Provisions of the Motor Vehicle Act, 1939. Their Lordships referred to the Fatal Accidents Act, 1846 the initial reformative legislation enacted by British Parliament the Fatal Accidents Act, 1955 which came to be passed on 27th of March, 1855 for India, the recommendations of the British Royal Commission, the Fatal Accidents Act, 1959, the 85th Report of the law Commission of India on claims for compensation under Chapter VIII of the Act on which the Parliament declined to take any action which is suggestive of the intendment to confer wider meaning on the expression 'legal representative' and took note of the fact that when the Fatal Accidents Act, 1855 was enacted there were no motor vehicles

on the roads in India; that roads have been rendered by the use of the motor vehicles highly dangerous; that "Hit and run" cases were increasing in number and thereafter analysing the concept of taking insurance policy under the 1939 Act and scanning the anatomy of various provisions of 1939 Act eventually expressed the view as follows:

> "Clauses (b) and (c)of sub section (1) of Section 110-A of the Act provide that an application for compensation arising out of an accident may be made where death has resulted from the accidents by all or any of the legal representatives of the deceased or by any agent duly authorized by all or any of the legal representatives of the deceased. The proviso to sub-section (1) of Section 110-A provides that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined shall be impleaded as respondents to the application. The expression "legal representative" has not been defined in the Act. Section 2(11) of the Code of Civil Procedure 1908 defines 'legal representative' as a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The above definition, no doubt, in terms does not apply to a case before the Claims Tribunal but it has to be stated that even in ordinary parlance the said expression is understood almost in the same way in which it is defined in the Code of Civil Procedure. A legal representative ordinarily means a person who in law represents the estate of a deceased person or a person on whom the estate devolves on the death of an individual. Clause (b) of sub-section (1) of Section 110A of the Act authorizes all or any of the legal representatives of the deceased to make an application for compensation before the Claims Tribunal for the death of the deceased on account of a motor vehicle accident and clause © of that sub-section authorizes any agent duly authorized by all or any of the legal representatives of the deceased to make it. The proviso to subsection (1) of Section 110-A of the Act appears to be of some significance. It provides that the application for compensation shall be made on behalf of or for the benefit of all the legal representatives of the deceased. Section 110-A (1) of the Act thus expressly states that (i) an application for compensation may be made by the legal representatives of the deceased or their agent and (ii) that such application shall be made on behalf of or for the benefit of all the legal representatives. Both the person or persons who can make an application for compensation and the persons for whose benefit such application for compensation can be made

are thus indicated in Section 110-A of the Act. This section in a way is a substitute to the extent indicated above for the provisions of Section 1-A of the Fatal Accidents Act, 1855 which provides that "every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased". While the Fatal Accidents Act, 1855 provides that such suit shall be for the benefit of the wife, husband, parent and child of the deceased. Section 10-A (1) of the Act says that the application shall be made on behalf of or for the benefit of the legal representatives of the deceased. A legal representative in a given case, need not necessarily be a wife, husband, parent and child. It is further seen from Section 110-B of the Act that the Claims Tribunal is authorized to make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid. This provision takes the place of the third paragraph of Section 1-A of the Fatal Accidents Act, 1855 which provides that in every action, the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. Persons for whose benefit such an application can be made and the manner in which the compensation awarded may be distributed amongst the persons for whose benefit the application is made are dealt with by Section 110-A and Section 110-B of the Act and to that extent the provision of the Act do supersede the provisions of the Fatal Accidents Act, 1855 in so far as motor vehicles accidents are concerned. These provisions are not merely procedural provisions. They substantively affect the rights of the parties. As the right of action created by the Fatal Accidents Act, 1855 was "new in its species, new in its quality, new in its principles, in every way new" the right given to the legal representatives under the Act to file an application for compensation for death due to a motor vehicle accident i equally new and an enlarged one. This new right can not be hedged in by all the limitations of an action under the Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies."

17. It is worthy to note that the Apex Court approved the view taken in the case of *Megitbhai Khimji Vira and another v/s Chaturbhai and Ors.* AIR 1977 Gujarat 195 and observed that the said view is in consonance with the principles of justice, equity and good conscience having regard to the conditions of the Indian society inasmuch as every legal representative who suffers on account of death of a person due to motor vehicle accident should have a remedy for realization of compensation and that is provided under Sections 110-F of 1939 Act. In that context, the Apex Court proceeded further to lay down :

> "The determination of the compensation payable and its apportionment as required by Section 110-B of the Act amongst the legal representatives for whose benefit an application may be filed under Section 110-A of the Act have to be done in accordance with well-known principles of law. We should remember that in an Indian family brothers, sisters and brothers, children and sometimes foster children live together and they are dependent upon the bread winner of the family and if the bread winner is killed on account of a motor vehicle accident, there is no justification to deny them compensation relying upon the provisions of the Fatal Accidents Act, 1855 which as we have already held has been substantially modified by the provisions contained in the Act in relation to cases arising out of motor vehicles accidents. We express our approval of the decision in Megitbhai *Khimji Vira and another v/s Chaturbhai and ors.* (supra) and hold that the brother of a person who dies in a motor vehicle accident is entitled to maintain a petition under Section 110-A of the Act if he is a legal representative of the deceased."

18. As it manifest, the Apex Court has given a wider meaning to the words 'legal representative' that occurred in Section 110-A of the Act. The same is the position under the 1988 Act. Thus, there is no shadow of doubt that a brother can maintain an application for grant of compensation and at his instance the claim petition is entertainable.

19. The gravamen of the matter is whether the claimant who is not a natural relative of the deceased can be treated as a brother for the purpose of being brought under the penumbra of legal representative under the Act. It is submitted by Mr. Vyas that that religious order has its own sacrosanctity and the conception of spiritual brotherhood has been traditionally received acceptation in many parts in India. It is urged by him that charitable trusts and endowments are created and math or debutter is quite in harmony and tune with the Indian religious philosophy.

20. In this context we may fruitfully refer to the fundamental conception of religion. The term 'religion' has not been defined. The Apex Court in *Commissioner, Hindu Religious Endoments V/s L.T. Swamiar,* AIR 1954 SC 282 has observed as under:

> "Religion' is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Budhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual wells being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for sits followers to accept, sit might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. (AIR 1954 SC, 282)"

21. B.K. Mukherjea,J. in his Tagore Law lecture of Hindu Law of Religion and Charitable Trusts had spoken thus :

> "Now religion is absolutely a matter of faith of individual or communities and does not necessary theistic (e.g. Buddhism). All that we understood by religious purpose is that the purpose or object is to secure the spiritual well being of a person or persons according to the tenets of the particular religion which he or they believe in. This may imply belief in a future state of existence where a man reaps the fruits of his pious act done in this world and it may be connected with the idea of atonement for past errors of a man and that of making peace with his maker."

22. V.K. Varadachari in his book "The Law of Hindu Religious and Charitable Endowment has observed thus:

> "Temples and Matts are two principal institutions of the Hindu religion system. They supplement each other in regard to the spiritual welfare of the persons belonging to that system. While temple afford opportunities for prayer to adoration of the super Being in His various manifestations Mutts exist chiefly for importing of spiritual instructions by preceptors.

23. In *Krishna Singh v/s Mathura Ahir* AIR 1980 SC, 707 the Apex Court while dealing with concept of 'Math' has expressed thus:

> 'Math' means a place for the residence of ascetics and their pupils, and the like. Since the time of Sankaracharya, who established Hindu maths, these maths developed into institutions devoted to the teaching of different systems of Hindu religious philosophy, presided over by ascetics, who were held in great reverence as religious preceptors, and princes and noblemen endowed these institutions with large grants of property. Dr. Bijan Kumar Mukherjea in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trusts, 4th ed., p.321 succinctly states:
>
> 'Math' in ordinary language signifies an abode or residence of ascetics. In legal parlance it connotes a monastic institution presided over by a particular order who generally are disciples or co-disciples of the superior."

24. In this context we may refer with profit to the decision rendered in *Sital Das v/ s Sant Ram and Ors*. AIR 1954 SC 606 wherein the Apex Court has ruled that:

> "It is well known that entrance into a religious order generally operates as a civil death. The man who becomes an ascetic severs his connection with the members of his natural family and being adopted by his preceptor becomes, so to say a spiritual son of the latter. The other disciples of his Guru are regarded as his brothers, while the so-disciples of his Guru are looked upon as -uncles and in this way a spiritual family is established on the analogy of a natural family."

25. In *Krishna Singh v/s Mathura Ahir* (supra), their Lordships have opined as follows :

> "The property belonging to a 'math' is in fact attached to the office of the mahant, and passed by inheritance to no one who does not fill the office. The head of a math, as such, is not a trustee in the sense in which that term is generally understood, but in legal contemplation he has an estate for life in its permanent endowment and an absolute in the income derived from the offerings of his followers, subject only to the burden of maintaining the institution. He is bound to spend a large part of the income derived from the offerings of his followers on charitable or religious objects. The words "the burden of maintaining the institution must be understood to include the maintenance of the math, the support of its head and his disciples and the performance of religious and other charities in connection with it, in accordance with usage; See *Sammantha Pandara v/s Sellappa Chetti* (1879) ILR 2 Mad. 175; *Giyana Sambanda Pandara Sannadhi v/s Kandasami Tambiran* (1887)ILR Mad 375; *Vidyapurna Tirtha Swami v/s Vidyanidhi Tritha Swami* (1904) ILR 27 Mad 435; *Kailasam Pillai* v/s *Natraja Thambiran* (1910) ILR 33 Mad 265; *Ram Prakash Das v/s Anand Das* (1916) 43 Ind.App. 73 (PC) and *Vidya Varuthi Tirtha v/s Baluswami Iyer,* LR (1921) 48 Ind.App 302 (PC). From these principles, it will be sufficiently clear that a math is an institutional sanctum presided over by a superior who combines in himself the dual office of being the religious or spiritual head of the particular cult or religious fraternity and of the manager of the secular properties of the institution of the math. In the instant case, the evidence on record sufficiently establishes that a math came to be established at Garwaghat and the building known as "Bangla Kuti" and certain other buildings including the house in suit constituted the endowment of the math itself."

26. In *Mother Superior Adoration Convent Ranjijammatom v/s D.E.O. Kottayam* 1977 KLT, 303 the Bench after referring to the decision rendered in *Shitaldas* (supra) has held as under :

> "This being the general consequence of becoming a monk or nun and joining the Holy Order it has to be taken that with the taking of the perpetual vow the person concerned ceases to have any connection with the members of the natural family. So far as the natural family is concerned, the woman is taken as dead and therefore her parents and other members specified in Rule 79, Part.III KSR are not taken as blood relations thereafter. Consequently even though such category of persons are alive, the legal effect of a person becoming a nun is that she cannot thereafter be considered as having a father or mother or other relatives mentioned in Rule 79."

27. A Division Bench of Kerala High Court in *Oriental Insurance Co. Ltd. Vs. Mother Superior S.H.Convent* 1994 (2) TAC 341 after referring to the decision in *Mother Superior, Adoration Convent Ranjiramattom v/s D.E.O. Kottayam* (Supra) has held as under:

> "The deceased joined the Holy Order of the Sacred Heart Congregation after renouncing her natural family. As soon as she professed the perpetual vow she ceased to be a member of her natural family and became a member of the Holy order. She had embraced a life of poverty, chastity and obedience. The convent became her family and the Mother Superior became the head of the family as well as her legal representative. All her income by way of her salary and other benefits will devolve on the convent of which the Mother Superior is the Administrator. Therefore, the Mother Superior being the head of the convent is entitled to claim compensation on account of the death of the deceased."

28. In *Narmadanand v/s Board of Revenue MP Gwalior and Ors.* (1994 R.N. 130) a Division Bench of this Court has held as under:

> "As per Mitakshara Succession under the Hindu Law, the heir to the property of a hermit (Vanaprashtha) is his spiritual brother belonging to the same hermitage, to that of an ascetic (Sanyasi) a virtuous pupil, and to that of a student in theology (Brahmachari) his religious preceptor. These heirs are entitled to succeed in preference to the kindred of the deceased. In default to kindred, the property of a deceased Hindu, who became an ascetic (hermit), even though he be a Sudra, passess to his preceptor; if there be no preceptor, to his disciple; and if there be no disciples to his fellow student. In determining who is the preceptor, a disciple or a fellow student, the Court will only consider the imparting of purely religious instruction. Entrance of a Hindu into a religious order generally operates as a civil death. The man who becomes an ascetic severe his connection with the members of his natural family and being adopted by his preceptor becomes, so to say, a spiritual son of the latter. The other disciples of his Guru are are regarded as his brothers, while the co-disciples of his Guru looked upon as uncles and in this way a spiritual family is established on the analogy of a natural family. (See 590 of Chapter 16 of the Mayne's Hindu Law & Usage - 13th Edition).

29. From the aforesaid annunciation of law it is clear as noon day that if a man becomes ascetic and severes all connection with his natural family he becomes the spiritual son of his preceptor and the other disciples of his Guru become his brothers. The whole relationship gets converted to a spiritual relationship. The concept of inheritance is recognised in the religious order and that makes disciples of same Guru as brothers. Be it noted, every Gurubhai cannot become a spiritual brother unless he satisfies the fundamental requirements i.e. becoming an ascetic and severing his connections with his natural family. It is not out of place to take note of the fact that there are many people belonging to a particular cult or sect

who call each other "Gurubhai", when they are 'Grahsthis'. They do not segregate their connections with the family. Their mere calling each other Gurubhai, because of a common Guru would not make them spiritual brothers to put forth a claim as 'legal representatives'. There has to be a distinction between the two categories. There are two 'Ashrams' namely 'Purvaashram' and 'Parasharam' whereby the concept of natural pedigree is lost and there is civil death of the person concerned. Unless that is proven he can not be conferred the status of a legal representative.

30. In the case at hand there is evidence that claimant was residing in the Ashram. He has changed his name in the traditions of the 'Math'. He has no connection with his natural family. There has been no cross-examination that he had any link with the natural family. In the absence of that we are of the considered opinion that he is the spiritual brother or Gurubhai of the deceased and, therefore, is entitled to maintain an application as legal representative as engrafted and envisaged under Section 166 of the Act.

31. Once we have held that the claimant is entitled to maintain the application, the computation has to follow. The tribunal has recorded the finding that income of the deceased was Rs.20000/-per year. It has also been held that no damage has been done to the activities of Ashram. Be that as it may, calculation has to take place on the basis of the loss of contribution and entitlement. We are disposed to think that the claimant would be entitled Rs.12000/-per year. Multiplier of 5 would be applicable. Thus, the amount of compensation would come to Rs.12000/-x 5 = Rs.60,000/-. To the aforesaid amount we shall add a sum of Rs.4,500/-on two heads, namely, loss of estate and funeral expenses. Ergo, the claimant would be entitled to get 64,500/-in toto. The differential sum shall carry interest at the rate of 6 % per annum from the date of presentation of the application till the date of payment.

32. Consequently, the appeal is allowed in part. However, in the facts and circumstances of the case, there shall be no order as to costs.

Appeal partly allowed.

I.L.R. [2008] M. P., 268
APPELLATE CIVIL
Before Mr. Justice Arun Mishra
15 October, 2007

HARIHAR SINGH ... Appellant*
Vs.
MST. DILAU & anr. ... Respondents

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.

*M.A. 801/1998 (Jabalpur)

First coming to the question whether contractor was given the work of maintenance of transformer. The Commissioner for Workmen's Compensation has considered the aforesaid aspect in Para 24 of the order and as apparent from Ex. D-1 to D-3 that contract for maintenance was given to the contractor by NCL. Work of maintenance of transformer which include painting etc. was given to Hari Singh as such the stand taken by the contractor as well as NCL that deceased was not in the employment and contract was not given has been rightly rejected by the Commissioner for Workmen's Compensation. The work of maintenance of transformer was necessary to be performed so as to carry on the the trade or business of principal. Thus, it has to be considered ordinarily part of trade or business of principle. Without maintenance of transformer it was not possible for the NCL to make production of coal.

In view of the aforesaid subsection (1) of section 12, it is clear that principal employer NCL also cannot escape the liability to make the payment of compensation. Thus, liability is also to be borne by principal employer. (Para 8)

Y.P. Sharma, for the appellant

Anoop Nair with *Ms. Surbhi Nigam*, for the respondents no. 2.

Cur.adv.vult.

ORDER

ARUN MISHRA, J. :–The appeal has been preferred by the contractor aggrieved by order dated 15.5.1998 passed by Commissioner for Workmen's Compensation in Case No. 2/96/WC Act (fatal).

2. Mst. Dilau filed a petition claiming compensation on account of death of her son Vidyapati who was a workman employed by Harihar Singh, contractor. While maintaining the transformer in electric substation in the workshop of Northern Coal Fields Ltd., he was subjected to electric shock due to that he died, consequently compensation of Rs. 1,20,160/- and penalty was claimed.

3. The Northern Coalfields Ltd. in its reply denied the claim on the ground that deceased was not in their employment. Harihar Singh was also not employed as a contractor. No permission was granted to maintain the transformer as such it was not liable.

4. The contractor also denied the claim. Deceased was not in his employment as such petition be dismissed against him.

5. The Commissioner for Workmen's Compensation has found that Vidyapati died while maintaining the transformer. He was employed by Harihar Singh. The Commissioner for Workmen's Compensation has awarded compensation of Rs. 89,084/- along with the interest @ 6% per annum from the date of filing of the claim petition till realization. Dissatisfied with the same, contractor has come up in the appeal.

6. Shri Y.P.Sharma, learned counsel appearing on behalf of appellant has submitted that there is finding recorded by the Commissioner for Workmen's Compensation that Vidyapati died while maintaining the transformer and the contract for maintenance was given to the contractor. In view of the aforesaid

finding considering section 12(1) of Workmen's Compensation Act, 1923 the Commissioner for Workmen's Compensation ought to have saddled the liability upon the principal employer also.

7. Shri Anoop Nair, learned counsel appearing on behalf of Northern Coalfields Ltd. has submitted that deceased was not in the employment of NCL. Contract was also not given to Hari Singh, thus the NCL could not be said to be the principal employer in the facts of the instant case.

8. First coming to the question whether contractor was given the work of maintenance of transformer. The Commissioner for Workmen's Compensation has considered the aforesaid aspect in Para 24 of the order and as apparent from Ex. D-1 to D-3 that contract for maintenance was given to the contractor by NCL. Work of maintenance of transformer which include painting etc. was given to Hari Singh as such the stand taken by the contractor as well as NCL that deceased was not in the employment and contract was not given has been rightly rejected by the Commissioner for Workmen's Compensation. The work of maintenance of transformer was necessary to be performed so as to carry on the the trade or business of principal. Thus, it has to be considered ordinarily part of trade or business of principle. Without maintenance of transformer it was not possible for the NCL to make production of coal. Section 12(1) is quoted below :-

> "12. Contracting.-(1) Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor for the execution by or under the contract of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he could have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed."

In view of the aforesaid subsection (1) of section 12, it is clear that principal employer NCL also cannot escape the liability to make the payment of compensation. Thus, liability is also to be borne by principal employer.

Resultantly, the appeal is allowed in part to the aforesaid extent. No costs.

Appeal allowed in part.

I.L.R. [2008] M. P., 271
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
30 October, 2007

SMT. SHASHI AGRAWAL ... Appellant*
Vs.
RAM CHANDRA AGRAWAL ... Respondent

Civil Procedure Code, (5 of 1908) - Order 41 Rule 5, Order 41 Rule 5 (3)(c) - Stay by Appellate Court - Respondent filed suit for declaration that he has 2/3rd share in property, partition, separate possession and mesne profits - Suit was decreed holding respondent has 2/3rd share in property and also for separate possession but suit for mesne profits dismissed - 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 (Paras 10 & 12)

Case Referred
(2007) 3 SCC 151.

R.K. Verma, for the appellant.
A.K. Jain, for the respondent.

Cur.adv.vult.

ORDER

U.C. MAHESHWARI,J.:–This order shall decide IA No.3599/07, appellant's application under Order XLI rule 5 of the CPC for grant of stay against the execution of the impugned decree and IA No.10254/07, respondent's application under Order XLI rule 5(3)(c) of the CPC for imposing some conditions on granting the stay against the execution of the impugned decree.

2. The facts which are necessary to adjudicate the aforesaid I.As in brief are that in respect of House No.739 and 739/1 (New No.880) situated in Maratal, Ram Manohar Lohiya Ward, Jabalpur, the respondent herein filed a suit against the appellant seeking declaration to declare him to be the owner of 2/3rd share in it with a prayer of its partition, separate possession and mesne profits. As per the case of the respondent, initially the aforesaid house was purchased jointly by the respondent, his brother Krishna Kumar and father Rameshwar Prasad vide registered sale deed dated 1.5.1972, since then the respondent was the co-owner of the property along with the father and brother. Subsequently, his father Rameshwar Prasad bequeathed his share to the appellant by way of Will dated 7.12.1985 and, on his demise, the appellant became the owner of the 1/3rd share of the said house, while the brother Krishna Kumar transferred his right in favour of the respondent by a registered document dated 25.9.1995. Accordingly, he became the owner of 2/3rd share of the aforesaid house. In such premises, the

*F.A. 226/2007 (Jabalpur)

respondent filed the aforesaid suit for obtaining separate possession of his 2/3rd share. Such suit was contested by the appellant on various grounds including that it was the sole property of Rameshwar Prasad and the name of the respondent and Krishna Kumar was mentioned in the document only on account of love and affection. Hence, in view of the exclusive property of Rameshwar Prasad, his other legal representatives are also having the share in it, and without impleading them as a party to the suit, neither the suit can be entertained nor the same can be decreed.

3. After holding the trial, on appreciation of the evidence, the suit of the respondent has been decreed by the trial court by holding his 2/3rd share in such house. The decree has also been passed for giving separate possession to the respondent but the suit was dismissed on the question of mesne profits. Such preliminary decree is under challenge at the instance of the appellant/defendant.

4. In pendency of the appeal, the appellant filed an application IA No.3599/07 for grant of stay against the execution of the impugned decree contending the above mentioned facts, on which she contested the matter in the trial court. It is also pleaded that she is in possession of 1/3rd share in it on the strength of the aforesaid Will, while the 2/3rd share of it, being the property of deceased Rameshwar Prasad Agrawal, the interest of other legal representatives is also involved in it and the impugned decree has been passed without impleading such legal representatives. In this premises, prayer for grant of stay against the impugned decree is made.

5. While, on the other hand, in IA No.10245/07 on behalf of the respondent, it is contended that in the disputed premises, the hotel business is being run in the name and style of Standard Hotel. As per findings of the trial court the appellant being in possession of the entire premises is getting profit by running the hotel business, whereas she is not entitled to enjoy the entire property except the 1/3rd share of it. In view of the decree of the trial court in favour of the respondent, by staying the same, the respondent should not be deprived to get the fruits of the decree and on staying the same, keeping in view the locality of the house and the hotel business of the appellant in it, in order to protect the interest of the respondent, the appellant be directed to deposit Rs.15,000/- per month and also the adequate security to abide the probable decree which would be passed against her in this appeal.

6. It appears from the record that both the parties have not replied the applications of each other but the same are supported by the affidavits of the respective parties.

7. While arguing the case, Shri R.K.Verma, learned appearing counsel for the appellant said that various legal questions are involved in this appeal and till their adjudication, the possession of the appellant over the property should be protected by grant of stay against the execution of the impugned decree otherwise the appellant will have to suffer irreparable injury. He further said that the claim of the respondent regarding mesne profit has already been dismissed by the trial court. Thus, no direction for depositing any sum in respect of the mesne profit or otherwise could be passed against the appellant. He also said that the alleged

hotel business is not being run by the appellant in the said premises and prayed for allowing his application for grant of stay by dismissing the application of the respondent.

8. On the other hand, Shri A.K.Jain, leanred counsel appearing on behalf of the respondent, while responding the aforesaid arguments said that after passing the decree by the trial court in his favour, he cannot be deprived to get its fruits by granting the stay against its execution without imposing any terms and conditions against the appellant. In any case, in view of the clear findings of the trial court, in order to protect the interest of the respondent regarding 2/3rd share of the property, while granting the stay as prayed by the appellant, she should be directed to deposit Rs.15000/- per month as damages or the mesne profits as she is earning Rs.25000/- per month by running the hotel business in said premises. He placed his reliance on a reported case of the Apex Court in the matter of *Pabbathi Venkataramaiah Chetty Vs. Pabbathi N. Rathnamaiah Chetty and others*- (2207) 3 SCC 151 and prayed for dismissal of the appellant's application. In the alternative he prayed for imposing the aforesaid conditions while granting the stay as prayed by the appellant.

9. Having heard the counsel, on perusing the record and the impugned judgment, it appears that the alleged house was purchased by the respondent, his brother Krishna Kumar and father Rameshwar Prasad and they being joint owners had equal share in it. Subsequent to it, the appellant acquired the title of 1/3rd share in it by virtue of a Will executed by Rameshwar Prasad and the share of Krishna Kumar was acquired by the respondent vide some registered document, and in such premises, the trial court has decreed the suit of the respondent by holding his 2/3rd share in it with a direction for its separate possession.

10. I am of the view that during pendency of the lis, in the present circumstances, the possession of the appellant should be protected till disposal of the appeal but on the other hand, the court is duty bound to protect the interest of the respondent/ decree holder who will not be in a position to get the fruits of the impugned decree after staying the same by this court.

11. It appears from the record that in the aforesaid premises, some hotel business is being run by or on behalf of the appellant. The house is also situated in the prime and commercial locality of the Jabalpur, hence the execution of the impugned decree could be stayed only subject to some terms and conditions and not otherwise. The aforesaid question is answered by the Apex court in the matter of *Pabbathi Venkataramaiah Chetty* (supra), in which it is held as under :-

> "4. This appeal arises from an interim order of the High Court. The appellant herein has filed an appeal against the final decree in a suit for partition. In the said appeal, he sought stay of execution of the final decree, which required division of a commercial building which is in the occupation of the appellant who is running a lodge therein. The High Court, considered the application for stay filed by the appellant and made an order dated 1-9-2006 directing that the appeal itself should be listed for final hearing after Dussehra vacation and till then, the building shall not be demolished.

5. The said order is under challenge. The learned counsel for the appellant submits that he is in possession of the suit premises and his prayer was for interim stay of dispossession as he is running a lodge and an order of stay of demolition will not, therefore, protect his rights, pending appeal. On the other hand, the learned counsel for the first respondent submitted that the appellant has been enjoying the suit premises and though the first respondent is entitled to two-third share therein, he has been kept out of possession and he is also not receiving any income therefrom. It is not in dispute that the appellant is running a lodge in the suit premises. The appeal against final decree filed before the High Court may become infructuous if stay of dispossession is not granted. But at the same time, the interests of the first respondent require to be protected. The learned counsel for the first respondent estimates the minimum loss to his client as Rs 25,000 per month.

6. Having regard to the facts and circumstances, interests of justice would be served if the appellant is directed to pay to the first respondent Rs 25,000 (Rupees twenty-five thousand) per month unconditionally during the pendency of the appeal."

12. In view of the aforesaid circumstances and the dictum of the Apex court, I dispose of aforesaid both the applications on the following terms:-

(a) Subject to depositing Rs.10,000/- (Rs. Ten Thousand) per month with the trial court/executing court by the appellant from the month commencing 01.02.2007, the execution of the impugned decree shall remain stayed till disposal of this appeal. The past arrears amount shall be deposited within six months while the recurring monthly amount shall be deposited within 15 days from the commencement of the succeeding month as per english calender. On committing any default in such deposit by the appellant, the stay shall be vacated automatically without further reference to the Bench and the respondent shall be at liberty to execute the decree.

(b) The respondent shall be at liberty to withdraw such amount on submitting the solvent surety for the amount withdrawn and also an undertaking to redeposit the same along with the interest at the banking rate on arising the occasion and subject to the decision of this appeal.

Now, this matter be listed for final hearing in due course.

Order accordingly.

I.L.R. [2008] M. P., 275
APPELLATE CIVIL
Before Mr. Justice P.K. Jaiswal
13 November, 2007

THE ORIENTAL INSURANCE COMPANY ... Appellant*
Vs.
SMT. KANTIDEVI & ors ... Respondents

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. (Paras 12 & 16)

Cases Referred :

1997 AJR (2) 347, 2007 (56) AIC 57 (SC), 1992 JLJ 143, AIR 1991 SC 1769, AIR 2007 SC 2594, 1994 ACJ 708 (MP), 2002(II) MPWN 181, 2006 ACJ 803, 2006 ACJ 1019, 2007 (3) TAC 11.

B.K. Agrawal, for the appellant
N.D. Singhal with *J.P. Kushwah,* for the respondents no. 1 to 7.
None, for the respondents no. 8 and 9.

Cur.adv.vult.

JUDGMENT

P.K. JAISWAL, J. :-These appeals are filed by the Insurance Company against the interim award dated 20.4.2007, whereby the learned Additional Motor Accident Claims Tribunal, Gwalior, allowed the applications filed by the claimants under Section 140 of the Motor Vehicles Act, 1988 (for short "the Act") and held that the owner, driver and the Insurance Company are jointly and severally liable to pay the interim compensation within a period of one month from the date of order, failing which they are liable to pay interest @ 6% per annum from the date of order till its realization.

2. For the sake of convenience, I state the facts occurring in Misc. Appeal No.728/07 arising out of award dated 20.4.07.

3. On 15.11.2005 deceased and injured were travelling in a goods carriage vehicle bearing registration No. MP07/G-6231 and due to rash and negligent driving by the respondent no.8-Leelaram, the said vehicle met with an accident. Due to which Disai, Kanchu Rajput, Shatrughan, Pawan, Dinesh, Ramkishan, Shivbalak, Videsh, Ganesh and Naresh received serious injuries and Dular Chand Sani, Rajkumar Sani, Tulsi and Mahto died on the spot. Constable Ashok Kumar lodged Dehati Nalishi vide Crime No.0/5 under Sections 279, 337 and 304-A of the Indian Penal Code. On the basis of Dehati Nalishi, FIR was registered vide Crime No.331/05 on 15.11.2005. In the FIR, it is very specifically stated that the deceased and injured were travelling in the offending vehicle.

*M.A. 728/2007 (Gwalior)

4. During the pendency of the claim petition, the claimants filed an application under Section 140 of the Act. The appellant-Insurance Company filed their reply and raised an objection that the vehicle is registered as goods carriage vehicle and in the said vehicle, 16 persons were travelling and no extra premium was paid nor their risk was covered and therefore the Insurance Company is not liable to indemnify the award. Thereafter on 17.3.07, written argument was filed by the Insurance Company. In the written argument, it is stated that at the time of accident, the deceased and injured were travelling in the vehicle and it is wrongly averred in the claim petition that they were sitting on the footpath and due to rash and negligent driving by the driver, the vehicle was overturned.

5. Learned counsel for the appellant drew my attention to the impugned award and submitted that the objection raised by the appellant was not decided at all nor the same was considered and without considering the objection raised by the Insurance Company, the impugned award has been passed.

6. He also drew my attention to the Single Bench decision of this Court in the case of *Prakash Tiwari v. Sadhuram Sahu and ors.* 1997AJR (2) 347 and submitted that the learned Tribunal committed error in not exonerating the Insurance Company for payment of interim compensation.

7. It is lastly submitted that the offending vehicle was involved in a vehicular accident and the owner is liable to pay the interim compensation to the claimants on the basis of no fault liability.

8. On the other hand, the learned counsel for the claimants urged that in fact nobody was found sitting in the pickup van of the owner and therefore as per terms and conditions of the policy, the Insurance Company is liable to pay the interim award awarded by the Claims Tribunal and the impugned award passed by the learned Tribunal is just and proper.

9. Motor vehicle Act is a beneficial legislation and provisions of Sec. 140 of the Act have been introduced in the year 1988 on the ground of no fault liability and immediate relief. It is settled position under the law that u/s 140 of the Act at the stage of deciding an application for interim compensation under no fault liability, no defence is available to the Insurance Co. under Section 149 (2) of the Act. The scope of inquiry is limited. Dispute of liability on the basis of breach of policy condition is foreign to the scope of inquiry u/s 140 of the Act. It has been further held that no fault liability is a statutory liability and defence u/s 149 (2) of the Act is not available to the Insurance Company at the stage of interim compensation provided that the vehicle is insured with the Insurance Company.

10. As far as the accident is concerned, it is not in dispute that the accident took place and the vehicle involved in the accident belonged to the respondent no.9. As per FIR, the deceased and injured were sitting in the Pickup Van. Even though the Insurance Company may not be liable to pay any compensation in view of violation of policy conditions, but under Section 140 of the Act, the owner of the vehicle is liable to pay a sum of Rs.50,000/- on the basis of no fault liability. Once the accident is established and death of the person in the accident is also established, compensation under the provisions of Section 140 of the Act is liable to be paid by the owner of the vehicle.

11. This question was considered by the Apex Court in the case of *Smt. Yallwwa and others and National Insurance Co. Ltd. And another* 2007 (56) AIC 57 (SC). Paragraphs 9, 11, 16 and 19 are relevant, which read as under :-

> "9. It is not in dispute that an award of the Tribunal is to be made in terms of section 168 of the Act. For the said purpose, the Tribunal is required to issue a notice to the insurer and give the parties an opportunity of being heard. While making an award in terms of Section 168 of the Act, the procedure laid down under Section 166 of the Act are required to be complied with. The proviso appended to Section 168 of the Act, however, lays down that where such application makes a claim for compensation under Section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of chapter X of the Act. Section 140, as noticed hereinbefore, provides for no fault liability. It uses the words "accident arising out of the use of a motor vehicle", the owner of the vehicle and when more than two vehicles are involved, "the owners of the vehicles" shall, jointly and severally be liable to pay compensation.
>
> 11. One of the defences available to the insurer is breach of conditions specified in the policy. When such a defence is raised, the Tribunal is required to go into the said question. Section 140 of the Act does not contemplate that an insurance company shall also be liable to deposit the amount while it has no fault whatsoever in terms of sub-section (2) of Section 147 of the Act.
>
> 16. The question which is required to be considered is what would be the meaning of the term 'award' when such a contention is raised. Although in a given situation having regard to the liability of the owner of the vehicle, a Claims Tribunal need not go into the question as to whether the owner of the vehicle in question was at fault or not, but determination of the liability of the insurance company, in our opinion, sands on a different footing. When a statutory liability has been imposed upon the owner, in our opinion, the same cannot extend the liability of an insurer to indemnify the owner although in terms of the insurance policy or under the Act, it would not be liable therefor.
>
> 19. Furthermore, evidently, the amount directed to be paid even in terms of Chapter X of the Act must as of necessity, in the event of non-compliance of directions has to be recovered in terms of Section 174 of the Act. There is no other provision in the Act which takes care of such a situation. We, therefore, are of the opinion that even when objections are raised by the insurance company in regard to its liability, the Tribunal is required to render

a decision upon the issue, which would attain finality and, thus, the same would be an award within the meaning of Section 173 of the Act."

12. The Hon'ble Apex Court in the case of *Smt. Yallwwa* (Supra) has held that once the Insurance Company raised a dispute in respect of breach of conditions specified in the policy, the Tribunal is required to go into the said question. Section 140 of the Act does not contemplate that an Insurance Company shall also be liable to deposit the amount while it has no fault whatsoever in terms of sub-section (2) of Section 147 of the Act. Once objections are raised by the Insurance Company in regard to its liability, the Tribunal is required to render a decision upon the issue.

13. From the perusal of the impugned order, I find that the question regarding breach of the policy, has not been considered by the learned Tribunal while deciding the application under Section 140 of the Act though the objections are raised by the Insurance Company in regard to its liability. Therefore, I am of the considered view that the learned Tribunal is required to render a decision upon the issued raised by the appellant.

14. Learned counsel for the claimants drew my attention to the Full Bench decision of this Court in the case of *Gaya Prasad and others v. Suresh Kumar and others* .1992 JLJ 143 and the Apex Court's decision in the case of *Shivaji Dayanu Patil v. Smt. Vatschala Uttam More* AIR 1991 SC 1769 and submitted that compensation on the principle of no fault liability holding of regular trial in the same manner as for adjudicating claim petition is not permissible. It is also submitted that FIR is not a substantial piece of evidence and all the eye witnesses have very categorically stated that the deceased and injured were not travelling in the offending vehicle and at the time of accident, they were sitting on the footpath and therefore the learned trial Court has not committed any error in directing the Insurance Company to pay the interim compensation to the claimants. In support of the said contention, he drew my attention to the decision of the Apex Court in the case of *Asharam v. State of M.P.* AIR 2007 SC 2594, *Dhanwanti and others v. Kulwant Singh and others* 1994 ACJ 708 (MP), *Dheeraj Singh v. Ajay Kumar* 2002 (II) MPWN 181, *Nanhu Singh v. Jaheer and others* 2006 ACJ 803 and *Hajarilal v. Lakhanpratap and others* 2006 ACJ 1019. The Apex Court in the case of *Oriental Insurance Company Ltd. v. Premlata Shukla and others* 2007 (3) TAC 11 (SC) has held that the the factum of accident could not be proved from FIR. It is also to be noted that once a part of contents of document admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that other contents contained in the rest part thereof had not been proved.

15. The Apex Court in the case of *Smt. Yallwwa* (Supra) has held that the Proviso appended to Sec. 166 of the Act, makes the owners of the vehicles liable but not the insurer perse. Irrespective of the fact whether a claim petition is required to be adjudicated under Chapter X or Chapter XII of the Act, it is permissible to raise a defence in terms of sub-section (2) of Section 149 of the Act.

16. Here in the present case, the learned Tribunal has not decided the objection raised by the appellant in regard to its liability nor on the basis of the FIR and the Court statement of the eye witnesses, has held that the deceased were travelling in the offending vehicle or they were sitting on the footpath. The learned Tribunal without deciding the objections directed the Insurance Company to pay the interim compensation to the claimants.

17. For the above mentioned reasons, the impugned orders are liable to be set aside and accordingly they are set aside. The Tribunal is directed to decide the objections raised by the Insurance Company regarding its liability on the basis of the material available on record and decide the applications under Section 140 of the Act filed by the claimants afresh. The amount deposited by the appellant in compliance to the order passed by this Court or in compliance to the provisions of Section 173 of the Act be refunded to the Insurance Company. In case, if it is found that the amount is already received by the claimants, then the same may be recovered from the owner of the vehicle. The amount of interim compensation received by the claimants and refunded to the Insurance Company may be recovered by the claimants now from the owner of the offending vehicle and owner of the vehicle shall make payment of the aforesaid amount to the claimants.

18. All the appeals stand partly allowed and disposed of to the extent as indicated hereinabove, without any order as to costs.

Appeals partly allowed.

I.L.R. [2008] M. P., 279
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
14 November, 2007

SMT. AKILABEE & ors ... Appellants*
Vs.
SHYAMKUMAR & ors ... Respondents

A. 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.

B. 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. (Para 6)

Case Referred :

2007 ACJ 825.

M.A. Khan, for the appellants:
H.C. Jindal, for the respondent nos. 1 & 2.

*M.A. 606/2004 (Indore)

R.S. Surolia, for the respondent no. 3.
H. Vaishnav, for the respondent no. 5.

Cur.adv.vult.

O R D E R

N.K. Mody, J. :– This is an appeal filed by the claimant under Section 173 of the Motor Vehicles Act against an award dated 30/09/03, passed by MACT, Indore, in claim case No.07/02. By impugned award, the Claims Tribunal has awarded a total sum of Rs.2,64,500/- with interest to the claimants for the death of one Firoj, who died in vehicle accident. According to claimants, the compensation awarded is on lower side and hence, need to be enhanced. It is for the enhancement in the compensation awarded by the Tribunal, the claimant has filed this appeal. So the question that arises for consideration is whether any case for enhancement in compensation awarded by the Tribunal on facts / evidence adduced is made out in the compensation awarded and if so to what extent ?

2. It is not necessary to narrate the entire facts in detail, such as how the accident occurred, who was negligent in driving the offending vehicle, who is liable for paying compensation etc. It is for the reason that firstly all these findings are recorded in favour of claimants by the Tribunal. Secondly, none of these findings though recorded in claimants' favour are under challenge at the instance of any of the respondents such as owner/driver or insurance company either by way of cross appeal or cross objection. In this view of the matter, there is no justification to burden the judgment by detailing facts on all these issues.

3. As observed supra, it is a death case. On 27/01/01, Firoj aged 30 years, met with a motor accident and died, giving rise to filing of claim petition by legal representatives (appellants herein) out of which this appeal arises seeking compensation for his death. The case was contested by the respondents. Parties adduced evidence. The Claims Tribunal by impugned award partly allowed the claim petition filed by claimants and as stated supra, awarded a sum of Rs.2,64,500/-, breakup of which is as under :-

Rs.2,55,000/-	Towards loss of dependency.
Rs.9,500/-	Towards other heads.

4. Learned counsel for the appellants submit that deceased Firoj was aged 30 years at the time of accident. Learned counsel submits that income of the deceased was assessed @ Rs.2,500/-, while evidence was adduced by producing certificate Ex.P/10, wherein it is mentioned that the income of the deceased was @ Rs.3,000/- per month. Learned counsel submits that multiplier of 17 has wrongly been applied by the learned tribunal as the age of the wife of the deceased was 26 years at the time of the accident. Learned counsel submits that looking to the large family learned tribunal ought to have deduct 1/3rd towards personal expenses instead of 1/2. It is further submitted that on other heads also amount awarded by the learned tribunal is on lower side.

5. Mr. RS. Surolia, learned counsel for respondent No.3, submits that the certificate of income has rightly been disbelieved by the learned tribunal. Learned counsel submits that income of the deceased assessed @ Rs.2,500/- per month,

which is just and proper. It is also submitted that the Hon'ble Apex Court in the matter of *New India Assurance Co. Ltd. Vs. Kalpana and Others,* Reported in 2007 ACJ 825, has applied the multiplier of 13 in a case, where deceased was aged 33 years, therefore, it can to be said that learned tribunal committed error in applying the multiplier of 17.

6. I have gone through the evidence adduced by the claimants. After taking into consideration all the evidence on record, this Court is of the view that in the year 2001 learned tribunal has rightly assessed the income of the deceased @ Rs.2,500/- per month. So far as application of multiplier of 17 is concern the age of the appellant No. 1 was 26 at the time of accident, therefore, as per second schedule of Motor Vehicles Act the multiplier of 18 ought to have been applied. So far as law laid down in *New India Assurance Co. Ltd Vs. Kalpana* (Supra) is concern in that case the amount awarded was of Rs.8,16,000/-, therefore, Hon'ble Apex Court has reduced the same by applying the multiplier of 13. Thus the same is distinguishable. So far as the deduction of 1/2 towards personal expenses is concern, it appears that deceased was having wife and minor children, who are appellant nos. 1 to 4 and also the parents in the circumstances there was no justification in deducting 1/2 towards personal expenses. The deduction ought to have been 1/4 towards personal expenses. Similarly in other heads also the amount awarded by the learned tribunal is on lower side. In my opinion it will be proper to enhance the compensation. The appellants are entitle for the following amount :

Rs.4,05,000/-	Towards loss of dependency.
Rs.2,000/-	Towards funeral expenses.
Rs.3,000/-	Towards loss of estate.
Rs.5,000/-	Towards loss of consortium.
Rs.25,000/-	Towards loss of love and affection.
Rs.4,40,000/-	Total

8. Thus, the appellants are entitle for Rs.4,40,000/-, instead of Rs.2,64,500/-. The enhanced amount of Rs.1,75,500/-, shall carry interest @ 7.5% p.a. from the date of application. The enhanced amount shall be deposited in the name of appellant No.1 in a nationalized bank, in such a manner so that it can earn monthly interest. The amount can be disbursed for the educational and marital needs of the appellants No. 2 to 4. So far as other findings of the learned tribunal are concern the same shall remain unaltered.

9. With the aforesaid modification the appeal stands disposed of. No order as to costs.

Appeal disposed of.

I.L.R. [2008] M. P., 282
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
15 November, 2007.

ARUN KUMAR PATEL & anr. ... Appellants*
Vs.
SMT. TERASI SAKET & ors. ... Respondents

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. (Para 8)

Case Referred :

Civil Appeal No. 2526/2007 decided on 15th May 2007
ILR (2007) M.P. 1302.

Sanjay Patel, for the appellants.
Ajit Agarwal, for the insurer.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred by the owner and driver aggrieved by Award dated 29.6.04 passed by Addl. Motor Accident Claims Tribunal,Mauganj, District-Rewa in Claim Case No.33/2001.

2. Claimants/respondents 1 to 7 preferred claim petition on account of death of Shyamlal who met with an accident on 4.6.01, he was travelling in tractor trolley. Vehicle was driven by Shravan Patel, it was owned by Arun Patel and insured with National Insurance Co.Ltd. The claimants submitted that the deceased was coming back in the tractor trolley after administering fertilizers in his agricultural field, deceased was shoe mendor, he used to sell shoes in the market, compensation of Rs.57,60,000 was claimed.

3. Owner denied the factum of accident in his reply, other facts were also denied. It was contended that vehicle was insured with National Insurance Co.Ltd., liability, if any, was required to be borne by the insurer.

4. The insurer in its reply denied the liability to make payment of compensation, it was specifically pleaded that in the tractor trolley marriage party was being carried at the time of accident. Thus, there was violation of terms and conditions of policy as tractor was insured for the purpose of agriculture use only, risk was not covered for such user within the purview of the policy.Driver was not having valid and effective driving licence to drive the vehicle.

*M.A. 2180/2004 (Jabalpur)

5. The Tribunal has found that there was violation of policy as at the time of accident in the tractor trolley the marriage party was being carried, thus, insurer has been exonerated. Compensation of Rs.1,73,000 has been awarded along with interest at the rate of 8% per annum from the date of filing of claim petition till realization. Dissatisfied with the same, owner and driver have come up in appeal.

6. Shri Sanjay Patel, learned counsel appearing for appellant has submitted that the finding recorded by the Tribunal that marriage party was being carried at the time of accident has not been established by satisfactory evidence. The evidence adduced on behalf of respondents has been wrongly relied upon. He has further submitted that lodger of FIR has not been examined, thus, facts mentioned in the FIR that marriage party had been carried has not been established, thus, finding of tribunal deserves to be set aside. He has also placed reliance on Rule 97 of Motor Vehicle Rules as applicable in M.P. which permits carrying of Barat in the trolley. Thus, he has submitted that user being permitted under the rules, it has to be considered even for the purpose of insurance policy, the claimant was a third party as such risk is covered under Section 147 of Motor Vehicles Act.

7. Shri Ajit Agarwal, learned counsel appearing on behalf of Insurer has submitted that there was violation of policy, it was not necessary to prove the FIR and examination of its lodger as it was a document of claimants, once they have filed it and document has been exhibited, it has been rightly taken into consideration by the tribunal. Apart from that there is other evidence on record indicating that tractor trolley was being used for the purpose of transporting marriage party which was not covered under the insurance policy.

8. First we consider whether marriage party was being carried at the time of accident, though it has been stated by Terasi (CW.1), widow of deceased, that her husband was coming back after administering fertilizer from the agricultural field, at that time he met with an accident, she has denied the suggestion made in cross examination that he was coming back from the marriage party. Kedar (CW.2) has also supported the version of CW.1 and has also denied the suggestion made in the cross-examination that marriage party was being carried. Sarvjeet Singh Jammu (NAW.1) has stated that enquiry was conducted by the insurer, it was found in the enquiry that marriage party was being carried in the tractor trolley at the relevant time, deceased was resident of Jaunpur and had come to attend the marriage, he himself was not personally aware of the facts. He has deposed on the basis of enquiry report. Rajesh Trivedi (NAW.2) had made an enquiry, he has stated that on enquiry he has found that marriage party was being carried, no doubt about it that statements of Rajesh Trivedi and Sarvjeet Singh Jammu may not be enough to hold that marriage party was being carried,but when we consider the FIR which was the immediate document and there was no doubt with respect to correctness of the facts mentioned therein that marriage party was being carried at the time of accident in the tractor trolley, that being so the finding recorded by the tribunal is based on proper assessment of evidence, man may lie but circumstances do not is the cardinal principle of evaluation of evidence. The immediate conduct evidence reflected in the shape of FIR indicates that marriage party infact was being carried. It was not necessary to examine the lodger of the FIR as the document was filed on behalf of claimants and they have

relied upon it, once they have relied upon it, the document could have been considered forming part of evidence and its evidenciary value has been found in the instant case. We place reliance on a decision of Apex Court in *Oriental Insurance Co.Ltd. vs. Premlata Shukla and others* (Civil Appeal No.2526/ 2007) decided on 15th May,2007 in which it has been considered that FIR can be relied upon ,it is not necessary to examine the lodger of FIR so as to prove it. In the facts and circumstances of the case, we are of the opinion that the finding recorded by the tribunal is proper in the instant case that there was violation of policy inasmuch as marriage party was being carried at the time of accident, case set up by the claimants has been rightly rejected.

9. Coming to the submission raised by Shri Patel with respect to absence of issue as to breach of policy in as much as marriage party was being transported, in our opinion, parties have adduced the evidence and question of breach of policy was clearly involved, there was issue with respect to liability of insurer, hence no prejudice has been caused to the case of claimants in any manner.

10. Coming to the submission based on Rule 97 of MP Motor Vehicle Rules, that has been considered by a Full Bench of this Court in *Bhav Singh vs. Smt.Savirani and others* (MA No.687/99, decided on 11.10.07), in which the Full Bench has opined that Rule 97 is not with respect to Section 147 of Motor Vehicles Act, Rule 97 has been framed with respect to permit conditions not to cover the risk under Section 147 which is contained in a different chapter of Motor Vehicles Act. Full Bench of this Court has held thus :-

> "12. Regarding the Division Bench judgment in *Sarvanlal and others* (supra), we find that the Division Bench has relied on not only the judgment of the Full Bench in *Jugal Kishore* (supra) but also clause (vii) of Rule 97 of the Motor Vehicle Rules, 1994 (for short "the Rules of 1994") made by the State of M.P. So far as the judgment of the Full Bench in *Jugal Kishore* (supra) is concerned, we have already clarified the position of law. Regarding clause (7) of Rule 97 of the Rules of 1994, we find that the Rules of 1994 have been made by the State of M.P.under Section 96 of the Act and in particular sub-section (2)(xxxi) which provides that without prejudice to the generality of the foregoing power, rules under Section 96 may be made with respect to the carriage of persons other than the driver in goods carriage. Section 96 is placed in Chapter-V of the Act which relates to "Control of Transport Vehicles". Sub-section (1) of Section 96 of the Act states that the State Government may make rules for the purpose of carrying into effect the provisions of Chapter-V. Hence, Rule 97 of the Rules of 1994 has been made by the State Government to give effect to the provisions of Chapter-V of the Act, which, as we have seen, relates to "control of transport vehicles". These rules obviously cannot have a bearing in interpreting the provisions of Chapter-XI of the Act including Sections 145 and 147 of the Act. As we have indicated above, the liability of the insurer to indemnify the insured in respect of death or bodily injury suffered by a

passenger or an employee would be covered by the provisions of Section 147 of the Act or the terms and conditions of insurance policy. Thus, the decision of the Division Bench in Sarwan Lal (supra) in so far as it relies on Rule 97 of the Rules of 1994 to hold the insurer liable for death or bodily injury suffered by the passengers does not lay down the correct law. "

11. In view of the aforesaid we do not find any merit in the appeal, the appeal is dismissed. No costs.

Appeal dismissed.

I.L.R. [2008] M. P., 285
APPELLATE CIVIL
Before Mr. Justice P.K. Jaiswal
20 November, 2007

ASHOK & ors. ... Appellants*
Vs.
K.K. SAXENA & ors. ... Respondents

Arbitration Act, Indian (10 of 1940) - Sections 16, 28 - Extension of time -Matter referred to arbitrators and they entered upon reference - Completed arbitration and passed award on 8-3-1982 - Respondents even after expiry of period prescribed for giving award, appeared, took part in proceedings before arbitrators and never objected to arbitration proceedings - Trial Court refused to make award Rule of Court and held the same to be ineffective and void - Held - Arbitration Proceedings should not be unduly prolonged - As parties were taking part willingly in the proceedings before arbitrator without a demur and had all along been willing to extend time - It is a fit case for extension of time - Accordingly time extended for giving award and award dated 8-3-1982 deemed to be given in time. (Para 11)

Cases Referred :

AIR 1985 SC 920,.M.A. 72/86 decided on 18/10/1996
(1987) 4 SCC 93, AIR 1990 SC 2273.

H.D. Gupta with *Shishir Saxena,* for the appellants.
K.N. Gupta with *R.K. Mishra,* for the respondents.

Cur.adv.vult.

JUDGMENT

P. K. Jaiswal, J. :- This appeal under section 39 of the Indian Arbitration Act, 1940 (for short "the Act") has been filed by the appellants, against the order dated 18.2.1991 passed by the Third Additional District Judge Vidisha in M.J.C. No.2/88, by which the trial Court rejected the application for making the award Rule of the Court, filed under section 16 of the Act and held that the award dated 8.3.1982 was ineffective and void.

2. It is submitted by the learned counsel for the appellants that with the consent of the parties vide agreement dated 29.5.1980 the matter was referred

*M.A. 285/1996 (Gwalior)

to the arbitrators and they enters upon the reference on 29.7.1980, completed the arbitration proceedings and passed the award on 8.3.1982. The respondents even after expiry of four months period that is, the period prescribed for giving the award, appeared before them, took part in the proceedings before the Arbitrators and never raised any objection to the arbitration proceedings and only when an application under section 16 of the Act for making the award Rule of the Court was filed, they raised an objection and in such a situation the condition of four months period will be deemed to have been waived. Learned trial Court contrary to the decision of the Apex Court in the case of *State of Punjab Vs. Hardyal*, 1985 SC 920 passed the impugned order declaring the award as null and void. It is further submitted that on 10.1.1996 they filed an application to enlarge time for making the award.

3. On the other hand Shri K.N. Gupta, learned Senior counsel for the respondents opposed the arguments of the learned counsel for the appellants and submitted that in view of the law laid down by the Apex Court in the case of *State of Punjab Vs. Hardyal* (supra) and Division Bench decision of this Court in Misc. Appeal NO.72/86, *M/s Jiyajirao Cotton Mills Ltd. Birlanagar Vs. M/s Jindal Handloom Emporium and others* decided on 18.10.1996 the Trial Court has not committed any error in passing the impugned order and dismissing the application filed under section 16 of the Act by holding that the award after the expiry of four months is null and void.

4. I have heard the arguments of the learned counsel for the parties and perused the record of the case.

5. Section 28 of the Arbitration Act 1940 and Clause 3 of First Schedule reads as under: -

Section 28 reads :

> "28. (1) The court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.
>
> (2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."

Clause 3 of First Schedule provides :

> "3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow."

6. Sub-section (1) of S. 28 is very wide and confers full discretion on the court to enlarge time for making the award at any time. The discretion under sub-s. (1) of S. 28 should however, be exercised judiciously. Subsection (2) of S. 28 also makes it evident that the court alone has the power to extend time. It further provides that a clause in the arbitration agreement giving the arbitrator power to enlarge time shall be void and of no effect except when all the parties consent to

such enlargement. It is not open to arbitrators at their own pleasure without consent of the parties to the agreement to enlarge time, for making the award.

7. Here in the present case, both the parties voluntarily took part in the arbitration proceedings even after expiry of four months, that is, the period prescribed for giving the award till the date of the award and never raised any objection before the Arbitrator that they have no powers to commence the proceedings after expiry of the period of four months.

8. In the case of *State of Punjab Vs. Hardyal* (supra) the Apex Court observed the following in para 12, 13 and 14 which reads as under:

> "12. The next question that crops up for consideration is what will be the effect if a party to the arbitration took part in the proceedings before the arbitrator even after the expiry of four months, that is, the period prescribed for giving the award. Some High Courts have taken the view that in such a situation the condition of four months period will be deemed to have been waived. Such a view has been taken by the Allahabad High Court in *Shambhu Nath v. Surja Devi* AIR 1961 All 180. A learned single Judge of that High Court observed (Para 4):
>
> "A party to an arbitration agreement who voluntarily takes part in the arbitration proceedings after the expiry of four months will be deemed to have waived the implied condition as to time."
>
> A similar view has been taken by the Madhya Pradesh High Court in *Shivlal v. Union of India* AIR 1975 Madh Pra 40. In *Ganesh Chandra v. Artatrana* AIR 1965 Orissa 17 (at P. 19) a single Judge of the Orissa High Court observed :
>
> "If the parties, after the expiry of four months, submit themselves to the jurisdiction of the arbitrators and take part in the proceedings enabling them to pass an award, it cannot be said that the arbitrators acted without jurisdiction. In such a contingency, the principle of waiver and estoppel would have full application.
>
> 13. Once we hold that the law precludes parties from extending time after the matter has been referred to the arbitrator, it will be contradiction in terms to hold that the same result can be brought about by the conduct of the parties. The age long established principle is that there can be no estoppel against a statute. It is true that the time to be fixed for making the award was initially one of agreement between the parties but it does not follow that in the face of a clear prohibition by law that the time. fixed under cl. 3 of the Schedule can only be extended by the court and not by the parties at any stage, it still remains a matter of agreement and the rule of estoppel operates. It need be hardly emphasized that the Act has injuncted the arbitrator to give an award within the prescribed period of four months unless the same is extended by the court. The arbitrator has no jurisdiction to make an award

after the fixed time. If the award made beyond the time is invalid the parties are not estopped by their conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after the expiry of the prescribed period.

14. The policy of law seems to be that the arbitration proceedings should not be unduly prolonged. The arbitrator therefore has to give the award within the time prescribed or such extended time as the court concerned may in its discretion extend and the court alone has been given the power to extend time for giving the award. As observed earlier, the court has got the power to extend time even after the award has been given or after the expiry of the period prescribed for the award. But the court has to exercise its discretion in a judicial manner. The High Court in our opinion was justified in taking the view that it did. This power, however, can be exercised even by the appellate court. The present appeal has remained pending in this Court since 1970. No useful purpose will be served in remanding the case to the trial court for deciding whether the time should be enlarged in the circumstances of this case. In view of the policy of law that the arbitration proceedings should not be unduly prolonged and in view of the fact that the parties have been taking willing part in the proceedings, before the arbitrator without a demur, this will be a fit case, in our opinion, for the extension of time. We accordingly extend the time for giving the award and the award will be deemed to have been given in time."

9. The Apex Court in the case of *Hindustan Steel Works Construction Co. Vs. C. Rajasekhar Rao*, (1987) 4 SCC 93 held that the Court has got the power to extend time even after the award has been given or after the expiry of the period prescribed for the award. But the court has to exercise its discretion in a judicial manner. This power, however, could be exercised even by the appellate Court.

10. In the case of *Nagar Palika Mirzapur Vs. Mirzapur Elect. Supply Co. Ltd.*, AIR 1990 SC 2273 the time for arbitration expired on 31.12.1970 and the award was made by the Arbitrator 27 days late on 27.1.1971 without formal extension of time. The Apex Court has held that conduct of the parties is a major factor to waive the extension of time given by the Court and held that the time should be taken as extended.

11. In view of the policy of law that the arbitration proceedings should not be unduly prolonged and in view of the fact that the parties have been taking willing part in the proceedings before the arbitrator without a demur and had all along been willing to extend time, this will be a fit case, in my opinion, for the extension of time. The unreported decision of this Court in the case of *M/s Jiyajirao Cotton Mills Ltd. Birlanagar* (supra) will not be applicable in the present facts and circumstances of the case.

12. In the aforesaid view of the matter I am unable to except the submission on behalf of Shri K.N.Gupta, learned Senior Advocate that the award was beyond time and time cannot be extended.

13 I accordingly extend the time for giving the award and the award dated 8.3.1982 will be deemed to have been given in time.

14. The other questions involved in the case, however, have not been dealt with by the learned Additional District Judge the objector-respondent had raised a number of pleas to challenge the award. It was therefore, obligatory for the trial Court to consider those point. However, the case will, therefore, have to be sent back to the trial Court for deciding the other issues involved in this case.

15. I accordingly allow the appeal in part and set aside the order dated 18.2.1991 passed by the Third Additional District Judge Vidisha in M.J.C. No.3/88 and remanded the case to the trial court for deciding the application filed under section 17 of the Act in making Rule of code in accordance with law. Since it is an old case it is, therefore, directed that the trial Court shall decide the application within three months from the date of receipt of record from the arbitrators. Parties are directed to appear before the Third Additional District Judge Vidisha on 3.1.2008. In the circumstances of the case, the parties shall bear their own costs.

Appeal partly allowed.

I.L.R. [2008] M. P., 289

APPELLATE CIVIL

Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi

21 November, 2007

SMT. KAPSI YADAV & ors. ... Appellants*

Vs.

PRADEEP @ BABLU & ors. ... Respondents

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. (Para 10)

Alok Hoonka, for the appellants.

Adil Usmani, for the respondent nos. 1 & 2.

Praveen Chaturvedi with *Alok Mishra,* for the respondent no. 3.

Nitin Gupta, for the respondent no. 5.

Cur.adv.vult.

O R D E R

The Order of the Court was delivered by ARUN MISHRA, J. :- The appeal has been filed by the claimants being aggrieved by impugned award exonerating the insurer awarding sum of Rs.1,36,334/- saddling

*M.A. 1233/2003 (Jabalpur)

the liability upon of the financier/State Bank of Indore, apart from driver and owner of the vehicle. The claimants have come in the appeal for enhancement of compensation whereas the State Bank of Indore has preferred cross objection in respect of saddling the liability upon it as per award passed by the tribunal.

2. The claimants submitted that deceased Ramkaran was travelling in the tractor trolley, driven by respondent No.1 Pradeep @ Bablu, owned by respondent No.2 Santosh Kumar Tiwari, insured with respondent No.4 the New India Assurance Co. Ltd. and financed by respondent No.3 State Bank of Indore. The tractor was driven in rash and negligent manner due to that Ramkaran (aged about 35 years) fell down from the tractor trolley and sustained injuries and succumbed to them. Compensation of Rs.7,00,000/- was claimed.

3. The owner and driver of the tractor trolley denied the factum of the accident; deceased boarded the tractor trolley while he in was badly drunken condition and was trying to jump from the trolley again and again. Ultimately, he jumped from the trolley and sustained injuries and succumbed to them. Deceased was not booking agent for sending the bus for religious travels. The claimants were not dependent on the earning of the deceased. The insurer contended that vehicle was not insured on the date of accident. The State Bank of Indore did not file any reply, it remained ex-parte.

4. The tribunal has found that accident was caused due to rash and negligent driving by Pradeep due to that Ramkaran fell down, sustained injuries and died. Vehicle was not insured on the date of accident. Liability has been fastened to make the payment of compensation upon the driver, owner and State Bank of Indore. Consequently, the appeal has been preferred.

5. Shri Alok Hoonka learned counsel appearing on behalf of the appellants has submitted that inadequate compensation has been awarded. Deceased used to earn Rs.20,000/- per month and he was booking agent for the purpose of religious tours, thus, the compensation awarded by the tribunal is inadequate it be enhanced.

6. Shri Adil Usmani appearing on behalf of the respondent Nos. 1 and 2 the driver and owner has submitted that deceased was himself negligent so no case for enhancement of compensation is made out in this appeal.

7. Shri Praveen Chaturvedi appearing on behalf of the State Bank of Indore contended that in view of the definition of the owner as per Section 2(30) of the Motor Vehicle Act 1988 Financier could not be saddled with the liability. Vehicle was in possession and control of the owner Santosh Kumar Tiwari, thus, State Bank of Indore be exonerated.

8. Shri Nitin Gupta appearing on behalf of the insurer has submitted that vehicle was not insured on the date of accident. The insurer has been rightly exonerated.

9. The question for consideration in the appeal is about quantum of compensation to be awarded due to death of Ramkaran (aged about 35 years) the evidence discloses that deceased was booking agent and used to earn Rs.20,000/- per month but no document in that regard has been furnished, in the cross-examination it was suggested that the deceased used to work as cleaner in the bus. It would be proper to assess the income of the deceased in the facts and

circumstances at Rs.3000/- per month, annual income comes to Rs.36,000/-. After making 1/3rd deduction towards self expenditure, which amount deceased would have spent on himself had he been alive, the annual loss of dependency comes to Rs.24,000/- multiplier of 17 is applicable, considering the age of the deceased years. Consequently, the compensation on account of loss of dependency comes to Rs.24,000/- X 17=4,08,000/-. Apart from that, we award a sum of Rs.40,000/- under the customary heads such as loss of estate, loss of expectancy of life and funeral expenses inclusive of a sum of Rs.10,000/- awarded to the widow of the deceased on account of loss of consortium. Thus, the total compensation comes to Rs.4,48,000/- (Rs. Four lacs forty eight thousand only). The compensation enhanced by this Court shall carry interest at the rate of 7% per annum from the date of filing of claim petition till realization.

10. Coming to the question of cross-objection preferred by the State Bank of Indore, it admitted that the vehicle was financed by the State Bank of Indore, as such the liability could not be fastened upon the Financier. In view of the provision contended under Section 2(30) of the Motor Vehicle Act "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the owner is the person in possession of the vehicle under the agreement. The person in possession under the agreement was Santosh Kumar Tiwari. He was controlling the vehicle and was in possession thus in view of the provision the Financier company could not be said to be liable to make the payment of compensation. Thus, we set aside the finding as to fastening of the liability upon State Bank of Indore.

11. Vehicle was not insured that finding has not been assailed. We affirm the finding the tribunal that insurer was not liable to make the payment of compensation.

12. Resultantly, we allow the appeal. The compensation of Rs.4,48,000/- (Rs. Four lacs forty eight thousand only) is awarded. The compensation enhanced by this Court shall carry interest at the rate of 7% per annum from the date of filing of claim petition till realization.

13. The State Bank of Indore is not liable to make the payment of compensation and not the Insurer. The respondents No.1 and 2 i.e. driver and owner of the vehicle are jointly and severally liable to make the payment of compensation. No order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 292
APPELLATE CIVIL
Before Mr. Justice S.K. Seth
22 November, 2007

RAJ SINGH ... Appellant*
Vs.
ANIL KUMAR ... Respondent

A. Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(e) - *Bonafide* Requirement - Respondent/Landlord wants to shift to city for getting better medical treatment for his aged grand mother and providing better educational facilities to children - Held - Once *Bonafide* need is established neither tenant nor Court can dictate terms to landlord or act as rationing authority - Appellate Court rightly granted decree on the ground of *Bonafide* requirement.

It is established that plaintiff's aged grand-mother required medical attention for ailments associated with old age. Every parent strives to provide best education facilities for his/her children. The reasoning of learned trial Judge to non-suit the plaintiff, to say the least, is contrary to law as settled in catena of decisions of the Supreme Court. Once the objectivity of bonafide need is established, neither the tenant nor Court could dictate terms to the landlord or act as rationing authority. Based upon appreciation of evidence, lower appellate Court has found as a fact that the need set up by the plaintiff is bonafide and not mere desire to throw out the appellant form the suit accommodation and the plaintiff has other reasonably suitable accommodation of his own in Shujalpur. We are, therefore, of the view that the lower appellate committed no mistake in granting a decree for eviction in favour of the plaintiff under Section 12(1)(e) of the Act. (Para 6)

B. Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(i) - Acquisition of accommodation suitable for residence of tenant - Alternative accommodation in the name of wife of tenant - No evidence to show that tenant cannot live in the said accommodation - Landlord/respondent entitled for decree of eviction under Section 12(1)(i) also - Cross-objection filed by respondent allowed. (Para 8)

Case Referred :

2005(II) MPJR 97.

Cur.adv.vult.

JUDGMENT

S.K. Seth, J. :– This is tenant's appeal against the eviction decree passed by the Court below in the reversing judgment.

2. Plaintiff/respondent filed the eviction suit against the appellant seeking his eviction from the suit accommodation more particularly described in para 2 and 3 of the plaint. Plaintiff sought eviction on the grounds contained in Section 12(1)(a),(e),(g) and (i) of the M.P. Accommodation Control Act, 1961(herein after referred to as the 'Act'). Claim was resisted by the appellant/defendant. Based upon pleadings trial Court framed issues and allowed the parties to adduce

*S.A.No. 51/2004 (Indore)

evidence. Learned trial Judge dismissed the suit holding that no ground for eviction was made out by the plaintiff. Aggrieved by Judgment and decree of the trial Court, plaintiff preferred first appeal. The Court below after appreciating pleading and evidence, decreed the suit and order eviction of the appellant from the suit premises under Section 12(1) (a) and (e) of the Act but did not accept the case of plaintiff for eviction under Section 12(1) (g)and(i) of the Act. Hence this appeal is by the tenant and cross objection by the plaintiff/respondent.

3. The tenant's appeal was admitted on the following substantial questions of law:

> "(1) Whether the lower appellate Court was justified in law in granting an eviction decree under Section 12(1)(a) of the M.P. Accommodation Control Act, 1961?
>
> (2) Whether the lower appellate Court was justified in law in granting an eviction decree under Section 12(1)(e) of the M.P. Accommodation Control Act, 1961?"

On the cross-objection preferred by the respondent/plaintiff, following substantial question of law was formulated:-

> "Whether the courts below erred in refusing to grant a decree for eviction on the ground mentioned in Section 12(1)(i) of the M.P. Accommodation Control Act, 1961?"

4. At the outset we may point out that learned counsel for the respondent herein rightly submitted that no ground for eviction under Section 12(1)(a) is made out in the facts and circumstances of the case. In this view of the matter we are not required to deal with substantial question No.1 as stated above.

5. Now the question is whether decree for eviction is sustainable under Section 12(1)(e) and/or 12(1)(i)of the Act.

6. Plaintiff set up the bonafide need of the suit accommodation for shifting his family from Kali Sindh to Shujalpur for the treatment of his aged grand mother and to provide better education to his daughter. He claimed that he had no other reasonably suitable accommodation of his own in the city of Shujalpur. Although appellant denied the need set up by the plaintiff, but did not adduce any cogent evidence to demolish the case established by the plaintiff through evidence. It is established that plaintiff's aged grand-mother required medical attention for ailments associated with old age. Every parent strives to provide best education facilities for his/her children. The reasoning of learned trial Judge to non-suit the plaintiff, to say the least, is contrary to law as settled in catena of decisions of the Supreme Court. Once the objectivity of bonafide need is established, neither the tenant nor Court could dictate terms to the landlord or act as rationing authority. Based upon appreciation of evidence, lower appellate Court has found as a fact that the need set up by the plaintiff is *bonafide* and not mere desire to throw out the appellant form the suit accommodation and the plaintiff has other reasonably suitable accommodation of his own in Shujalpur. We are, therefore, of the view that the lower appellate committed no mistake in granting a decree for eviction in favour of the plaintiff under Section 12(1)(e) of the Act.

7. . Now coming to the cross objection and the substantial question of law framed which relates Section 12(1)(i) of the Act, it would be appropriate to reproduce the provision for ready reference:-

> "Section 12. Restriction on eviction of tenants. (1) Notwithstanding any thing to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely:
>
> (a) .....
>
> (b .....
>
> (c) .....
>
> (e) .....
>
> (f) .....
>
> (g) .....
>
> (h) .....
>
> (i) that the tenant has, whether before or after commencement of this Act, built, acquired vacant possession of, or been allotted an accommodation suitable for his residence"

8. Thus, from a bare perusal of Section 12(1)(i), it is clear that when a tenant built, acquired or allotted vacant possession of an accommodation suitable for his residence, the landlord is entitled for a decree for eviction under Section 12(1)(i) of the Act. We are not impressed with the contention of learned counsel for appellant that no decree could be passed under Section 12(1)(i) of the Act because the alternative accommodation is in the name of the wife. There is no dispute that wife of the appellant owns a residential accommodation in Shujalpur, however, no evidence was led to show that appellant could not live in the said accommodation. There is no evidence that relations between the appellant and his wife are so strained that it is not possible for them to live under the same roof. However, a word of caution was sounded by this Court before applying the said principle for the eviction of a tenant on the said ground in *Shivnarayan Vs. Narendra Kumar* reported in 2005(II) MPJR 97. In the present case there is no evidence that appellant can not go and stay/live as a matter of right in the residential accommodation acquired in the name of his wife.

9. In view of the foregoing discussion, we are of the clear view that a case for eviction under Section 12(1)(e)and (i) was clearly made out. As a result, the appeal preferred by the tenant is hereby dismissed and the cross objection preferred by the respondent is hereby allowed. Impugned judgment and decree of the Court below is modified to the extent indicated hereinabove. Appeal and the cross objection stand disposed off without any order as to costs.

Appeal disposed of.

I.L.R. [2008] M. P., 295
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
22 November , 2007

SMT. JALISA BEGUM & ors ... Appellants*
Vs.
JAGDISH SAHU & ors ... Respondents

A. Motor Vehicles Act (59 of 1988)–Section 166, Mohammedan Law, Section 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.

B. 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. (Para 11)

Shashank Upadhyay, for the appellants.
Umesh Trivedi, for the respondent nos. 1 & 2.
S.K. Rao, alongwith *Ajit Agarwal,* for respondent no. 3

Cur.adv.vult.

ORDER

The Order of the Court was delivered by
S. A. Naqvi, J. :-This appeal has been preferred by the claimants for enhancement of compensation amount being aggrieved by award dated 27-11-04 passed by the First Additional Motor Accident Claims Tribunal, Chhatarpur in Claim Case No. 58/1996 whereby the claim petition filed by the petitioner Smt. Jalisa Begum and Manzoor Khan has been dismissed.

2. The admitted facts of the case are that the respondent no.2, Smt. Mammidevi Chourasia was the owner of bus No. UP-78B-9243, the respondent no.1, Jagdish Sahu was driver and the respondent no.3, the Oriental Insurance Company Ltd. was the insurer of the bus on the date of accident.

*M.A. 819/05 (Jabalpur)

3. The case of the appellants in a nutshell is that Smt. Jalisa Begum was legally wedded wife of the deceased Maksud Ali and Manzoor Khan was the son of Jalisa Begum and the deceased. The age of Maksud Ali was 26 years and he was a Paledar and he was earning Rs. 125-150 per day. On 15-7-96 Maksud Ali went to Bizawar for his work of labour. At about 10:00 A.M. he was sitting near Ashok-ki-lat. The respondent no.1 by driving bus No. UP-78B-9243 rashly and negligently dashed Maksud Ali. Maksud Ali was badly injured and succumbed to the injuries. The appellants were dependent upon the deceased Maksud Ali. They filed claim petition No. 58/96 for Rs. 9,80,000/- along with the parent of the deceased Shafi Mohammad @ Dhannu Khan and Smt. Mahmudan Begum.

4. The respondents denied the case of the appellants and they averred that Jalisa Begum is not the wife and the appellant Manzoor Khan is not the son of the deceased Maksud Ali, they are not entitled to any compensation amount. The name of the wife of the deceased was Jalilunisha. She was not having any child. Jalulnisha has died before the death of Maksud Ali. The age of Maksud Ali was 50 years and he was suffering from bronchitis. He was unable to carry out Palledari work. The power of attorney holder, the respondent no.2, Brij Kishore was removed from 1-8-96. The bank and Brij Kishore were informed in time in this respect. If after 1-8-96, he has carry out any work in respect of the vehicle, then the respondent no. 2, is not responsible to the action of Brij Kishore. The respondent no.3, contended that on 15-7-96, Brij Kishore insured the ill-fated bus by forgery when insured came to know about the accident and collected the information about Brij Kishore Chourasia it came to know that the cover note No. 20717 was cancelled from 15-7-96 and an affidavit was filed in this respect. The amount of premium was returned to Shri Brij Kishore Chourasia by cheque. The respondent no.2, on 11-10-96 again insured the bus with the respondent no. 3, the Oriental Insurance Company Ltd. Hence, insurer is not liable to indemnify the owner.

5. The Tribunal framed five issues. After hearing learned counsel for both the parties, perusing evidence and material on record, partly allowed the claim petition and awarded Rs. 2,22,000/- to the parents of the deceased and dismissed the petition pertaining to the appellants, holding that Smt. Jalisa Begum was not legally wedded wife of the deceased and appellant no.2, Manzoor Khan, is not son of Maksud Ali, being aggrieved by the impugned award, the appellants have preferred this appeal on various grounds.

6. We have heard the learned counsel appearing for the parties, perused the impugned award, evidence and material on record.

7. The learned counsel for the appellants urged that there is sufficient evidence on record to prove that the appellant no.1, Jalisa Begum is legally wedded wife of Maksud Ali and Manzoor Khan is the son of the deceased Maksud Ali. The Tribunal erred in appreciating the evidence in this respect in right perspective, the impugned award is on the lower side. The Tribunal committed error in assessing the monthly income of the deceased. The award passed by the Tribunal is erroneous. Contrary to that, learned counsel for the respondents supported the impugned award and urged that award passed by the Tribunal is legal.

8. As per the provisions of Mohammedan Law, the marriage between the

parties is a contract. As per Section 253 of the Mohammedan Law, a marriage may be valid (Sahih), or irregular(Fasid), or void (Batil) from the beginning. As per Section 254 of the Mohammedan law, a marriage contracted without witnesses is required by Section 252 is irregular, but not void. It is essential to the validity of the marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mohammedans. The proposal and acceptance must be expressed at one meeting; a proposal made one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writting nor any religious ceremony is essential. Every Mohammedan of sound mind, who has attained puberty, may enter into a contract of marriage. Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years. As per Section 268 of the Mohammedan law, marriage will be presumed in the absence of direct proof, from;

(a) Prolonged and continual cohabitation as husband and wife or

(b) the fact of the acknowledgment by the man, of the paternity of the child born to the woman, provided all the conditions of a valid acknowledgment mentioned in Section 344 are fulfilled or

(c) the fact of the acknowledgment by the man of the woman as his wife.

The presumption does not apply if the conduct of the parties was inconsistent with the relation of husband and wife nor does it apply if the woman was admitted a prostitute before she was brought to the man's house. The mere fact, however, that the woman did not live behind the parda, as the admitted wives of the man did, is not sufficient to rebut the presumption. Mahr or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage, whether prompt dower or deffered dower.

9. As per Section 308 of Mohammedan law, any Mohammedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause. As per Section 310 of the Mohammedan Law, divorce(Talaq) may be oral or in writting

(1) Oral Talak- No particular form of words are prescribed for effecting a talak. If the words are express(saheeh) or well understood as implying divorce no proof of intention is required.

The kinds of Talaq are (i) Talak ahsan (ii) Talak hasan (iii) Talak-ul-biddat or talak-i- badai.

10. Keeping in mind the aforementioned principles of law of marriage and talak of Mohammedan, we are considering the evidence adduced by the parties in this respect. Jalisa Begum (AW-1), stated that deceased Maksud Ali was her husband and appellant no.2, Manzoor Khan is their son. She deposed that her father-in-law and mother-in-law are alive. She denied her previous marriage with Munna

Khan in paragraph-5 of her statement. She is ignorant of the fact that the first wife of the deceased Maksud Ali had died. She deposed that her Nikah with deceased Maksud Ali was performed by a female Kazi named Sona. She admitted that on 25th July 1979, she entered into marriage with Munna Khan S/o Sheikh Basir resident of Chhattarpur. The Nikahnama is Exhibit D-1. She again reiterated that she entered into marriage with deceased Maksud Ali second time. She also deposed that after marriage with Maksud Ali, Manzoor Khan was born out of their wedlock. Though, in paragraph-9 she deposed that Manzoor Khan, the appellant is son of Munna Khan but she denied the factum of marriage with Munna Khan and birth of Manzoor Khan out of wedlock of Munna Khan. She reiterated that Manzoor Khan is son of the deceased Maksud Khan. The appellant Jalisa Begum is an illiterate rustic women and Manzoor Khan is her minor son. She do not understand the implication of her admissions and denial regarding some facts in the evidence. Admittedly, the parents of Maksud Ali are alive. The name of the father of Maksud Ali is Shafi Mohammad @ Dhannu Khan. Witnesses attended the marriage of Maksud Ali. He deposed that Kazi had read the Nikah of Maksud Ali . He deposed that first wife of Maksud Ali has already died. Shafi Mohammad, the father of Maksud Ali deposed that after death of first wifeof Maksud Ali, Nasima, he contracted second marriage with appellant no.1, Jalisa. He deposed that Manzoor Khan, respondent no.2 is son of first wife of Maksud Ali. In cross-examination he also reiterated the factum of marriage of appellant no.1 with deceased Maksud Ali. He deposed that marriage took place in village Kurraha, he is aware of the fact that if the women is not divorced then legally second marriage could not be performed. In cross-examination, he admitted that after 2-3 years of marriage with Maksud Ali with appellant no.1, Manzoor Khan was born. Shafi Mohammad sworn in affidavit Exhibit D-2 & Exhibit D-3 and mentioned in its affidavit that appellant no.1, Jalisa Begum is legally wedded second wife of Maksud Ali. He received Rs. 34,000/- as compensation from the owner of the bus. It is quite clear that the interest of the appellants and the respondents Shafi Mohammad clashes in connection with the compensation amount, hence, it is not possible that he will falsely depose that appellant no.1, Jalisa Begum is legally wedded wife of deceased Maksud Ali. There is overwhelming evidence on record to prove that Jalisa Begum got married with deceased Maksud Ali and out of their wedlock Manzoor Khan was born, she lived with Maksud Ali as wife for a quite long time. There is no evidence on record to prove that alleged first husband Munna objected the marriage of Jalisa Begum with Maksud Ali on the ground that he has not given her divorce. In the facts and circumstances of the case, it shall be presumed that Munna Khan has given divorce(talak) to appellant no.1, Jalisa Begum and thereafter she contracted second marriage with deceased Maksud Ali, if any marriage took place between them. Hence, marriage of Maksud Ali and the appellant no.1, Jalisa Begum is valid and Manzoor Khan is valid son of deceased Maksud Ali and Jalisa Begum. The Tribunal on minor contradictions in the evidence of Jalisa Begum and admission of Jalisa Begum which are of no avail, held that their marriage was illegal. As per above discussion and non-examination alleged husband Munna Khan, evidence of Rajkumar, Gauri Shankar Singh, Jagdish Sahu and Pradip Kumar Shrivastava, non-appellants witnesses is not reliable in respect of marriage of Jalisa Begum with Munna Khan and in

respect of marriage of Jalisa Begum with Maksud Ali without divorce with Munna Khan. It is clear from the evidence that the deceased Maksud Ali and his father Shafi Mohammad @ Dhannu Khan had acknowledge the marriage of Jalisa Begum with Maksud Ali and in paternity appellant Manzoor Khan and hence, there is presumption of prolonged and continual cohabitation by Maksud Ali as husband with Jalisa Begum as wife. We are of the considered opinion and it is proved by cogent and overwhelming evidence and circumstances on record that the marriage of Jalisa Begum with Maksud Ali was valid marriage and Manzoor Khan is legal son of the deceased Maksud Ali and Jalisa Begum. Consequently, we set aside the findings arrived at by the Tribunal in this respect. Consequently, we hold that the appellants are also entitled to get compensation amount due to the death of Maksud Ali in a vehicular accident.

11. Jalisa Begum(AW-1) deposed that her husband was earning Rs. 150 per day. He was giving Rs. 100/- per day to her for maintaining home affairs. This fact has not been controverted in cross-examination. Karim (AW-2) has also deposed that deceased was earning Rs. 100-200/- per day by doing labour. The father of the deceased Shafi Mohammad (AW-3) deposed that Maksud Ali used to earn Rs. 1000-2000/- per day. Though, Jagdish Sahu, (NAW-1) and Rajkumar have deposed that due to old age and illness , the deceased Maksud was not doing any work and he was not earning a single penny but learned Tribunal did not relied on the testimony of these witnesses and held that the deceased was working as a labourer and he was earning money. On going through the evidence in this respect, we deem it proper to hold that at the time of accident, the deceased was earning Rs. 3000/- per month i.e, Rs. 36,000/- p.a. Deducting 1/3rd customary amount from the annual income towards the expenditure of the deceased which have occurred if he had been alive, the dependency of appellants and respondent nos. 4 and 5 on deceased comes to Rs. 24,000/-p.a. Looking to the age of the deceased, the multiplier of 18 can be safely used. Consequently, the loss of dependency of appellants and respondent nos. 4 and 5 comes to Rs. 24,000 x 18= Rs. 4,32,000/-. They are entitled to compensation of Rs. 40,000/- under the customary heads of loss of estate, funeral expenses, loss of expectancy of life inclusive of Rs. 10,000/- to the widow for loss of consortium. Consequently, the appellants and respondent nos. 4 and 5 are entitled to get compensation amount of Rs. 4,72,000/-(Rupees Four Lacs Seventy Two thousand only).

12. Consequently, the appeal is allowed. The compensation amount is enhanced from Rs. 2,22,000/- to Rs. 4,72,000/-. The appellants and respondent nos. 4 and 5 are entitled to get compensation amount from the respondents. Respondents are jointly and severally liable to pay compensation amount. the enhanced compensation amount shall carry interest @ 7% p.a from the date of filing of the claim petition before the Tribunal till realisation. Out of the compensation amount, the appellant no.1, Smt. Jalisa Begum shall get 35% of the compensation amount. The appellant, Manzoor Khan shall get 35% of the compensation amount and the respondent nos. 4 and 5 shall get equally 30% of the compensation amount. The compensation amount of Manzoor Khan shall be deposited in fixed deposit in a nationalised bank for a period of seven years. No order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 300
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
27 November, 2007

BIHARILAL ... Appellant*
Vs.
PANNALAL & ors ... Respondents

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.

(Paras 8 & 9)

Cases Referred.

2004 ACJ 1827, 2007 ACJ 737, 2007 (1) Manisa 204

ILR (2007) M.P. 1323 (FB).

Manish Jain, for the appellant
SS. Chawla, for the respondents.

Cur.adv.vult.

ORDER

N.K. Mody, J. :– This order shall also govern the disposal of MA. No.811/06 as both the appeals are arising out of one award and one accident. In both the appeals parties are one and the same except the claimant, who are appellants.

2. Short facts of the case are that appellants who are Bihari and Deepubai and father and daughter in relation filed claim petitions alleging that on 25/06/04 they were traveling on a motor byke which was driven by son of Biharilal namely Balram. It was alleged that a truck bearing registration No. HR 38/M3841 was coming from other direction, which was rashly been driven by respondent no. 2, owned by respondent no. 1 and insured with respondent no. 3. It was alleged that because of rash and negligent driving of respondent no. 2 an accident took place in which Bihari sustained fracture of Tibia and Fibula in right leg. It was alleged that appellant Biharilal was hospitalized at District Hospital, Shajapur from 25/06/04 to 26/06/04 from where appellant was referred to Saluja Narsingh Home, Ujjain, where appellant remain as indoor patient from 26/06/04 to 06/07/04, where appellant was operated and rod was inserted. There was permanent disability up to 14.6%. In other matter in which the injured is appellant Deepubai learned counsel for the appellant submits that appellant sustained fracture of femur bone. Appellant

*M.A. 810/06 (Indore)

was hospitalized at District Hospial, Shajapur from 25/06/04 to 26/06/04 from where appellant was referred to Saluja Nursing Home, Ujjain where appellant was hospitalized from 26/06/04 to 06/07/04. Appellant was operated and plating and bone grafting took place. Permanent disability was assessed @ 18.4%.

3. Learned counsel for the appellant submits that learned tribunal after framing of issues and recording of evidence awarded a sum of Rs.35,000/- in both the case and deducted 50% of the amount on account of contributory negligence on part of the driver of the motor vehicle. Learned counsel submits that looking to the injuries sustained by the appellants amount awarded in both the cases is on lower side. It is submitted that since the driver of the motor byke was not a party to the petition, therefore, there was no occasion to decide the contributory negligence against a person who was not a party to the petition. Learned counsel submits that no case was registered against the driver of the motor byke. It is submitted that only on the ground that three persons were traveling on a motor byke. It was held that appellants are entitled for 50% of the awarded amount. Learned counsel submits that learned tribunal placed reliance on a decision of Madras High Court in the matter of *Managing Director, Tamilnadu Road Transport Corporation Vs. Abdul,* Reported in 2004 ACJ 1827, wherein Madras High Court has held as under:-

> We are concerned as to whether such action of the individuals is permissible under law. The motor cycle and any other two wheelers are meant only for two persons, the rider and a pillion rider. If more than two persons are traveling on a motor cycle or any other two wheeler, undoubtedly such action of the individual would become illegal and unauthorised. It is an awful sight when we come across three persons traveling on a motor cycle. They are sitting in such a cramped manner that the rider of the motor cycle almost sitting on the petrol tank or at the front edge of the seat. When he is sitting in such a position, naturally because of the restricted movement of his legs, he cannot have complete control over the brake. The movement of his hands are also restricted. When that be so, this court is of the opinion that definitely the rider of the two wheeler cannot have full control over the vehicle.
>
> Apart from that, when three persons are traveling on a motor cycle, two as pillion riders, any unusual movement of the pillion riders would make the rider of the motor cycle to loose his control over the vehicle. Even though such traveling of three persons on a motor cycle is contrary to the statute, still the enforcement wing do not care to take note of the same and failed to take action against their illegal action. Virtually because of the failure on the part of the enforcement wing, such traveling of three persons on the two wheelers have become a regular sight. Even though the highway petrolling is available but it is a rare sight to see a highway patrolling vehicle. The traveling of three persons has become rampant in the mofussils and in the city; especially among the youngsters like the college students. When that be the case, the

enforcing authority is expected to enforce the statute with some strictness to avoid any untoward incident. There is no purpose in conducting the Road Safety Week without infusing the road sense in compliance of the rules and regulations of the statute in the minds of those who are using the vehicles.

When three persons traveling on motor cycle which is meant for two persons, this court is of the view, the conduct of persons who travel in such a manner is liable for contributory negligence; especially when their action is contrary to the statute.

4. Learned counsel for the appellant submits that divisional bench of this court has taken a different view in the matter of *Manjo Bee and ors. Vs. Sajjad Khan and ors,* Reported in 2007 ACJ 737, wherein it has been held that carrying more passengers than one on motor cycle is violation under section 128 of M.V. Act but by carrying more persons, one can not be said to be negligent as a person having more than one pillion rider can also be more careful than a person going along on a motor cycle and accordingly repealed the plea of contributory negligence on behalf of the driver of the motor cycle.

5. Learned counsel for the appellant further submits that different view was taken by another Divisional Bench of this court in the matter of *National Insurance Company Ltd. Vs. Smt. Uma Tiwari and others,* Reported in 2007 (I) Manisa 204, wherein it was held that driving the scooter along with three other persons by violating the provisions of Section 128 of the act was negligent and had accordingly determined the liability on the owners of the jeep and the scooter in the proportion of 70:30.

6. Learned counsel further submits that since there was two different views taken by the Divisional Bench, therefore, the matter was referred to the Full Bench of this court in the matter of *Devising Vs. Vikramsingh,* in MA No.670/07, and vide order dated 17/10/07 Full Bench of this Court observed as under:-

"A plan reading of Section 128 of the Act quoted above, would show that sub-section (1) casts a duty on the driver of a two wheeled motor cycle not to carry more than one person in addition to himself on the motor cycle. Similarly, Rule 123 of the Rules quoted above mentions the safety devices to be provided while manufacturing a motor cycle. These provisions obviously are safety measures for the driver and pillion rider and breach of such safety measures may amount to "negligence" but such negligence will not amount to "contributory negligence" on the part of the pillion rider or "composite negligence" on the part of the driver of the motor cycle, unless such negligence was partly the immediate cause of the accident or damage suffered by the pillion rider as would be clear from the authorities discussed above.

Thus, we are of the considered opinion that if the damage in the accident has not been partly on account of violation of Section 128 of the Act by the pillion rider of the motor cycle, the pillion rider is not guilty of contributory negligence. Similarly, if the damage

suffered by the pillion rider has not been caused partly on account of violation of Section 128 of the Act by the driver, the pillion rider cannot put up a plea of composite negligence by the rider. In other words, if breach of Section 128 of the Act, does not have a causal connection with the damage caused to the pillion rider, such breach would not amount to contributory negligence on the part of the pillion rider of the motor cycle or composite negligence on the part of the driver of the motor cycle.

In this case it was held that:

(1) Violation of Section 128 of the Act, per se, by a motor cyclist does not arise a presumption of contributory negligence on his part.

(2) Similarly, violation of Section 128 of the Act per se does not amount to contributory negligence on the part of the pillion riders.

(3) A pillion rider cannot put up a plea of composite negligence by the driver of the motor cycle, if the driver only violates Section 128 of the Act.

7. Mr. S.S. Chawla, Learned counsel for respondent no. 3 submits that Balram was aged 19 years and was son of the appellant/injured Biharilal and has not been examined by the appellant. It is submitted that since Biharilal himself was owner of the motor byke, which was being driven by Balram, therefore, owner and insurance company was not impleaded as party. It is submitted that since Balram was aged 19 years at the time of accident and was not possessing valid driving license, therefore, learned tribunal has rightly held that it was a case of contributory negligence and appellant in both the cases are entitled for 50% of the amount.

8. From perusal of the record it appears that the criminal case was registered against respondent no. 1. Spot map is on record, which is Ex.P/9, according to it when the offending motor byke, which was driven by Balram was completely on the left side of the road was dashed by offending truck, which was going towards Shajapur. From perusal of the spot map one can safely reach to the conclusion that it was offending vehicle which was at fault. Best witness of this fact was driver of the truck, who has neither appeared nor examined. No steps has been taken by the respondent no. 3 to examine the driver to state that in what circumstances the accident occurred. It is true that three persons were traveling on the motor byke and the Balram is not a stranger but a son of the appellant Biharilal, who is only aged 19 years. Since no license has been filed, therefore, it may be presumed that Balram was not having valid driving license at the relevant time when accident occurred.

9. Keeping in view the law laid down in the matter of Devisingh (supra) only because three persons traveling on the motor byke, it can not be presumed that the driver of the motor byke was equally liable for the accident as there is no evidence on record in this regard. Since Biharilal claimant/appellant himself was the owner of the motor byke, therefore, it was not expected from him to implead

himself as non-applicant/respondent in the petition. In the facts and circumstances of the case looking to the spot map and also the registration of the criminal case against respondent no. 2 and also from the fact that respondent no. 2 did not appear before the learned tribunal and also before this court, this court is of the view that learned tribunal committed error in holding that it was a case of contributory negligence.

10. From perusal of the record it appears that looking to the injuries sustained by the appellants in both the appeal amount awarded by the learned tribunal on number of heads is on lower side. In view of this a case of enhancement is made out. In my opinion, it will be proper to enhance the compensation by Rs.20,000/- in both the cases. In other words, in view of this, the claimants are held entitled for a total sum of Rs.55,000/- by way of compensation for the injuries sustained by appellants in the accident. The enhanced amount of Rs.20,000/- shall carry interest @ 7.5% p.a.

11. With the aforesaid observations appeal stands disposed of. No order as to costs. A copy of this order be placed in the record of MA. No.811/06.

Appeal disposed of.

I.L.R. [2008] M. P., 304
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
28 November, 2007

SMT. VARSHA & ors ... Appellants*
Vs.
UTTARANCHAL RAJYA PARIVAHAN NIGAM & ors ... Respondents

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.

From perusal of record it appears there was no sufficient evidence relating to the income of the deceased which has been assessed @ Rs.8,000/- per month. No accounts of M/s Nimesh Engineering Works has been filed to demonstrate that deceased was being paid salary @ Rs.8,000/- per month. No documentary evidence is on record to show the academic qualification of the deceased Ramesh. In the facts and circumstances of the case the income of the deceased ought to have been assessed @ Rs.5,000/- per month. So far as the application of multiplier is concern, looking to the age of the appellant no. 1 wife of deceased and appellant no. 2 who is minor daughter of the deceased the multiplier of 15 ought to have

*M.A. No. 3348/07 (Indore)

been applied. Similarly on account of loss of love and affection no amount has been awarded. (Para 7)

V.S. Chouhan, for the appellants
R.N. Dave, for the respondent nos. 1 & 2.

Cur.adv.vult.

ORDER

N.K. Mody, J. :– This order shall also govern the disposal of MA. No.3293/07, which is being filed by respondent no. 1 and 2 against award dated 16/08/07 passed by XVIth Additional MACT (Fast Track), Indore in claim case No. 136/06 whereby the claim petition filed by the appellants was allowed and a sum of Rs.8,41,500/- has been awarded along with interest @ 6% per annum.

2. Short facts of the case are that appellants filed a claim petition alleging that deceased Ramesh was husband of appellant no. 1, father of appellant No. 2 and son of appellant no. 3, who was traveling in a bus bearing registration No.UP.11-C/2137, on 28/03/06 as passenger. It was alleged that the said bus met with an accident with another bus bearing registration No. UPA.07&4164, which was driven by respondent no. 2 and owned by respondent no. 1. It was alleged that because of rash and negligent driving of respondent no. 2 accident took place in which ramesh died. The claim petition was contested by the respondents.

3. After framing of issue and recording of evidence learned tribunal allowed the claim petition and awarded a sum of Rs.8,41,500/-, break up of which is as under:-

Rs.8,32,000/-	Towards loss of dependency.
Rs.2,000/-	Towards funeral expenses.
Rs.2,500/-	Towards loss of estate.
Rs.5,000/-	Towards loss of consortium.

4. Being dissatisfied of the inadequacy of the amount awarded by the learned tribunal, MA. No.3348/07 has been filed by the appellants, while respondent No. 1 has also filed MA. No.3293/07, wherein the submission of respondents no. 1 and 2 is that the amount awarded by the learned tribunal is on higher side.

5. Mr. VS. Chouhan, learned counsel for the appellants submits that no amount has been awarded on account of loss of love affection. Learned counsel submits that multiplier of 13 has been applied by the learned tribunal while looking to the age of the appellant no. 1 and 2 the multiplier of 15 ought to have been applied. Learned counsel submits that income of the deceased also has been assessed on lower side as the deceased Ramesh apart from the service, was also doing other work. Learned counsel submits that in the facts and circumstances of the case amount awarded by the learned tribunal is on lower side. Learned counsel submits that no evidence has been adduced by the respondents in rebuttal.

6. Mr. RN. Dave, learned counsel for respondent no. 1 submits that the amount awarded by the learned tribunal is on higher side. For assessing the income of the deceased @ Rs.8,000/- per month the learned tribunal has taken into consideration the evidence adduced by the appellants. It is submitted that appellants has examined

one Nimesh, who is one of the partner of M/s Nimesh Engineering Works. Learned counsel submits that only on the basis of a pay sleep which is Ex.P/5, learned tribunal assessed the income of the deceased @ Rs.8,000/- per month. Learned counsel further submits that neither any account of M/s Nimesh Engineering Works were submitted nor there is any evidence regarding the educational qualification of the deceased is on record. Learned counsel submits that the amount awarded by the learned tribunal is on higher side and deserves to be reduced. It is also submitted that looking to the age of the deceased multiplier is also on higher side, which ought to have been 11 as per second scheduled of the Motor Vehicles Act.

7. From perusal of record it appears there was no sufficient evidence relating to the income of the deceased which has been assessed @ Rs.8,000/- per month. No accounts of M/s Nimesh Engineering Works has been filed to demonstrate that deceased was being paid salary @ Rs.8,000/- per month. No documentary evidence is on record to show the academic qualification of the deceased Ramesh. In the facts and circumstances of the case the income of the deceased ought to have been assessed @ Rs.5,000/- per month. So far as the application of multiplier is concern, looking to the age of the appellant no. 1 wife of deceased and appellant no. 2 who is minor daughter of the deceased the multiplier of 15 ought to have been applied. Similarly on account of loss of love and affection no amount has been awarded. Appellants are entitled for the following amount:-

Rs.6,00,000/-	Towards loss of dependency.
Rs.5,000/-	Towards funeral expenses.
Rs.5,000/-	Towards loss of estate.
Rs.10,000/-	Towards loss of love and affection.
Rs.10,000/-	Towards loss of consortium.
Rs.6,30,000/-	Total

Thus, the appellants are entitle for Rs.6,30,000/-, instead of Rs.8,41,500/-. The amount shall carry interest @ 7.5% from the date of application. The amount shall be deposited in the name of appellants no. 1 and 2 in the ratio of 50:50 in a nationalized bank in such a manner so that it can earn highest rate of interest and the monthly interest shall be payable to the appellant no. 1 and the principle amount shall be released looking to the educational and marital needs of the appellant no. 2.

8. With the aforesaid modification the appeal stands disposed of. No order as to costs. A copy of this order be placed in the record of MA. No.3293/07.

Appeal disposed of.

I.L.R. [2008] M. P., 307
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
29 November, 2007

DINKAR JOSHI ... Appellant*
Vs.
NITIN TIWARI .... Respondent

A. 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.

B. 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.

It is proved by the evidence of Nitin Tiwari, Dr. H.G. Kalyani, Dr. Ravindra Gangrade and Exhibits P-31, P-6, P-24, P-26 that Nitin Tiwari sustained grievous injuries in thoracic, 10th vertebra and he sustained permanent disability. At the time of accident, age of Nitin Tiwari was 21 years, he sustained grievous injuries and permanent disability. He was treated quite some time in Hoshangabad hospital, he suffered pain and mental agony, it is quite natural that he might have spent money on treatment, special diet and attendant though no medical bills have been proved by Nitin Tiwari but it cannot be hold that he has not spent money on treatment, special diet and attendant. Looking to the age of Nitin Tiwari, injuries sustained by him, permanent disability, pain and suffering, we deem it proper to award a lump sum compensation of Rs. 50,000/- to Nitin Tiwari in all heads along with interest @ 7% p.a from the date of filing of the claim petition before the Tribunal till realisation. (Para 7)

D.K. Mishra, for the appellant
Deepak Pendharkar, for the respondent.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **S.A. Naqvi, J.** :–Both the appeals are the outcome of same award passed by the

*M.A. 3201/2004 (Jabalpur)

IInd Additional Motor Accident Claims Tribunal, Hoshangabad in MVC No. 73/03 whereby MVC filed by the appellant of appeal No. 945/03 Nitin Tiwari has been dismissed and the Tribunal directed that the amount towards no fault liability deposited by the appellant of appeal No. 3201/04 (Dinkar Joshi) shall be paid to the petitioner Nitin Tiwari.

2. Admitted facts of the case are that the non-petitioner Dinkar Joshi, was owner of the fiat car No. MP-04C-8092 on the date of accident i.e, 15-1-2000, he was driving the vehicle on the date of accident.

3. Facts of the case in a nutshell are that on 15-1-2000, Dinkar Joshi, by driving fiat car No. MP-04C-8092 rashly and negligently dashed the petitioner Nitin Tiwari, Nitin Tiwari, sustained grievous injuries and permanent disability, he spent money on treatment, he was treated in hospital, he claimed compensation amount of Rs. 48,40,000/-. The non-petitioner, Dinkar Joshi by denying the case of the petitioners pleaded that he has not caused accident by driving fiat. NItin Tiwari was not knowing driving of scooter. At the time of accident, Nitin Tiwari was driving scooter along with his friend Sandip as a pillion rider. The accident occurred due to negligence of Nitin Tiwari. Out of sympathy, he took injured Nitin Tiwari to hospital,he is not liable to pay any compensation amount to the claimant.

4. The learned Tribunal framed five issues. After hearing learned counsel for both the parties, perused evidence and material on record, dismissed the claim petition by directing that the amount paid by the non-petitioner towards no fault liability shall be paid to the petitioner, aggrieved by the impugned award, both the parties have filed the aforesaid miscellaneous appeals.

5. We have heard the learned counsel for both the parties in all the four appeals, perused the evidence and material on record.

6. Learned counsel for the appellant Nitin Tiwari urged that the Tribunal has committed error in appreciating evidence lead by the parties and circumstances of the case, there is sufficient evidence on record to prove that the accident caused by the non-petitioner Dinkar Joshi by driving car rashly and negligently. The Tribunal erred in dismissing the claim petition. Contrary to that, learned counsel for the respondent Dinkar Joshi in MA No. 3201/04 urged that learned Tribunal did not commit any error in dismissing the claim petition but erred in directing that the amount deposited by him towards no fault liability shall be paid to the petitioner Nitin Tiwari because Tribunal came to conclusion that the accident is not caused by non-petitioner Dinkar Joshi by driving fiat car hence, he is not liable to pay any amount towards no fault liability.

7. Nitin Tiwari (Aw-1) deposed that at about 2:15 p.m, he was going on foot along with Sandip Chhutelkar, from behind Dinkar Joshi by driving car rashly and negligently dashed him, he sustained injuries on his back and spinal cord was fractured, the number of the car was MP-04C-8092. Driver of the car, Dinkar Joshi took him to the hospital where he was treated for 9 days, he was treated in Hoshangabad hospital for 24 days. Ashish Tiwari (AW-2) deposed that he was going to his house along with his friend Nitin and his friends were coming from the opposite side. One fiat car came in zig-zag manner and in excessive speed and dashed Nitin. Nitin sustained injuries. The driver of the fiat car took Nitin to the

hospital, he has further deposed that the number of the car was MP-04C-8090 or 8092. Akim Quershi (Aw-3) also corroborated the testimony of Nitin and Ashish Tiwari and deposed that Dinkar Joshi by driving car dashed Nitin. Contrary to that, Abdul Wazhid (NAW-1), Gyanendra Singh(NAW-2) and Dinkar Joshi (NAW-4) deposed that Nitin was driving the scooter and fell down from the scooter, Dinkar Joshi stopped his car and out of sympathy took the injured to the hospital. No accident was caused by Dinkar Joshi by driving vehicle. Dr. Ravindra Gangrade (NAW-3) deposed that Nitin was admitted in hospital for 8 days but he never insisted to lodge FIR. The Police Station is near to the hospital. He proved Bed head ticket Exhibit P-31 dated 15-1-2000. It is clear from the evidence of Ravindra Gangrade and Exhibit P-31 that vehicular accident is mentioned in the Bed head ticket. No information has been given by Dr. Ravindra Gangrade to Police regarding vehicular accident. The conduct of Dr. Ravindra Gangrade is against rules and norms. The duty of the treating doctor was to inform the police that a person injured in vehicular accident has been admitted for treatment in the hospital. There is no mention in Exhibit P-31 that Nitin Tiwari fell down from the scooter, contrary to that vehicular accident is mentioned in the documents. Dinkar Joshi has also not reported the matter to the Police or stated to the doctor that Nitin Tiwari fell down from the scooter and injured was driving the scooter. No sufficient explanation has been putforth by Dinkar Joshi in this respect, even Dinkar Joshi has not informed the relatives of the injured, he unsuccessfully tried to explain this fact that Nitin told him that he will be on road after some time and he will go to the house. There is no material contradictions in the statement of Nitin Tiwari, Ashish Tiwari and Akim Quereshi. The presence of Dinkar Joshi alongwith fiat car No. MP-04C-8092 on spot is established by the admission of Dinkar Joshi and evidence lead by both the parties. The appellant came to know that report of accident was not lodged by anyone then he lodged the report Exhibit P-1 on 14-2-2000 at Police Station, Hoshangabad. This report contains the facts of the accident and corroborates the factum of accident caused by Dinkar Joshi that by driving fiat car No. MP-04C-8092 rashly and negligently and dashed Nitin Tiwari. The fact that Dinkar Joshi took NItin Tiwari in his fiat car to the hospital and did not disclose to the doctor that NItin Tiwari fell down from the scooter while driving the scooter also corroborates the case of the petitioner. We are of the view that the learned Tribunal on erroneous and flimsy grounds disbelieved the evidence adduced by the petitioner and finding of the Tribunal in this respect deserves to be set aside. We are of the view that the evidence lead by the petitioner is reliable and the evidence lead by the non-petitioner is not reliable. We hold that it is proved that on 15-1-2000, Dinkar Joshi by driving fiat car rashly and negligently dashed Nitin Tiwari who sustained injuries. The finding arrived at by the learned Tribunal in this respect is set aside. It is proved by the evidence of Nitin Tiwari, Dr. H.G. Kalyani, Dr. Ravindra Gangrade and Exhibits P-31, P-6, P-24, P-26 that Nitin Tiwari sustained grievous injuries in thoracic, 10th vertebra and he sustained permanent disability. At the time of accident, age of Nitin Tiwari was 21 years, he sustained grievous injuries and permanent disability. He was treated quite some time in Hoshangabad hospital, he suffered pain and mental agony, it is quite natural that he might have spent money on treatment, special diet and attendant though no medical bills have been proved by Nitin Tiwari but it cannot be hold that he has

not spent money on treatment, special diet and attendant. Looking to the age of Nitin Tiwari, injuries sustained by him, permanent disability, pain and suffering, we deem it proper to award a lump sum compensation of Rs. 50,000/- to Nitin Tiwari in all heads along with interest @ 7% p.a from the date of filing of the claim petition before the Tribunal till realisation.

8. Consequently, MA No. 3201/04 filed by Dinkar Joshi is dismissed and MA No. 945/05 filed by Nitin Tiwari is allowed, it is directed that appellant Nitin Tiwari is entitled to get compensation amount of Rs. 50,000/- from Dinkar Joshi. The compensation amount shall carry interest @ 7% p.a from the date of filing of the claim petition before the Tribunal till realisation. The amount paid towards no fault liability shall be adjusted towards this compensation by Dinkar Joshi. No order as to costs.

Order accordingly.

I.L.R. [2008] M. P., 310
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
30 November, 2007

JHANAK & ors ... Appellants*
Vs.
SANTOSH @ MONU & ors ... Respondents

A. Civil Procedure Code (5 of 1908) - Order 3 Rule 4 - Advocate witness - Whether Counsel can subsequently appear as a witness - Held - Advocate accepting, brief and conducting matter knowing full well that he is likely to be cited as witness on material point - He cannot subsequently withdraw from suit and appear as witness.

The respondents have examined Anirudh Kumar Malviya (NAW-3), who deposed that he also went in the marriage of Shri Sunil Chouhan, advocate and no accident was caused by MP-05F-5555. It is evident fact that Anirudh Kumar Malviya was the advocate of the respondent nos. 1 and 2 in this claim petition. He accepted brief of respondent nos. 1 and 2 and conducted the matter and knowing full well that he could be likely to be cited as a witness on material point i.e, non-involvement of the jeep in the accident. In *R.K. Agarwal Vs. Rana Harishchandra Ranjitsingh and others* AIR 1994 Bombay 117, it has been held by the Bombay High Court that if an advocate accepts brief and conducting matter knowing full well that he is likely to be cited as witness on material point, he cannot subsequently withdraw from suit and appear as a witness and evidence of such advocate as a witness cannot be read in evidence and deserves to be expunged. Consequently, the evidence of Anirudh Kumar Malviya is expunged from the records as no evidence. (Para 8)

B. 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

*M.A. 1342/2002 (Jabalpur)

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. (Para 9)

Case Referred :

AIR 1994 Bombay 117

Arpan Shrivastava, for the appellants

Sanjay Agarwal with *S.Tiwari,* for the respondent no. 3 /Insurer.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **S.A. Naqvi, J:-**The appellants have preferred the appeal under Section 173 of the Motor Vehicles Act for enhancement of compensation amount being aggrieved by the impugned award dated 29-6-02 passed by Additional Motor Accident Claims Tribunal, Multai in M.V.C. No. 78/98 whereby claim petition of the appellants have been dismissed.

2. The facts of the case in a nutshell are that on 19-06-98, the deceased Subhash was the second driver on Mini-truck No MP-05A-9137 along with Gendroa Thakre. At about 1:30 at night, the right tyre of the mini-truck was punctured. Subhash was repairing the puncture. The respondent no.1, Santosh @ Monu by driving jeep No. MP-05F-5555 in a rash and negligent manner dashed the deceased Subhash. Subhash sustained injuries and succumbed to them. The respondent no.2, Sheikh Khalil was the owner of the mini-truck and respondent no.3, the Oriental Insurance Company Limited was the insurer on the date of accident. The deceased Subhash was earning Rs. 3000/- per month from the service of driver and Rs. 500 per month by tailoring. The appellants being the legal heirs of the deceased claimed compensation amount of Rs. 23,94,000/-.

3. The respondents by denying the pleadings of the petition pleaded that the Vehicle No. MP-05F-5555 is not involved in the accident. A false case has been crafted against the respondent. On 19-6-98, a jeep was in a marriage party of Shri Sunil Chouhan, Advocate and carried other advocates to Bhaisdahi. The owner, driver and insurer of the mini-truck are necessary party.

4. The Tribunal framed seven issues. After hearing learned counsel for both the parties, perusing evidence and material on record, the learned Tribunal held that the accident does not occurred by Jeep No. MP-05F-5555. Respondents are not responsible to pay compensation amount to the claimants. The jeep was not on the spot at the time of accident. The owner, driver and insurer of the mini-truck are not necessary parties and dismissed the claim petition, being aggrieved by the impugned award, the appellants have preferred this appeal for enhancement of compensation amount.

5. We have heard the learned counsel for both the parties, perused the impugned award, evidence and material on record.

6. The learned counsel for the appellants urged that there is sufficient evidence

on record to prove including the admission of the driver of the Jeep Santosh @ Monu that accident caused by the Jeep No. MP-05F-5555 and Subhash was the driver at the time of the accident. The learned Tribunal erred in appreciating the evidence of both the parties in right perspective. The evidence of advocate Anirudh Kumar Malviya cannot be read in evidence because he was advocate of respondent no.1 and 2 in the claim petition. The case of the appellants is corroborated by the FIR and Tribunal has erred in ordering to refund Rs. 50,000/- paid towards no fault liability to the appellants. Per contra, learned counsel for respondent no.3 supported the impugned award and urged that the Tribunal has rightly dismissed the claim petition.

7. It is not in dispute that Subhash died in a vehicular accident. It is also proved by the evidence on record that at the time of accident, age of the deceased was 22 years. Appellant no.1 and 2 are the parents and appellant no.3 is the brother of the deceased. Jhanaklal is not eye-witness. He proved documents Exhibit P-1 to Exhibit P-15 pertaining to the criminal investigation of the accident, Exhibit P-16, is the driving licence of Subhash. Jhanklal (AW-1) deposed that his son was driver, his pay was Rs. 3000/- per month beside that he used to carry tailoring business and was earning Rs. 500 per month. The owner of the mini-truck deposed that Subhash and Gendrao Thakre were driver on his mini-truck, he was paying Rs. 3000/- per month to Subhash. The evidence of Jhanaklal has not been impeached in the cross-examination in this behalf and no evidence has been adduced by the respondents to controvert the testimony of Jhanaklal. On going throgh the evidence, we are of the view that the monthly income of the deceased was Rs. 2500/-, consequently, we hold that the deceased Subhash was earning Rs. 2500/- per month.

8. Gendrao Thakre, the first driver of the mini-truck No. MP-05A-9137 deposed that on 19-6-98, at about 1:30 in the night, Subhash was the second driver on the mini-truck. The tyre of driver side was punctured. Subhash was changing the tyre, mini-truck was stationary on the left side of the road. Gendrao Thakre went near to evacuate, he saw that jeep came in excessive speed and dashed Subhash and went ahead. Gendrao Thakre cried and ran towards jeep in the light of mini-truck and light of crusher, he saw the jeep No. MP-05F-5555. Gendrao Thakre also deposed that the driver of the jeep applied the brake of the jeep, at this juncture, he saw the number of the jeep in the light of the crusher. He deposed that this jeep used to ply Multai and Bhaisdahi, Santosh used to drive the jeep. At the time of accident, after ten minutes, one vehicle came from the the side of Varud Road on the spot, Gendrao inquired about the jeep, the driver of the jeep told him that he saw the jeep of which light of the left side was broken. Gendrao Thakre in that vehicle brought Subhash to Multai hospital where he was treated and lateron succumbed to the injuries. Nothing has come adverse in the cross-examination of Gendrao Thakre which render his evidence even doubtful, though Santosh (NAW-1) driver of the jeep No. MP-05F-5555 deposed that on 18-6-98, he went along with jeep to Bhaisdahi along with advocates who have attended the marriage of Shri Sunil Chouhan, advocate. He also deposed that his jeep was not involved in the accident and at the time of the accident he was not on the spot. Sheik Khalil (NAW-2), the owner of the jeep also deposed that no accident was

caused by his jeep in the intervening night of 18-6-98 and 19-6-98. Though, he stated that he told police that the jeep was in Bhaisdahi in connection with a marriage of an advocate but he has not filed any application to any Police Officer in this respect, he has no knowledge that who went to Bhaisdahi by his jeep and jeep came back along with other persons. He also deposed that driver Santosh got filled fuel in Bhaisdahi and took bill but he has not given bill of fuel to the police and has not produced and proved the bill during the course of trial. He came to know about the accident when vehicle was seized, he has ample opportunity to produce fuel receipt to police. Non-production of fuel receipt are unexplained which leads to the presumption that at the time of accident jeep was not in Bhaisdahi and no fuel was filled at Bhaisdahi. Though, driver Santosh denied the factum of accident and involvement of the jeep in the accident but it is clear from his cross-examination that he has knowledge that accident occurred near crusher and Subhash died in the accident. He admitted that a case under Section 304-A was registered. In paragraph-11 of his statement, Santosh deposed that he started from Bhaisdahi in the morning and in the evening at 7:00 reached Lordkaranja and attended the marriage of advocate. He also deposed that after 15 minutes of reaching Bhaisdahi, he along with his owner went to Varud, he went from Varud to Masod, Sivangi, and Pattan. He also admitted that in between Pattan and Varud, the crusher is situated where the accident occurred. He also admitted that he was in front of the crusher in the night of 19-6-98 but he has not located any vehicle there. There was no blood stains or stones on the road. It is clear from the evidence of driver Santosh that on 19-6-98, the jeep was on the spot though, he has denied the fact that jeep was on the spot at the time of accident. On appreciating the whole evidence of Santosh in this context, only two differences appears in respect of accident and jeep's presence on the spot. It is quite natural that to save himself from criminal charge, driver Santosh has not stated correct facts regarding the accident. The fact that the jeep was on the spot on the date of accident strengthen the evidence of Gendrao Thakre (AW-2) that accident is caused by the jeep No. MP-05F-5555 which was being driven by Santosh in rash and negligent manner. The evidence of Gendrao Thakre is also corroborated by documents proved by Jhanaklal, father of the deceased. The respondents have examined Anirudh Kumar Malviya (NAW-3), who deposed that he also went in the marriage of Shri Sunil Chouhan, advocate and no accident was caused by MP-05F-5555. It is evident fact that Anirudh Kumar Malviya was the advocate of the respondent nos. 1 and 2 in this claim petition. He accepted brief of respondent nos. 1 and 2 and conducted the matter and knowing full well that he could be likely to be cited as a witness on material point i.e, non-involvement of the jeep in the accident. In *R.K. Agarwal Vs. Rana Harishchandra Ranjitsingh and others* AIR 1994 Bombay 117, it has been held by the Bombay High Court that if an advocate accepts brief and conducting matter knowing full well that he is likely to be cited as witness on material point, he cannot subsequently withdraw from suit and appear as a witness and evidence of such advocate as a witness cannot be read in evidence and deserves to be expunged. Consequently, the evidence of Anirudh Kumar Malviya is expunged from the records as no evidence. Sunil Singh(AW-4) and Mahadev (AW-5) also deposed that no accident was caused by the jeep but looking to the evidence of Santosh and Gendrao Thakre, evidence

of these witnesses are not reliable. We are of the view that the learned Tribunal erred in rejecting the evidence lead by the petitioners and disbelieving the evidence of Gendrao Thakre, we hold that the evidence of Gendrao Thakre is wholly reliable and it is proved that on 19-6-98, the respondent no.1, Santosh @ Monu by driving MP-05F-5555 dashed the deceased Subhash and Subhash died, due to the injuries sustained in the accident hence, we set aside the finding arrived at by the Tribunal in this respect. It is not disputed that on the date of accident Sheik Khalil was the owner of the jeep and it was insured with the respondent no.3, the Oriental Insurance Company Limited hence, the respondents are jointly and severally liable to pay compensation amount to the appellants.

9. We have hold that the monthly income of the deceased was Rs. 2500/- i.e, Rs. 30,000/- per year. The appellant nos. 1and 2 are parents of the deceased and they were dependent on the deceased. By deducting customary 1/3rd amount from the annual income of the expenditure of the deceased which amount he would have spent upon himself had he been alive, loss of dependency comes to Rs. 20,000/- per annum. At the time of accident, age of the father of deceased was 43 years and mother was 41 years,thus, multiplier of 13 is applicable. Hence, the loss of future dependency comes to Rs. 20,000/- x 13= Rs. 2,60,000/- beside that appellant nos.1and 2 are also entitled to get Rs.30,000/- under customary heads of funeral expenses, loss of estate and for loss of expectancy of life. Thus, the appellant nos. 1 and 2 are entitled to get total compensation of Rs.2,90,000/-.

10. Consequently, the appeal has merit. Appeal is allowed. It is directed that appellant nos.1 and 2 are entitled to get total compensation of Rs. 2,90,000/- from the respondents. Respondents are jointly and severally liable to pay compensation amount to appellant no.1 and 2. The compensation amount shall carry interest @ 7% p.a. from the date of filing of the claim petition before the Tribunal till realisation. No order as to costs. *Appeal allowed.*

I.L.R. [2008] M. P., 314
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
4 December, 2007

DR.V.K. VERMA ... Appellant*
Vs.
DAWOODI BOHRA MASJID COMMITTEE ... Respondent

Limitation Act, Indian (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. (Para 8)

Cases Referred :
AIR 1981 MP 13, 1998 (1) MPJR 111.

*S.A. No. 296/2001 (Jabalpur)

Mukhtar Ahmed, for the appellant
Pranay Gupta, for the respondent.

Cur.adv.vult.

JUDGMENT

A.K. Shrivastava, J. :– This second appeal has been filed at the instance of the defendant as the learned First Appellate court has allowed the appeal of the plaintiff and decreed the suit by the impugned judgment and decree.

2. No exhaustive statements of facts are necessary for the disposal of this appeal. Suffice it to say that the plaintiff filed an appeal before the learned First Appellate Court, which was barred by time and eventually an application to condone the delay was filed. The appeal was decided by the learned First Appellate Court without deciding the application under section 5 of the Indian Limitation Act, 1963 (in short the Act).

3. This second appeal was admitted on 8.2.02 on the following substantial questions of law :

> "i) Has the decision of first appeal, which was beyond time, without condoning the delay, been without jurisdiction and non-est in view of *Chhitu V. Mathuralal* (AIR 1981 MP13)?"
>
> "ii) Has the first appellate Court below erred in exempting the respondent Masjid Committee from operation of M.P. Accommodation Control Act, 1961, though no notification was issued by the State Government exempting such property of trust from operation of the Act before institution of suit, in view of *Santosh Kumar v. Jama Masjid Committee, Sagar* (1998(1) MPJR 111) and like?"

4. It has been submitted by Shri Mukhtar Ahmed, learned counsel for the appellant that it was imperative on the part of the first appellate court to have decided the application under section 5 of the Indian Limitation Act, 1963 and then only it could have decided the appeal on its own merit. In support of his contention learned counsel has placed reliance on the decision of this court in *Chhitu V. Mathuralal* (AIR 1981 M.P. 13).

5. By placing reliance on the decision of this Court in the case of *Santosh Kumar v. Jama Masjid Committee, Sagar* (1998(1) MPJR 111), it has been contended that the provisions of the M.P. Accommodation Control Act, 1961, are applicable and, therefore, the decision of the learned first appellate Court decreeing the suit of plaintiff is vitiated since it is contrary to the law.

6. On the other hand Shri Pranay Gupta, learned counsel for the respondent / plaintiff argued in support of the impugned judgment but fairly contended that the application under section 5 of the Act was not decided.

7. Having heard learned counsel for the parties I am of the view that this appeal is liable to be allowed and the matter is required to be sent back to the learned first appellate Court.

Regarding substantial question of law no.1,

8. On going through the record of the learned First Appellate Court it is gathered that the appeal was filed beyond the prescribed period of limitation, and eventually

an application under section 5 of the Act was filed which was marked as I.A.1. On going through the order-sheets of learned appellate court it is gathered that from time to time the matter was adjourned to hear the said application but the same was not heard though in the some order-sheets it has been mentioned that the said application shall be considered in the final judgment. On going through the impugned judgment it is gathered that the application under section 5 of the Act, marked as I.A.No.1 before the learned First Appellate Court, was not at all decided. In this view of the matter, the learned First Appellate Court was not having any jurisdiction to decide the appeal on merit without condoning the delay.In this context I may profitably rely on the decision of *Chhitu* (supra) of this court and para 9 of the decision may be taken note of.

9. The substantial question of law no. 1 is thus answered that "without condoning the delay in filing the appeal, the learned first appellate court was not having any jurisdiction to decide the appeal on merit and allow the same by decreeing the suit of the plaintiff".

10. Since the application has not been decided and the matter is being sent back to the learned First Appellate Court to decide the application under section 5 of the Act, I am not deciding the substantial question of law no.2. The Parties shall be free to raise this point before the learned First Appellate Court.

11. For the reasons stated herein above this appeal is allowed, the judgment and decree passed by the learned First Appellate Court is hereby set aside and the case is sent back to the learned First Appellate Court to decide the application of condonation of delay filed under section 5 of the Act first and if the delay is condoned then only appeal may be heard on merit.

12. Looking to the facts and circumstances the parties are directed to bear their own costs. Learned First Appellate Court shall decide the matter as early as possible preferably within a period of three months from the date of receipt of the copy of judgment of this Court.

Appeal allowed.

I.L.R. [2008] M. P., 316
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice Sanjay Yadav
7 January, 2008

KALINIDI MOHAN ... Appellant*
Vs.
BANK OF MAHARASHTRA & ors. ... Respondents

A. Bankers Books Evidence Act (18 of 1891) - Sections 2(8), 4 - Mode of proof of entries in Banker's Book - Manager of Plaintiff Bank proved statement of account - Nothing could be extracted in cross examination of the witness to create doubt in respect of maintenance of account as provided under the Act - Nothing irregular shown by appellant that loan accounts were not maintained properly - No discrepancy in respect of maintenance of account.

*F.A. 419/99 (Jabalpur)

In the instance case PW-1 Manager of Bank of Maharashtra Branch Waraseoni has proved the statement of account Ex.P/18, Ex.P/19 and Ex.P/20 in respect of the aforesaid loan facilities and the transactions effected therein. The evidence of PW-1, in respect of maintenance of statement of A/c, thus, leaves no iota of doubt that the statement of account and entries therein are proved as provided under the provisions of Banker's Books 1891. Though, this witness was extensively cross examined by the appellant/defendant however, nothing could be extracted to create doubt in respect of maintenance of account as provided under the Act of 1891. Nothing irregular has been shown by the appellant that the loan A/cs were not maintained properly in accordance with the provisions contained in the Act, 1891, no evidence to that effect has been led, we therefore, do not find any discrepancy in respect of the maintenance of the account. (Para 9)

B. Civil Procedure Code (5 of 1908) - Order 30 Rule 4(1),(2), Order 1 Rule 10 - Suit by or against firm - Legal representatives of deceased partner - Impleadment of - Suit filed against defendant who is only surviving Partner - Rule 4(1) of Order 30 carves out exception to provision of Section 45 of Contract Act- Not necessary to join legal representative of deceased partner as a party to the suit.

In the light of the aforesaid proposition of law laid down by the Apex Court, we do not find any discrepancy in respect of the suit being brought against the appellant/defendant, the surviving partner of the said firm. Accordingly, the contentions raised by the appellant in respect of mis-joinder of parties is sans merit and is rejected hereby. (Para 11)

C. Banking Regulation Act, (10 of 1949) (As inserted by Banking Law (amendment) Act 1984) - Section 21A - Rate of interest - Agreement provides that bank shall be entitled to change rates of interest from time to time - Section 21A of Act, provides that rates of interest charged by banking companies not to be subject to scrutiny by Courts - Contention that interest being excessive and *de hors* the term of agreement without substance - Appeal dismissed.

The next question is whether the interest charged @ 20% per annum besides being exhorbitant is *de hors* the term of agreement. We have perused the Agreements entered into by the appellant with the plaintiff/Bank wherein it is agreed upon that the Bank shall be entitled to change the rates of interest from time to time.

The contentions regarding the charge of interest being excessive and *de hors* the term of agreement is without any substance and accordingly rejected.

Case Referred : (Para 12)

AIR 1997 SC 257

Sanjay Jain, for the appellant

None, for the respondents.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by SANJAY YADAV, J:–The appellant, borrower, being aggrieved of the judgment and decree dated 18.11.97 passed by the District Judge, Balaghat in C.S. No. 16-B/91

has preferred the present appeal. The learned District Judge vide impugned judgment has decreed the suit preferred by the respondent No.1, Bank of Maharashtra for recovery of Rs.14,47,000/- alongwith interest @ 20% per annum and cost.

2. The facts giving rise to filing of the suit for recovery and the judgment and decree thereof are that the Appellant and Dadulal Pariwal & Brijrani Pariwal for constructing Savita Talkies in Waraseoni were granted loan facilities in the nature of term loan, cash credit facility and the over draft facility. The various amounts which were advanced towards aforesaid loan facilities were the term loan of Rs.4,00,000/-(Four lacs) on 25.6.82, cash credit facility of Rs.1,18,000/- on 16.7.86, working capital by way of over draft facility of Rs.60,000/- on 11.10.86 and Rs.25,000/- on 11.10.88. In order to avail aforesaid loan facilities the appellant and other partners, viz, Dadulal Pariwal and Brijrani Pariwal executed various security documents, viz, the demand promissory note dated 5.12.85, 16.7.86 & 11.10.88 and term loan agreement dated 5.12.85, 16.7.86 & 11.10.88 hypothecation of plant and machinery dated 5.12.85, 16.7.86 & 11-10-88 letter of guarantee dated 5.12.85 & 16.7.86. Besides the aforesaid security documents, the appellant and his aforesaid partners created an equitable mortgage by deposit of the title deeds of their immovable properties situated in village Wara, Tehsil Waraseoni District Balaghat bearing Khasara No. 730/2, 731/1, 1047/1, 1049/2, 1049/4, 1049/6, 1049/6, 1057/3, 1052/5 admeasuring 2.41 acres and the land situated in Sikendra Tehsil Waraseoni District Balaghat bearing Khasara No. 285/2(cha) admeasuring 3054 sq ft. That during the subsistence of the aforesaid loan facilities the two partners viz, Dadulal Pariwal and Brijrani Pariwal died, thus, leaving the appellant to be the sole proprietor of the Savita Talkies, wherefor the aforesaid loan facilities were availed. That subsequent to the death of the aforesaid partners, Surajlal Bisen and Ramchand, respondent Nos.2 and 3 executed the letters of guarantee dt. 11-10-88 in respect of the aforesaid loan facilities, thereby guaranting the due repayment of the amount due in respective accounts alongwith interest thereon. The appellant acknowledged his liability to repay the loan amount alongwith interest by executing the letter of acknowledgment on 11-10-88.

3. That various loan facilities though were availed of by the appellant but there was default in repayment resulting in the amount due, to the extent of Rs. 14,47,000/- as on 10.10.91 when the suit was filed by the respondent Bank for its recovery and for sale of the immovable property mortgaged. The appellant/defendant No.1 denied his liability and prayed for the dismissal of suit on the ground that the suit was not maintainable because of the mis-joinder and was not properly constituted and that the suit was time barred. It was further averred that since the Bank has failed to provide the working capital in time the same resulted in delayed fructification of the venture and therefore was not able to make payment within time. The trial Court having considered the material evidence on record decreed the suit for recovery of Rs.14,47,000/- alongwith interest @ 20% per annum and for the property.

4. Challenge is putforth by the appellant on the following counts:-

(i) That the statement of A/c was not maintained in accordance with the provisions contained in the Bankers Books evidence and in absence of the same the suit ought not to have been decreed ;

(ii) That the plaint was not verified by the competent person as such the same ought to have been rejected;

(iii) That the interest charged was exhorbitant contrary to term of contract, and

(iv) That there was mis-joinder of parties so much so that though the loan facilities were tendered to a partnership firm but the suit was brought against individual, the appellant treating him to be the sole proprietor.

5. In furtherance, of his submission the learned counsel for the appellant has taken us through the evidence on record. It is pointed out by the learned counsel for the appellant, while placing reliance on the statement of appellant/claimant, Ex.D/2, that the plaintiff Bank being under an obligation to maintain the account in accordance with the Bankers Books evidence Act has failed to prove that the account was maintained as per the stated. It is further submitted that though the agreed rate of interest was 16.5% per annum plus the penal interest of 2% but the rate of interest charged and granted by the Court below @ 20% per annum was exhorbitant and contrary to the term of agreement. Furthermore, it is urged that the plaint was not verified by the competent person as such there was no proper institution of a suit. In respect of the mis-joinder, it is submitted on behalf of the appellant, that the loan was sanctioned in favour of a partnership firm whereas the suit was filed against the appellant individual styled as the proprietor of a firm.

6. We gave our anxious considerations to the submissions made on behalf of the appellant and have perused the record.

7. In respect of the submissions regarding the verification of the plaint by incompetent person we observe from paragraph 37 of the impugned judgment the appellant/plaintiff did not pursue the same, and rightly so in view of Ex.P/40 being the General Power of Attorney dated 12.4.88 in favour of Shri Anil Yashwant Paranjape, an officer who verified the plaint. The trial Court recorded a finding that because of non-pressing of the aforesaid question by the appellant on 28.7.93 no issue was framed. It is therefore, now not open to the appellant/plaintiff to raise the issue at appellate stage, the contentions therefore pertaining to verification is accordingly rejected.

8. Now coming to the contentions pertaining to maintenance of statement of A/c. Section 2 (8) of Bankers Books evidence Act 1891 (hereinafter referred to as the "act") defines "certified copy" to mean when the books of a bank-,

"(a) are maintained in written form, a copy of any entry in such books together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book is still in the custody of the bank, and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in the

usual course of the bank's business after the date on which the copy had been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title; and

(b) consists of printouts of data stored in a floppy, disc, tape or any other electromagnetic data storage device, a printout of such entry or a copy of such printout together with such statements certified in accordance with the provisions of section 2A.

(c) a printout of any entry in the books of a bank stored in a micro film, magnetic tape or in any other form of mechanical or other process which in itself ensures the accuracy of such printout as a copy of such entry and such printout contains the certificate in accordance with the provisions of section 2A."

9. Furthermore, Section 4 of the Act of 1891 stipulates the mode of prove of entries in Banker's Books. It is provided that :-

"4. Mode of proof of entries in banker's books:- Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as the original entry itself is now by law admissible, but not further or otherwise."

In the instance case PW-1 Manager of Bank of Maharashtra Branch Waraseoni has proved the statement of account Ex.P/18, Ex.P/19 and Ex.P/20 in respect of the aforesaid loan facilities and the transactions effected therein. The evidence of PW-1, in respect of maintenance of statement of A/c, thus, leaves no iota of doubt that the statement of account and entries therein are proved as provided under the provisions of Banker's Books 1891. Though, this witness was extensively cross examined by the appellant/defendant however, nothing could be extracted to create doubt in respect of maintenance of account as provided under the Act of 1891. Nothing irregular has been shown by the appellant that the loan A/cs were not maintained properly in accordance with the provisions contained in the Act, 1891, no evidence to that effect has been led, we therefore, do not find any discrepancy in respect of the maintenance of the account.

10. The next question which crops for consideration is whether the plaint was properly constituted. We noted the contention of the appellant/defendant that the loan facilities were extended to a partnership firm. It is not in dispute that during the subsistence of the aforesaid loans, the two partners Dadulal Pariwal and Brijrani Pariwal died leaving defendant alone as the sole owner of the business/Savita Talkies. Order 30 Rule 4(1) of the CPC stipulates:-

"4. Rights of suit on death of partners- (1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 (9 of 1872) where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such

persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

Thus, an exceptions is carved out by aforesaid provision to Section 45 of the Contract Act.

11. In the case of *Anokhe Lal Vs. Radhamohan Bansal and others* AIR 1997 SC 257 their Lordship of the Apex Court in respect of the aforesaid provision held in paragraph 7 as under:-

> "7. The aforesaid Rule 4(1) is clearly an exception to Section 45 of the Contract Act. The principle made out in Section 45 applies to a situation where one person has made a promise to two or more persons jointly. The right to claim performance of the contract arising out of such a promise would then rest with those promisees together during their joint lives and after the death of any of them, such right would devolve on the representative of the deceased promisee jointly with the surviving promisees. Thus, if the joint promisees were partners of a firm this provision obliges the legal representative of a deceased partner who join the rest in enforcement of the right to have performance of the contract."

In the light of the aforesaid proposition of law laid down by the Apex Court, we do not find any discrepancy in respect of the suit being brought against the appellant/defendant, the surviving partner of the said firm. Accordingly, the contentions raised by the appellant in respect of mis-joinder of parties is sans merit and is rejected hereby.

12. The next question is whether the interest charged @ 20% per annum besides being exhorbitant is de hors the term of agreement. We have perused the Agreements entered into by the appellant with the plaintiff/Bank wherein it is agreed upon that the Bank shall be entitled to change the rates of interest from time to time. Besides there being the clause of enhancement of rate of interest from time to time, Section 21A of the Banking Regulation Act, 1949 as inserted by Banking laws (Amendment) Act, 1984 stipulates:-

> **"21A. Rates of interest charged by banking companies not to be subject to scrutiny by courts:-** Notwithstanding anything contained in the Usurious Loans Act, 1918, or any other law relating to indebtedness in force in any State, a transaction between a banking company and its debtor shall not be reopened by any court on the ground that the rate of interest charged by the banking company in respect of such transaction is excessive."

The contentions regarding the charge of interest being excessive and de hors the term of agreement is without any substance and accordingly rejected.

13- No other points then the aforesaid, are urged by the appellant. In the result, the appeal being devoid of substance is dismissed. No costs.

Appeal dismissed.

I.L.R. [2008] M. P., 322
APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

18 January, 2008

NEW INDIA INSURANCE CO. LTD. ... Appellant*

Vs.

SANTOSH & ors. ... Respondents

Motor Vehicle 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. (Para 10)

Anup Nair, & Shishir Dixit, for the appellant.

None, for the respondent nos. 1, 2 & 3.

Devendra Shukla, for the respondent no. 4.

Cur.adv.vult.

ORDER

U.C. MAHESHWARI, J.:–This appeal is directed on behalf of the insurer/ appellant under Section 173 of the Motor Vehicle Act (in short "the Act") being aggrieved by award dated 9.10.02 awarding the claim of respondents No.1 and 2 for the sum of Rs.47000/- along with interest at the rate of 9% P.A from the date of filing the claim petition.

2. The facts giving rise to this appeal in short are that on dated 29.6.2001 at about 10.30 P.M in the night, the respondent No.2 being employee of respondent No.1, after giving the services of his horse in some marriage ceremony was returning to home, on the way such horse was dashed by the auto bearing registration No.CIQ 3937 driven by respondent No.3 in a rash and negligent manner, resultantly along with respondent No.2 such horse also sustained the injuries in its right leg and in consequence of it, the horse succumbed to injuries. The F.I.R regarding the incident was lodged at P.S. Cantt, Sagar. The postmortem of the horse was carried-out at veterinary hospital, Sagar, while respondent No.2 was taken to the hospital where his MLC report was prepared. Respondent NO.2 suffered huge expenses on his treatment and also sustained the loss of income. As per further averments, the earning of the respondent No.2 was Rs.20,000/- per annum, while the cost of the horse was Rs.35,000/- . The respondent No.1 has been deprived from the future income which he would have earned had the horse alive. With these averments, the respondent No.1 preferred his claim for Rs.300000/- regarding horse and its income while the respondent No.2 preferred his claim for the sum of Rs.18000/-.

3. Respondent No.3 remained ex-parte in the tribunal while in reply of respondent No.4, the averments of the claim petition are denied. It is also stated that the claim is preferred on false pretext, while in the reply of the appellant insurer it is stated that the alleged claim is not tenable either in law or on facts. It

*M.A. No. 2193/2002 (Jabalpur)

is accepted that the auto was insured with it with covering the risk of third party, therefore, its liability, regarding the damages of the property, was limited only upto Rs.6000/- and not more than this amount. It is also stated that respondent No.3 did not have a valid and effective driving licence to drive the alleged vehicle.

4. The tribunal framed the issues and recorded the evidence, on appreciation of the same, by holding the respondent No.3 is liable for the alleged accident, awarded the claim against the appellant and respondents 3 and 4 jointly and severally for the sum of Rs.35000/- in respect of the horse and Rs.10,000/- in respect of the income from such horse. Besides this, Rs.2000/- was awarded to respondent No.2 regarding the injuries sustained by him. The interest at the rate of 9% P.A from the date of filing the claim petition was also awarded on the awarded sum.

5. Being aggrieved by such award the insurer has come to this court with this appeal.

6. Shri Anup Nair and Shri Shishir Dixit, the appearing counsel for the appellant argued that in the lack of any additional premium for covering the additional risk regarding the damages of the property of third party, the claim regarding loss of the horse or its income could not be awarded against it for more than Rs.6000/-. He also referred the provision of Section 147 of the Act in this regard. In continuation he said that as per the policy, no additional premium was paid by respondent No.4 in this regard. He did not assail the part of the award, by which the claim of respondent No.2 has been awarded in respect of the injuries sustained by him. With these submissions they prayed for modification in the impugned award by allowing this appeal.

7. None appeared on behalf of respondents 1 to 3 to respond the aforesaid arguments while Shri Devendra Shukla, learned counsel for respondent No.4 by supporting the impugned award said that the same is based on proper appreciation of the evidence and also is in conformity with law. It does not require any interference at this stage. As per his submission, in any case, the appellant could not be exonerated from the liability to indemnify the awarded sum.

8. Having heard the counsel on perusing the record of the tribunal and the impugned award, I have not found any entry in the Insurance Policy (Ex.D/1) showing that any extra premium for covering the additional risk of the property of third party was paid. In such circumstance, I am of the considered view that the tribunal ought to have decided the matter in accordance with the provision of Section 147 of the Motor Vehicle Act. It appears that without taking such provision in consideration the joint and several liability for the entire sum has been saddled against the appellant.

9. The findings of the tribunal holding that the alleged accident was the cause and consequence of rash and negligent driving of the alleged auto-rickshaw by the respondent No.3 and the offending vehicle was insured with the appellant in the light of available evidence do not require any interference at this stage. Hence the same are hereby affirmed.

10. So far the liability of the appellant to indemnify the claim is concerned,

firstly, I would like to reproduce the provision of sub section 2 of Section 147 of the Act. The same reads as under :-

> **147. Requirements of policies and limits of liability.**
> (1).....
>
> "(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:?"
>
> (a) save as provided in clause (b), the amount of liability incurred;"
>
> (b) in respect of damage to any property of a third party, a limit of rupees six thousand:
>
> Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier."
>
> (3) .....(4) .....(5) .....

A bare reading of the aforesaid provision clearly shows that the liability against the appellant insurer regarding damages of the property like horse could be saddled by the tribunal only upto Rs.6000/- and not more than that. It is noted that I have not been shown any provision or the legal position contrary to the aforesaid provision by the counsel for respondent No.4. Apart this he could not show from the policy that any extra premium was paid to cover the additional risk of the property of third party.

11. It appears from para-21 and onwards of the impugned award that in the lack of any rules, regulations or provisions the liability to pay the entire sum has been saddled jointly and severally against the appellant along with respondent No.3 and 4. In the light of the aforesaid provision such approach of the tribunal does not appear to be correct. Hence such finding of the tribunal is set aside.

12. In the aforesaid premises, the impugned award requires modification for holding the liability of the appellant/insurer upto the limit of Rs.6000/-, therefore, by allowing this appeal in part, the joint and several liability of the insurer/appellant along with respondent No.3 and 4 to indemnify the claim regarding damages of horse is reduced from Rs.35000/- to Rs.6000/- and interest on it at the rate as awarded by the tribunal while the liability of the aforesaid remaining sum Rs.29000/- regarding the horse is saddled against respondents No.3 and 4. Besides this, the remaining part of the impugned award is hereby affirmed. It is further directed that if any excess amount has been paid by the appellant to the claimants then the appellant shall be at liberty to recover the same from respondents 3 and 4 by filing the execution on the basis of this award only and no separate proceedings will be required for it.

13. In the facts and circumstances of the case, there shall be no order as to the cost. The appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2008] M. P., 325
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
18 January, 2008

THE NEW INDIA ASSURANCE CO. LTD. ... Appellant*
Vs.
NANDRAM PRAJAPATI & anr. ... Respondents

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. (Para 8)

V.K. Pandey, for the appellant
None, for the respondents.

Cur.adv.vult.

O R D E R

U.C. Maheshwari, J. :–This appeal is preferred by the Insurer/appellant under Section 173 of the Motor Vehicle Act,1988 (in short the Act) being aggrieved by the award dated 10.7.2002 whereby the claim of the respondent No.1 regarding death of his daughter in vehicular accident has been awarded against the appellant for the sum of Rs.65000/- along with the interest at the rate of 9% P.A from the date of filing the claim petition.

2. The facts giving rise to this appeal in short are that on dated 25.2.2001 at about 1 O' Clock in the noon, Ms Priyanka aged 6 years daughter of respondent No.1 died in a road accident near Int-Bhatta, Rajiv Nagar Ward, Sagar. The alleged incident was caused by a tractor bearing registration No.MP 15-F 1684 due to negligence of respondent No.2 the driver of such truck. Such tractor was registered in the name of respondent NO.1 and insured with the appellant. On the aforesaid date it was stationed with the running condition of its engine, resultantly it proceeded and ran over the said Priyanka. On receiving the information, an offence under Section 304-A of the IPC was registered at Police Station Moti Nagar, Sagar. After investigation, respondent No.2 was charge-sheeted for such offence. Due to untimely death of the daughter, respondent NO.1 was deprived from her love and affection and also sustained the mental pain. It is also pleaded that due to shock of this incident, his wife also died. With these averments, the claim was preferred for the sum of Rs.10,10,000/- with a prayer to award the interest at the rate of 18% P.A.

3. Respondent No.2 remained ex-parte before the tribunal while in reply of appellant, the averments of the claim petition are denied. In additional pleadings, it is pleaded that respondent No.1 being the registered owner of the vehicle and insured person, is not entitled to get any award of the alleged incident as the tractor was insured only to cover the risk of third party and respondent No.1

*M.A. No. 1715/2002 (Jabalpur)

being insured, is not covered within the purview of the third party. The claim petition is preferred with the collusion of the respondent No.2. The respondent No.2 did not possess the valid and effective driving licence to drive such tractor. Accordingly, the tractor was plied contrary to the terms and conditions of the policy. With these averments the prayer for dismissal of claim was made.

4. The issues were framed and the evidence was recorded by the tribunal, on appreciation of the same, the claim of respondent No.1 was awarded against the respondent NO.2 and the appellant, for the sum as mentioned above. The same is under challenged at the instance of the appellant/insurer.

5. While arguing the case on merits, Shri V.K.Pandey, learned counsel for the appellant assailed the impugned award only on the question that the respondent No.1 being the registered owner of the tractor and the insured person, was not entitled for such the award as the policy of the tractor was issued by covering the risk of only third party and the respondent No.1 could not be treated as third party for awarding the claim. With these submissions, he prayed to exonerate the appellant from indemnifying the liability of the awarded sum to respondent No.1 by allowing this appeal.

6. None appeared on behalf of any of the respondents to respond the aforesaid arguments.

7. Having heard the learned counsel after examining the record of the tribunal and perusing the impugned award, I am of the considered view that the tribunal has not committed any error in awarding the claim against the appellant and the respondent No.2.

8. It is undisputed fact on record that in the alleged road accident the daughter of the respondent No.1 died and subsequent to it, his wife, the mother of the deceased also died. Before giving any finding, I would like to mention here that on the death of the daughter, her mother had a right to file the claim petition against the appellant, respondent No.2 the driver and respondent No.1 the registered owner of the tractor. On demise of the mother of the deceased, the respondent No.1 being her husband, inherited all rights as her legal representative and was also having the right to file the claim as one of the legal representative of the deceased as the deceased was the third party for which the policy was issued by the appellant. In such circumstances, the respondent No.1 had three different capacities; (i) the registered owner of the alleged vehicle, (ii) one of the legal representative of the deceased Priyanka and (iii) the sole legal representative of his wife who died due to shock of the death of her daughter deceased Priyanka. Thus, in any case, in the aforesaid (ii) & (iii) capacities, respondent No.1 had the right to file the claim and get compensation regarding death of his daughter. Although the tribunal has not examined the case deeply with the aforesaid approach but the ultimate approach of tribunal in awarding the claim appears to be correct.

9. I deem fit to mention here that if any injury was sustained by respondent No.1 himself in the alleged accident and his personal risk was not covered by the insurer in the lack of additional premium in such situation the claim of respondent NO.1 could not be awarded but his claim could not be defeated when the same is filed by the respondent No.1 as one of the legal representative of deceased Priyanka

and also the sole legal representative of the mother of the deceased Priyanka and not as registered owner of the tractor. It is undisputed fact that the deceased was the third party for whom the vehicle was duly insured and in view of settled proposition that the legal representatives and dependent of the deceased of vehicular accident are entitled for the award of compensation. In such premises the claim of respondent No.1 was rightly awarded by the tribunal.

10. Under the aforesaid premises, it is held that the tribunal has not committed any error in awarding the claim of the respondent No.1. Thus, by affirming the impugned award, this appeal is hereby dismissed. There shall be no order as to the cost.

Appeal dismissed.

I.L.R. [2008] M. P., 327

APPELLATE CRIMINAL

Before Mr. Justice S.K. Kulshrestha & Mr. Justice W.A. Shah

14 August, 2007

FAYYUM & ors. ... Appellants*

Vs.

STATE OF M.P. ... Respondent

A. Penal Code, Indian (45 of 1860), Sections 302 or 302/34 - Appellant No. 1 alleged to have fired at deceased - No firearm injury was found by doctor - No ballistic expert report that Weapon had actually been fired - Appellant No. 1 fired any shot at deceased not proved. (Para 15)

B. Penal Code, Indian (45 of 1860) - Sections 302 read with 149 - Constructive liability - It is not necessary to prove the overt act of accused - But once the prosecution chooses to give particulars of the overt acts and said description is found demonstratively false, it makes it doubtful that the person was on the spot and had participated in the incident. (Para 16)

C. Penal Code, Indian (45 of 1860) - Section 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. (Para 18)

Jai Singh with *Rajesh Chouhan,* for the appellants

Girish Desai, Deputy Advocate General for the respondent.

Cur.adv.vult.

J U D G M E N T

The Judgment of the Court was delivered by **S.K. Kulshrestha, J.** :–This appeal is directed against the judgment dated 04.05.1998 of the learned 1st Additional Sessions Judge, Ujjain in Session Trial No. 148/1995 by which while acquitting co-accused Ayub Khan, Sadik, Rashid and Mannan Khan, the appellants have been convicted for an offence punishable under Section 302 of the Indian Penal Code read with Section 34 thereof and each has been I rsentenced to imprisonment for life.

*Cr.A. 694/1998 (Indore)

2. Before the trial Court it was alleged that the appellants had formed an unlawful assembly and in furtherance of their common object they had caused death of Hayat Khan on 13.07.1994. The prosecution case, in brief, is that on 13.07.1994 at about 01.00 p.m. Hasmat Khan (PW-I) was sitting on the OTLA of Ratanlal opposite his house and his son Hayat was coming from the market. He informed his father that Sadik haS brought him from the house of Jalil. At that point of time, accused Chhote Khan, Mansoor, Fayyum Khan, Rashid, Sadik and others arrived with various weapons including a country made pistol with few. Immediately thereafter accused Fayyum fired a shot at Hayat which caused injury in his abdomen. He thereafter exhorted others not to leave him alive and that he will take care of the consequences. Rashid and Sadik thereupon, caught hold of Hayat Khan and Fayyum, Mansoor and Chhotu assaulted him with knives causing injuries in his hand, chest and nose. Hayat fell down unconscious and accused persons fled away. At that time, Hasmat's son Jakir (PW-2), Habib Shah (PW-4) and Pyara @ Shakil (PW-11) were present. On hearing the commotion, Hasmat as also Dinesh (PW-9), Ashok, Azad and Anil arrived and took Hayat on a handcart. On way, however, Hayat succumbed to the injuries caused to him and was taken to the hospital. PW-1 Hasmat Khan then proceeded to the Police Station where he lodged report Ex.P/1. On receiving the said report; PW-14 SHO K..N. Sharma proceeded towards the hospital and summoned the witnesses to hold inquest. He prepared inquest report Ex.P/3 and under requisition Ex.P/5 requested doctor for autopsy of the deceased.

3. Autopsy was performed by PW-10 Dr. Shashikant Joshi who gave his report Ex.P/5A. In the said report, he noticed the following external injuries on the body: -

(1) Incised wound on right palm below right thumb. Size 4 cm x 2 cm x 1 cm. Clean cut edges.

(2) Incised wound right side of upper lip ½ cm x ¼ cm x ¼ cm with clean cut edges, blood clots present.

(3) Incised-cum-stab wound right side of chest front aspect. Size 1 ½ cm x 1 cm x cavity deep. Situated 1 ½ cm medial and downward to lipple. On further examination, the underlying tissue and muscles were clearly cut and on further exploration, the right lower lobe were also cut.

(4) Incised-cum-stab wound 3 cm x 1 ½ cm x cavity deep with clean cut edges on front of left side of chest in the 4th intercostal space obliquely placed directed downwards, inwards and centerlly. On further examination, underlying tissue, muscles were clearly cut. On further dissection, the underlying left lung and right & left atrur of heart were clearly cut. On further examination, the pericordig cavity and pleural cavity contains about 650 cc of blood with hard blood clots.

(5) Multiple abrasions of varying size ½ cm x ½ cm, ½ cm x ¼ cm, mostly circular and about the same size, scattered on front o right side of chest. Mid and lower zone and adjoining part of right Hypocondrium and epigastic of chest above the land of nipple

directed upwards. Total 66 abrasions present.

In the opinion of the autopsy surgeon, death occurred due to shock and haemorrhage as a result of injury to vital organs lung and heart.

4. The clothes of the deceased were sealed and the bundle was handed over to Constable Mansoor Alam who produced it before the Head Constable Salim Beig (PW-5) who seized it vide memo Ex.P/6. Investigating Officer K.N. Sharma (PW-16) went to the spot and took samples of blood stained and control earth vide Ex.P/7. He also prepared spot map Ex.P/27 and informed Patwari to prepare site plan. Patwari Gangaram Parmar (PW-8) went to the spot and prepared the site plan Ex.P/19. Witnesses acquainted with the facts of the case were summoned and the statements were recorded. Accused persons were arrested vide memo Ex.P/8 to P/l I and on the information of the accused Fayyum, he made disclosure Ex. P/13 about the whereabout of 12 bore KATTA which was seized vide Ex. P/l 6. On a knife being produced by Chhotu, it was seized vide Ex.P/l 5. A country made pistol was sent to the Reserve Inspector where it was examined by PW-7 Madan Pal Singh who gave his report Ex.P/l 8. According to this report, the country pistol was found in working order but for ascertaining whether the said weapon had been fired, the weapon was sent to the Forensic Science Laboratory. The sanction from District Magistrate Ex.P/23 for prosecution under the provisions of the Arms Act was also obtained and after completion of the investigation, the accused were prosecuted.

5. On charges being framed against the accused persons they pleaded that they had been falsely implicated on account of the enmity and the witnesses have been procured to support a false case against them. However, they did not produce any evidence in their defence. Notwithstanding, the plea of the appellants, while acquitting four co-accused, appellants have been convicted for the offence punishable under Section 302/34 IPC and sentenced as herein above stated.

6. Learned senior counsel for the appellants has submitted that from the events referred to by the prosecution, it is transparent that the first information report Ex.P/l was brought into being subsequently and antedated. To expatiate learned counsel has referred to documents in this behalf. On 13.07.1994 at 01.00 p.m. the incident is said to have taken place of which report was purportedly made at Police Station, Tarana at 01.18 p.m. Surprisingly, the postmortem as revealed by the PM report Ex.P/5A commenced at 01.20 p.m. The grievance of the learned counsel is that had it been that the FIR had been lodged at 01.18 p.m. it was humanly impossible to shift the body to the hospital and sent requisition for postmortem within two minutes. Learned counsel for the appellants also submitted that though the eye witnesses examined by the prosecution have contradicted inter se and their version is replete with improbabilities, with the result, the correct picture of the state of affairs has not emerged.

7. Learned Deputy Advocate General for the respondent/State has, however, maintained that since out of the five witnesses examined to unfold the ocular account of the incident, PW-1 Hasmat Khan and PW-3 Jakir have fully supported the prosecution case, coupled with the medical evidence and other

circumstances on record with regard to the seized weapons from the respective appellants, there is clinching evidence of the prosecution and the conviction and sentence passed against the appellants do not call for any interference.

8. We have heard learned counsel for the parties and perused the record.

9. The prosecution has examined 14 witnesses in the case and out of these witnesses, six witnesses were offered as eye witnesses to the incident. PW-1 Hasmat Khan, father of the deceased who lodged FIR Ex.P/1 and PW-3 Jakir, brother of the deceased have given an occular account of the incident while PW-4 Habib Shah and PW-6 Rafique have only partly supported the case of the prosecution. PW-9 Dinesh though cited as an eye witness, has turned completely hostile.

10. To appreciate the rival contentions, brief reference to the eye witnesses' account would be necessary. PW-1 Hasmat Khar who lodged first information report Ex.P/1 has stated in his deposition that deceased Hayat was his son and about 7 years prior to the date of his deposition, in the afternoon he was sitting on the OTLA of Ratanlal. At that time, Sadik called his son and thereafter Sadik and Rashid caught hold of the hands of his son Hayat and Fayyum shot him with the KATTA with which he was armed. On account of that gun shot, Hayat fell down and he was then assaulted by Chotiya and Mansoor with knives. Hayat sustained injuries in his chest and waist. When he rushed to the spot, assailants ran away and at that time his driver's son Azad arrived. Azad, Dinesh, Ashok and others took Hayat to the hospital while he went to the Police Station to lodge report. He has affirmed having lodged report Ex.P/1 and his signature thereon. He has submitted that before they could reach hospital, Hayat had a hiccup and died.

11. Learned counsel has referred to paragraph 6 of the testimony of PW-1 Hasmat Khan in which he has admitted that at the time of the incident, his son had not arrived. Jakir and Azad had only seen the accused persons running away. He has also stated that he did not Know who was the scribe of the report and the report was written down in the room of Head Constable.

12. On the basis of the above testimony of PW-1, learned senior counsel has pointed out that Jakir and Azad could not have been eye witnesses to the main incident as PW-1 has admitted that they had come later and had seen the accused fleeing. He has further pointed out that since the report was written in the room of the Head Constable, the statement of investigating officer PW-14 K.N. Sharma to the effect that he had recorded the First information report stands shaltered. If the statement of this witness in paragraph 7 is examined in the correct perspective, it becomes obvious that he has merely admitted that report was written in the room of Head Constable. He has nowhere stated that Head Constable himself had recorded the first information report so as to contradict the statement of PW-14. K N Sharma. In this view of the matter, we are not impressed by the contention of the learned senior counsel that the prosecution evidence suffers from irreconcilable contradictions.

13. Coming to the statement of PW-3 Jakir, brother of the deceased, he has corroborated the main theme of the deposition of PW-1 Hasmat Khan, his father. He has deposed that he was in the house and when he heard noise outside, he

came out to see and found that Fayyum shot his brother Hayat, Ayub was exhorting others and Sadik and Rashid caught hold of the deceased while Mansoor and Chhotu stabbed him with their respective knives.

14. In the above context, we may also examine the testimony of PW-4 Habib Shah and PW-6 Rafique Khan who have partly supported the prosecution. PW-4 Habib Shah has deposed that while he was proceeding to MADARWADA at about 01.00 p.m. he saw Hayat going in that direction but he was stabbed. At that point of time, one bullet was fired but he could not see as to who was the miscreant. Since he did not refer to the overt act of the accused persons or their identity, he was declared hostile. PW-6 Rafique Khan has deposed that while he was going to bus stand he witnessed that Mansoor and Chhotu had caught hold of Hayat and were stabbing him with knives. He has clarified that Chhotu had caught hold of Hayat while Mansoor Khan had stabbed him with the knife and Fayyum had fired a shot which caused injury in his abdomen. He has clearly stated that apart from the three appellants, there v/as none on the spot. He is also a witness to the recovery of the weapons from the accused but since he did not support the recoveries, he was declared hostile and cross examined by the prosecution.

15. The story that emerges from the testimony of the above witnesses is that Fayyum had fired with the country pistol with which he was armed. To fathom the truth of the above story, other attending circumstances are also required to be considered. Immediately after the incident, postmortem was performed and in the postmortem though Dr. Shashikant Joshi (PW-10) has mentioned that there were multiple abrasions of various size ½ cm x ½ cm and ½ cm x ¼ cm mostly circular and about same size, 66 in number, he could not say whether these were injuries caused by gun shot. As a matter of fact, he has admitted in no uncertain terms that the deceased Hayat had not sustained any gun shot injuries. Though we have our reservations with regard to the injury No.5 found by the doctor, in view of the fact that PW-10 Dr. Shashikant Joshi has himself not accepted the prosecution story that there was gun shot injury, it cannot be said that appellant No.1 Fayyum had fired from the KATTA and caused gun shot injury to the deceased. The above discrepancies apart, the weapon seized from Fayyurn was sent to the Reserve Inspector for examination and according to the evidence of PW-7 Madanpal Singh, Head Constable, the hammer and trigger of the weapon were in working order, which he reported vide Ex.P/18. The said weapon was forwarded to the Forensic Science Laboratory to ascertain whether the weapon had been fired. However, in the report of the FSL Ex.P/28, it is mentioned that the said country pistol had been sent to the ballistic expert of the laboratory. No report was received thereafter to show that the weapon had actually been fired, with the result, it cannot be said with any degree of certainty that the said weapon which was seized from appellant No.1, had been fired at the time of the incident. We may also add that since no empty was found at the seen of occurrence, it was not possible for the laboratory to ascertain whether a particular cartridge which resulted in injury to the deceased had been fired from the same weapon; as pin marks and breach marks were not available for comparison. Thus, if the evidence of PW-7 Madanpal Singh is believed, it merely proves that a weapon was seized from appellant No.1 Fayyum which was in working order. The weapon has not been in

any manner connected with the crime. This apart, in view of the admission of PW-10 Dr. Shashikant Joshi, since firearm injury was not found on the body of the deceased, it cannot be said that appellant No.1 Fayyum fired any shot at the deceased which caused injury to him.

16. We are conscious of the fact that it is not necessary in a case which attracts constructive liability to prove the overt act of the accused persons. But once the prosecution chooses to give particulars of the overt acts and said description is found demonstratively false, it makes it doubtful that the person was on the spot and had participated in the incident. It is, therefore, not akin to general participation where constructive liability would be attracted. Under these circumstances, appellant No.1 Fayyum s/o Ayub Khan deserve the benefit of doubt especially, when on all counts, medical evidence, evidence of the ballistic and the evidence of the eye witnesses, his participation is not made out.

17. As regards appellant No.2 Chhotu @ Maqsud s/o A. Manna Khan, while the evidence of PW-1 Hasmat Khan and PW-3 Jakir indicates that both of them had participated in the assault and each had caused injuries by means of a knife, the testimony of PW-6 Rafique to the extent that he supports the prosecution case contraindicates participation of Chhotu in-so-far as causing of injuries is concerned. Rafique has been declared hostile only as he has not supported the seizure and recovery of the weapon, but his initial testimony is in accordance with the version of the prosecution. PW-3 Jakir, according to the statement of his father, had arrived at a time when the accused persons were fleeing, therefore, much credence cannot be attached to his version as to the actual incident. It is, therefore, PW-1 Hasmat Khan alone who says that Chhotu had stabbed the deceased while PW-6 Rafique had ascribed the stabbing to appellant No.3 Mansoor Khan and that appellant No.2 Chhotu had merely caught hold of the deceased.

18. Learned counsel for the respondent/State has pointed out that as many as 4 incised/stab injuries were found on the body of the deceased and, therefore, even if the role ascribed to Chhotu by Rafique (PW-6) is examined, since he continued to keep the deceased in his grip till four injuries were caused, it was apparent that he shared the same intention as appellant No.3 Mansoor and, therefore, sanctity of his conviction under Section 302/34 of the Indian Penal Code cannot be doubted. A reference to the evidence of PW-6 Rafique bears out that Chhotu had caught hold of the deceased and Mansoor had stabbed him. It does not, any way state that Chhotu was keeping hold of the deceased till all the injuries had been caus 'd by Fayyum. Thus, it is doubtful that Chhotu had caught the deceased, pinned in his grip till Mansoor had caused him all the four injuries by means of a knife. Since in view of the testimony ot PW-6 Rafique Khan a doubt is created with regard to the statement ofPW-1 Hasmat Khan that both Chhotu and Mansoor had started stabbing his son Hayat, benefit of this doubt should accrue to the accused. Accordingly, in the absence of any evidence, that Chhotu was sharing the same intention of causing death of the deceased along with Mansoor Khan, Chhotu cannot be held liable under Section 302/34 of the Indian Penal Code. At the most, he must have expected that annellant No.3 Mansoor Khan may cause grievous injury to the deceased Hayat. Under these circumstainces, Chhotu cannot be held guilty for an offence under Section 326/34 of the IPC only.

19. In the result, this appeal partly succeeds. While Fayyum s/o Ayub Khan is acquitted of the charge against him, conviction of Chhotu under Section 302/34 IPC and the sentence of imprisonment for life awarded to him are set aside. He is, in stead, convicted under Section 326 of the Indian Penal Code and sentenced to rigorous imprisonment for seven years. The appeal of Mansoor Khan s/o A. Manna Khan (appellant No.3) is dismissed except that he is convicted under Section 302 of the IPC, simpliciter. The sentence awarded to him thereunder is maintained. The appellants are on bail. The bail bonds of appellant No. 1 Fayyum are discharged. Appellants No.2 & 3 are directed to surrender to their bail bonds to serve out the sentence awarded to them. Simultaneously, warrants of arrest be issued against appellants No.2 & 3 for sending them to jail to serve out the sentence awarded to them.

I.L.R. [2008] M. P., 333
APPELLATE CRIMINAL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
10 September, 2007

MITHILESH ... Appellant*
Vs.
STATE OF M.P. ... Respondent

A. Penal Code, Indian (45 of 1860) - Sections 376, 302, 201 - Rape and Murder - Circumstantial Evidence - Witnesses stated that appellant was putting lungi of brown colour - Fabric threads seized from place of incident - Lungi seized from the house of appellant on his memorandum - As per FSL report fabric threads were found to be of lungi - Held - This is material clinching circumstance to fasten the guilt upon accused.

He was carrying "Lungi", has been proved by the statement of various witnesses. PW-6 Rajendra @ Rajjan has stated that Mithilesh was having the lungi of brown colour. Similar is the statement of Shashikant Pandey (PW-8), a child witness aged 9 years. Guddu @ Bahorilal (PW-11) in paragraph 3 of his deposition has also stated that accused was putting Lungi of brown colour. Seizure of Lungi as per information memo (P/11) of the accused and from his house as per seizure memo (P/10) has been proved by PW-5 Kamlesh Kumar, he has stated that the accused had given the information was reduced in writing as per memo (P/11) and seizure memo (P/10) was drawn in his presence.

There is report of FSL (P/22 to P/24). It is apparent from (P/22) that the fabric thread seized from the agricultural field the place of incident where the offence took place (C/2) were of lungi of accused. These fabric threads as per the FSL report (P/24) on record were found to be of Lungi (Article C/2) seized as per the information and at the instance of accused from his house. This is a material clinching circumstance even if there was absence of any other evidence on record so as to fasten the guilt upon the accused, though there is overwhelming evidence on record so as to fasten the guilt of the accused. (Para7)

*Cr.A. 488/1998 (Jabalpur)

B. 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.

It was submitted by counsel that their police statements were recorded belatedly on 26th and 28th April. We find no merit in the submission. Firstly for the delay explanation has not been obtained from IO. In *State of U.P. v. Satish* (2005) 3 SCC 114 the Apex Court has laid down that as regards delayed examination of certain witnesses, unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down that as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion. On the other hand, if the explanation is found to be implausible, certainly the court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of the prosecution's evidence tendered by the other witnesses. In the instant case no questions were put to I.O. about delayed examination of these witnesses investigation cannot be faulted, explanation ought to have been obtained from the I.O. (Para 10)

C. Penal Code, Indian (45 of 1860) - Sections 376, 302 and 201 - Rape and murder - Deceased a 13 years old girl and her brother were in agricultural fields - Younger brother met with appellant while he was returning home - Appellant told brother that he will take his sister towards river and he should not disclose to any body - Younger brother ran back and informed deceased - Deceased told him to call grand father and hide herself in standing crop of wheat - Hue and cry heard by some witnesses who saw that appellant was lying on a girl - Grand father also came to spot and called deceased number of times - On next day dead body of deceased was found in the river - Ante mortem injuries were found on the body of deceased - Injuries were also found on the body of accused - Fabric threads also seized from spot which were lateron found to be that of lungi belonging to appellant - Deceased was subjected to rape - Conviction of appellant affirmed - Appeal dismissed.

Cases Referred

(2005) 3 SCC 114, AIR 1976 SC 2488, AIR 1871 SC 1554

(1996) 5 SCC 369, 2007 (II) MPJR 37.

S.C. Datt with *Siddharth Datt,* for the appellant

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

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J.:–The appeal has been preferred by the appellant aggrieved by his conviction u/s 376, 302 and 201 of the I.P.C. u/s 302 I.P.C. he is sentenced to undergo Imprisonment for life and fine of Rs.1000/- in default of fine R.I.for 2 months He is sentenced u/s 376 I.P.C. to undergo R.I. for 10 years, fine of Rs.1000/- in default of fine, R.I. for 2 months, and u/s 201 of the I.P.C. he is sentenced to undergo R.I. for 2 years, fine of Rs.500/- in default R.I. for one month.

2. The prosecution case, in short, is that deceased; Ku. Sandhya (aged 13 years) was daughter of Shri Shiv Balak Pandey and grand-daughter of Shanti Prasad Pandey (PW-7). She used to go to agricultural field along with Shanti Prasad Pandey (PW-7). On 14.4.1995 Shanti Prasad Pandey (PW-7) had gone to collect his pension at Khitola, consequently Ku. Sandhya was accompanied to the agricultural field by Shashikant Pandey (PW-8) her younger brother. Ku. Sandhya came to the house in the afternoon for taking the meals of Shashikant Pandey (PW-8) she returned back to the agricultural field. They remained for the whole day at the field. When Shashikant was coming back from the field he met with the accused Mithilesh, he was wearing Baniyan of black colour, Pent of white colour and he was also carrying a Lungi on his neck, he was also wearing a cap. He told to Shashikant that he would take his sister towards the river, he should not disclose the fact to anyone, on that Shashikant ran back and informed the fact to his sister; Ku. Sandhya, on that Ku. Sandhya asked Shashikant (PW-8) to send Shanti Prasad Pandey (PW-7) to the field. Thereafter Ku. Sandhya went and hide in the agricultural land in the standing crop of wheat, accused also entered into agricultural land, thereafter Shashikant ran towards the house and in the way he met with Shanti Prasad Pandey (PW-7) and told him that Ku. Sandhya had called him, he should to the field immediately. Shanti Prasad Pandey thereafter went towards the field, but, was unable to trace Ku. Sandhya it was quite dark by that time.

Prosecution further alleged that when accused was dragging Ku. Sandhya, on hearing the hue and cry raised by her, Rajjan (PW-6), Guddu@ Bahorilal (PW-11) and Kaluram (PW-13), after crossing the river came to the MEND of the field of Netram Patel and saw accused Mithilesh was lying on a girl, who was wearing frock of red colour, after seeing them accused Mithilesh stood up and threatened them with dire consequences and asked them not to disclose the fact to anybody. Accused was wearing black Baniyan and carrying brown colour Lungi, white shoe, one white colour pent was also lying nearby, the witnesses went to their houses. Thereafter Shanti Prasad Pandey (PW-7) came to the spot, he called Ku. Sandhya number of times,but, she did not response, as such he though, that she may have gone from different way to her house, he went back to his agricultural field and slept in the hut In the morning at about 7 a.m. when Shahadat went to the river he found that a dead body was lying in the river wearing red colour frock. He informed the fact to Kaluram in turn he proposed to inform the Kotwar and when Kaluram and Shahadat were going to inform the village Kotwar through the field of Shanti Maharaj, at that time they went and informed Shanti Maharaj that one dead body was lying in the river. Thereafter Shanti Maharaj (PW-7) went towards the river and found that it was the dead body of Ku. Sandhya.

Thereafter the body was taken out. Village Kotwar Rajkumar Dahiya (PW-2) informed the police check-post Khiltola, Marg intimation (P/2) was reduced in writing and Police Station Sihora was informed telephonically. D.S. Chouhan (PW-12) along with police force proceeded towards the place of incident. Inquest (P/8) was prepared. The dead body of Ku. Sandhya was sent to Govt. Hospital, Sihora, she was examined by Dr. Smt. S. Patod (PW-10) and Dr. R.K. Jain (PW-9) had performed the autopsy. Post-mortem report (P/16) was submitted. Her frock was found torn at several places besides the underwear. Dr. Smt. S. Patod (PW-10) opined that the deceased Ku. Sandhya was subjected to sexual intercourse before she was murdered. It was a case of homicidal death. As many as 14 injuries were found on the person of deceased. Injuries No.1 to 10 were found ante-mortem, injuries No.11 to 14 were caused due to dragging after she had died. From the spot seizure of articles, control and blood stained soil was made. The "threads" of the cloths of blue and brown colour were also seized from the spot besides hair were found entangled in the stump of wheat. Seizure memos (P/4 and P/5) were drawn. On the basis of information furnished by accused, at his instance from the field of Netram Patel one monkey cap of brown colour was seized as per seizure memo (P/9). As per memo (P/10) from the house of accused at his instance full pent, "lungi" and shoes were seized. First information report was reduced in writing. On the underwear of the accused semen stains were found. Accused was subjected to medical examination, on his person four injuries were detected by Dr. R.K. Jain (PW-9). It was also found that he was competent to perform sexual intercourse. The seized article from the spot "threads of cloth" and Lungi etc. were sent to Forensic Science Laboratory. The thread seized from the spot was found to be similar to that of "lungi" seized from the possession of the accused from his house. Reports (P/22, P/23 and P/24) were submitted. Serological examination report (P/25) was also submitted.

3. Accused abjured the guilt and contended that he is innocent. Aggrieved by conviction and sentence imposed the appeal has been preferred.

4. Shri S.C. Datt, learned Sr.counsel appearing with Shri Siddharth Datt, on behalf of the accused appellant has submitted that the witness Rajjan (PW-6) and Guddu@ Bahorilal (PW-11) did not disclose the fact immediately after the incident. Their police statements were recorded on 26th and 28th April, 1999.Kaluram (PW-13) did not support the prosecution case. Shashikant Pandey (PW-8) is a child witness, as such his deposition requires close scrutiny. It was not probable that accused would disclose to PW-8 that he would take his sister to river and would ask him not not to disclose fact to anybody, disclosure of fact makes the presence of the witness (PW-8) to be doubtful as it was not the natural conduct. Though threads of cloth seized from the spot was found to be similar that of the Lungi seized from the possession and at the instance of the accused, but, the articles were not identified in the Court, though they were the similar threads but not same. Apart from that the injuries found on the person of accused were not enough to fasten the guilt on him as it was not the case set up by the eye-witnesses that the deceased Ku. Sandhya struggled at the time of commission of offence of rape/murder and during that course the aforesaid injuries were caused. Thus, four injuries on the person of accused were not enough to fasten the guilt on the

accused or to connect him with the incident. Some unknown person had committed the offence and thereafter shape has been given to the case. The next day upto 4:45 p.m. police was not aware of the name of the accused as stated by Dr. D. S. Chouhan (PW-12), Sub-Inspector, Police Station Sihora. He has stated that the statements of Rajjan, Guddu and Kaluram were recorded during the investigation u/s 174 Cr.P.C. However, it was not possible to ascertain the name of accused by that time. Thus, the counsel has submitted that benefit of doubt should be given to the accused.

5. Shri R.S. Patel, learned Addl. A.G. appearing on behalf of the State has submitted that not only the evidence of seizure of threads of Lungi of accused from the spot is clinching in the instant case, injuries were found on the person of the accused and nature of injuries discloses that the accused had committed sexual intercourse and then committed the murder of the deceased, there was struggle given by deceased, that explains the injuries found on the person of the accused and on the deceased, besides there is no reason to disbelieve the evidence of child witness Shashikant Pandey (PW-8) brother of deceased and Shanti Prasad Pandey (PW-7) that he was asked by Shashikant Pandey (PW-8) to go to the field. Besides that accused was having criminal antecedents, he was involved in the incident of causing injuries by sword and several other offences and witnesses; Rajjan, Guddu and Kaluram were threatened by him. Thus, the statements of aforesaid witnesses which were recorded on 26th and 28th April were recorded with promptly. Witness; Guddu was not available as he had gone outside and when he came back, only thereafter, his statement was recorded on 28th April, 1995. There was no delay in recording the statement of Rajendra @ Rajjan (PW-6) and Investigating Officer (IO) was not questioned why he could not record the statement earlier, as such it was not permissible to discredit the investigation without seeking explanation of IO as to delay in recording the statement of eye-witness. Thus, he has also relied upon the FSL reports (P/22 to P/24) and the statement of Doctor so as to submit that it a clearly case of rape and murder of minor girl of 13 years. Hence, conviction recorded by the trial Court is proper. No case for interference in the appeal is made out.

6. In the instant case we find following four sets of evidence on which conviction of the accused is based :

(i) recovery of threads of Lungi of the accused found entangled in the stump of wheat on the spot where offence was committed.

(ii) there were injuries found on the accused and nature of injuries goes to show that there was struggle given by deceased at the time commission of offence, there were injuries No.1 to 10 found on the deceased which were ante-mortem.

(iii) there is evidence of child witness Shashikant Pandey (PW-8) brother of deceased, he has stated that accused had followed his sister and Ku. Sandhya entered the agricultural field in order to hide herself in the standing crop of wheat, accused had followed her in the agricultural field, thereafter the witness had informed Shanti Prasad Pandey (PW-7) that Ku. Sandhya had called him to be field.

(iv) after Shashikant pandey (PW-8) has left, hue and cry was raised by the deceased; Ku. Sandhya, on hearing it Rajendra @ Rajjan (PW-6), Guddu(PW-11) came to the spot along with Kaluram (PW-13) and they had seen from the MEND of the field of Netram Patel accused was lying on a girl earing red frock accused was having criminal antecedent and accused had threatened them.

7. Man may lie, but circumstances do not, is the cardinal principle of evaluation of evidence. Before we appreciate the oral evidence adduced in the case which we have found to be reliable. there is material circumstances available against the accused. He was carrying "Lungi", has been proved by the statement of various witnesses. PW-6 Rajendra @ Rajjan has stated that Mithilesh was having the lungi of brown colour. Similar is the statement of Shashikant Pandey (PW-8), a child witness aged 9 years. Guddu @ Bahorilal (PW-11) in paragraph 3 of his deposition has also stated that accused was putting Lungi of brown colour. Seizure of Lungi as per information memo (P/11) of the accused and from his house as per seizure memo (P/10) has been proved by PW-5 Kamlesh Kumar, he has stated that the accused had given the information was reduced in writing as per memo (P/11) and seizure memo (P/10) was drawn in his presence. Shri S.C. Datt, learned Sr. counsel has stated that there were other family members residing in the house of accused, as such the Lungi could have belonged to anyone of them, submission is baseless, when we consider the siezure with other evidence on record. In the instant case, we have found that this is a clinching material circumstance on record which support the ocular version of the witnesses coupled with the medical corroboration as injuries caused in struggle have been found on person of accused and also on deceased. There is report of FSL (P/22 to P/24). It is apparent from (P/22) that the fabric thread seized from the agricultural field the place of incident where the offence took place (C/2) were of lungi of accused. These fabric threads as per the FSL report (P/24) on record were found to be of Lungi (Article C/2) seized as per the information and at the instance of accused from his house. This is a material clinching circumstance even if there was absence of any other evidence on record so as to fasten the guilt upon the accused, though there is overwhelming evidence on record so as to fasten the guilt of the accused.

8. Coming to second circumstances : the injuries found on the person of accused, there are following injuries noted in injury report (P/7) :

(1) Abrasion 1/2 cm x 1/4 cm with scab formation. Greenish in colour present on left side of neck. 7 cm above the left clavicle;

(2) Abrasion 3 cm x 1/4 cm oblique in shape with scab formation. Greenish in colour present on right side of neck 2 cm above the right clavicular region;

(3) bruise 1/2" x 1/2" Circular in shape. Greenish in colour present on the middle of right shoulder region;

(4) Abrasion 1/4 cm x 1/4 cm circular in shape. Greenish in colour present on the right hand at the level of metacarpo phalengical joint of right thumb.

Duration was 5 to 7 days that co-relates to the date of incident. These injuries have been proved by Dr. R.K. Jain. He has not only proved the injuries, but has also proved the injury report (P/17).

9. There is statement made by IO also that he made the seizure and sent the articles to FSL. There is absolutely nothing to doubt the investigation made in that regard. It was not necessary to identify the fabric thread and Lungi sent as article in the Court. Articles were in the Court and with reference to articles the statements have been made by the witnesses. If the accused wanted to challenge, it was for him to confront the articles that fabric threads were not of his lungi the report of FSL was proved and the report speaks volumes that the accused was involved in the incident, consequently the fabric thread of his Lungi was found and seized from the spot, where the offence was committed and struggle was made at the time of commission of sexual intercourse and thereafter Ku. Sandhya was murdered as as many as 14 injuries were found on her body, 10 injuries were ante-mortem and her death was caused due to asphyxia not due to drowning, thereafter the dead body was dragged and there were marks of dragging from place of incident in agricultural field going to the river, that also corroborates that the accused dragged the deceased from the spot.

Aforesaid evidence lends support to the version of Shashikant Pandey (PW-8) a child witness of 9 years. He has clearly stated that when he was to come back to the house he found accused on the spot, thereafter accused said that he would take his sister Sandhya towards the river and he should not disclose the fact to anyone, on that Shashikant (aged 8 years) ran back and informed the fact to his sister; Ku. Sandhya (aged 13 years), on that Ku. Sandhya asked Shashikant (PW-8) to send Shanti Prasad Pandey (PW-7) to the field. Thereafter Ku. Sandhya went to hide in the agricultural field in the standing crop of wheat, accused also entered into agricultural land, on seeing that Shashikant (PW-8) ran towards the house and in the way he met with Shanti Prasad Pandey (PW-7) and told him that Ku. Sandhya had called him at once to the field. Merely by the statement of witness that accused has told him that he would take his sister towards river criminal intention could not have been inferred that too by the child. At the same time what is material is that Ku. Sandhya went to hide in the agricultural in the standing crop of wheat, accused had followed her in the field and was dragging the deceased. We have found the statement of witness (PW-8) to be quite reliable being a child witness, he was obviously not able to understand what was to happen ultimately on the spot, as such he informed the grand-father (PW-7) that Ku. Sandhya had called him at once to the agricultural land, as the field was at the distance it took about 30-35 minutes, for Shanti Prasad Pandey to reach the spot as dark had set in by that time he had called deceased by name number to times, as he found no response he made the search, but, he could not found Sandhya as such he went back to agricultural field and slept in the hut he thought that Sandhya would have gone to the house from different way. Conduct of Shanti Prasad Pandey (PW-7) in making the search of Ku. Sandhya is based upon information of Shashikant Pandey (PW-8) which renders support to the prosecution case that child Shashikant Pandey (PW-8) had immediately informed Shanti Prasad Pandey

(PW-7) who had made search in the night itself. House was situated at a different place. PW-8 could not visualize in the night that what has in fact happened he came to know next day in the morning that a dead body was lying.

10. Coming to next set of evidence in the instant case, it appears that after Shashikant Pandey (PW-8) had left the spot accused entered the field and caught hold of the deceased, she raised hue and cry, on that three witnesses namely; Rajjan (PW-6), Guddu (PW-11) and Kaluram (PW-13) came towards the spot after crossing the river and they saw from the MEND of the filed of Netram Patel that the accused was lying on a girl who was wearing red frock and stood up after seeing them, they witnessed this part of the incident, accused had threatened them not to disclose the fact to anybody, there was nothing to infer for these witnesses that it was Ku. Sandhya who was lying on the ground as they had seen from quite distance, they were threatened and apprehended that accused might to be hiding as such they had gone away. Out of the aforesaid three witnesses; Kaluram (PW-13), Rajjan (PW-6), Guddu (PW-11), Kaluram (PW-13) did not support the prosecution case and has been declared hostile whereas Rajjan (PW-6) and Guddu (PW-11) have supported the prosecution case in toto. It was submitted by counsel that their police statements were recorded belatedly on 26th and 28th April. We find no merit in the submission. Firstly for the delay explanation has not been obtained from IO. In State of U.P. v. Satish (2005) 3 SCC 114 the Apex Court has laid down that as regards delayed examination of certain witnesses, unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down that as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion. On the other hand, if the explanation is found to be implausible, certainly the court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of the prosecution's evidence tendered by the other witnesses. In the instant case no questions were put to I.O. about delayed examination of these witnesses investigation cannot be faulted, explanation ought to have been obtained from the I.O. It was also submitted on the basis of statement of D.S. Chauhan (PW-12) that he had recorded the statements of Rajjan (PW-6), Guddu (PW-11) and Kaluram (PW-13) during the investigation of marg intimation. In case their statements were recorded there was no delay and if there was any contradiction or omission in the statements. It was for the defence to contradict the version to the aforesaid witnesses, the statements of the witnesses cannot be rendered unworthy of reliance on the basis of some earlier statement if any without asking them whether it was recorded and if yes what was the contrary statement made by them in the court then that version, thus, on the aforesaid basis no dent is caused in the version of the witnesses (PW-6) and (PW-8) or in the investigation done.

Shri S.C. Datt, learned Sr. counsel has relied upon the decision of the Apex Court in *State of Orissa v. Mr. Brahmananda Nanda*, AIR 1976 SC 2488,

Chanan Singh v. The State of Haryana, AIR 1971 SC 1554, *Alil Mollah and anr. v. State of West Bengal*, (1996) 5 SCC 369 and *State of M.P. v. Bardanilal* Ahirwar, 2007(II) MPJR 37 .In the instant case, we have found the facts are quite different. The ratio of the aforesaid cases is not applicable. In the absence of explanation being sought from IO for the delay.

11. Merely by the statement of I.O. that the police was unable to ascertain till 4:45 p.m. who was the accused, nothing could be gained by the accused. No question has been asked to Rajjan (PW-6) and Guddu (PW-11) as to whether their statements were recorded earlier and they had not disclosed the names of the accused to the police and in case there was an omission of which defence wanted to take an advantage the witnesses should have been confronted with the statement as it was for the defence to seek explanation. Shri S.C. Datt, learned Sr. counsel has submitted that the statements recorded u/s 174 of the Cr.P.C. could not have been confronted as they were not supplied, but, we are not able to accept the submission in view of section 145 of the Evidence Act. In case any witnesses' testimony is to be impinged on the basis of earlier statement it is permissible to call for the statement recorded under section 174 Cr.P.C., if there was any omission or contradiction, but, that has not been done, as such we are not inclined to discredit the aforesaid witnesses on the said ground.

12. It appears that Kotwar was given information by Shahdadat and Kaluram; Kaluram turned hostile and did not support the prosecution case, no dent was caused in the prosecution case. As a matter of fact Rajjan (PW-6), Guddu (PW-11) were cross-examined at length merely on the basis of what they had disclosed to police not on the basis what they had disclosed next day, in the absence of seeking their explanation as to what they had uttered, their version cannot be discredited even otherwise the accused was having criminal antecedent, he committed other offence on the point of sword and was involved in other criminal cases as stated by these witnesses, they did not apprehend at all that murder of Ku. Sandhya had been committed as they had seen the incident from distance that accused was lying over one girl wearing red colour frock then they went away. Thus, we have found their version to be quite reliable and renders support to the circumstances and other evidence adduced in the instant case.

13. Further corroboration is rendered as to commission of sexual intercourse by Dr. Smt. S. Palod. There were marks of commission of rape. Dr. Smt. S. Palod (PW-10) has proved the injury report. on private part of deceased, separation of labia minora and the hymen was found torn, torn edges of hymen were congested and bruised. Doctor Smt. Palod opined that the deceased was subjected to immediate sexual intercourse.

Following injuries were found on the person of the deceased :

(1) Bruise 1&1/4" x 1/4" transverse in shape present on the left supra orbital region of the left eye, blacking of left upper lid is present with swelling.

(2) Bruise 1&1/4" x 1/2" brown in colour, oblique in shape, present on the left side of face, 1&1/2" away, higher to the left angle of the mouth.

(3) Swelling 1/2"x1/4" Radish in colour, Transverse in shape,present on the left lower eye lid, on lis medial aspect.

(4) Lacerated wound 1"x1/4"x1/4" margins inverted, edges in defined, transverse in shape, present on the inner surface of middle of uppertip.

(v) Lacerated wound 3/4"x1/4"x1/4" Red margins inverted, edges in defined, transverse in shape, present on the inner surface of lower lip.

(vi) Bruise mark, 4 in number, present on the Rt. side of the face, obliquely downwards & outwards and on between the others. 3/4"x.2", 1"x.25", & 3/4"x.2" respectively, brown in colour, 1/2" away from the Rt. angle of mouth.

(Vii)Bruise 1/4"x1/2" brown in colour, present on the left side of neck 1/2" away from the trachea, just below the angle of left mandible.

(viii) Bruise mark 4 in number,present on the Rt. side of neck, obliquely downwards & outwards and one between the others, 3/4"x.2", 1"x.25", 1"x.25" & 3/4"x.2" respectively, brown in colour 3/4" away from the trachea.

(ix) Lacerated wound 3/4"x1/4"x1/4" margins inverted, edges in defined, oblique in shape, present on the Rt side of neck, 2" below the Rt. mastoid process.

(x) Lacerated wound 1"x1/4"x1/4" transverse in shape, present on the dorsal surface of Rt hand.

(xi) Abrasion 4"x3", present on he left scapular region of the back of the chest, they are dark brown in colour with absence of bleeding. No ecchymosis present.

(xii) Abrasion 4&1/2"x3" present on the Rt scapular region of the back of chest, dark brown in colour with absence of bleeding, No ecchymosis present.

(xiii) Abrasion 1&1/2"x1/2" present on the lateral surface of Rt. knee joint, dark brown in colour with absence of bleeding. No ecchymosis present.

(xiv) Abrasion 1/2"x1/2" 3 in number, present on the Rt. leg on lis lateral surface, dark brown in colour, absence of bleeding & no ecchymosis present.

As per Dr. R.K. Jain (PW-9) the injuries No.(i) to (x) were ante-mortem and this supports that the accused had followed the deceased in the field, she struggled before succumbing to accused and accused left the threads of his Lungi entangled the stump of the wheat that was seized from the spot. The Lungi of which thread was found was seized on the basis of information and at the instance of accused from his house. In our opinion, it was the accused who had committed the offence of rape and murder. It was proved beyond periphery of doubt.

14. Resultantly, we find that the appeal is without merit. Consequently, appeal is hereby dismissed. Conviction and sentence imposed upon the appellant is hereby confirmed. With respect to disposal of property order of trial Court is affirmed.

Appeal dismissed.

I.L.R. [2008] M. P., 343
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
31 October, 2007

AYYUB ... Appellant*
Vs.
STATE OF M.P. ... Respondent

A. 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). (Para 7)

B. Penal Code, Indian (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. (Paras 7, 8 & 9)

T.N. Singh with *Ku. Hemlata,* for the appellant.
Mukesh Parwal, for the respondent.

Cur.adv.vult.

JUDGMENT

S.L. Kochar, J. :– The appellant has filed this appeal, challenging his conviction U/S.498-A of the IPC, sentence to undergo RI for three years with fine of Rs.5,000/-; in default whereof to undergo RI for six months, passed by learned Addl. Sessions Judge, Jaora in ST No.181/1990, judgment dated 01st October 1994.

2. Prosecution case in short as put forth before the trial Court is that on 6/10/1989 at about 7.45 p.m wife of the appellant Jubeda committed suicide in his residential house situated in Jaora because the appellant was intentionally harassing her and ill-treating her by demanding dowry, she was also beaten. Because of demand of dowry, ill-treatment, harassment and beating, the wife of the appellant Jubeda committed suicide by consuming some poisonous substance.

3. The matter was reported from Civil Hospital, Jaora to police by Dr.Shrivastava through report (Ex.P.1). SHO Laxmansingh Chouhan (PW.7) registered inquest No.15/1989 and started enquiry. In enquiry, he found that appellant was ill-

* Cr.A. No. 671/1994 (Indore)

treating his wife for demand of dowry and registered the offence U/S.306 of the IPC against the appellant. In search of the house of the appellant, letters were seized and one letter was seized from father of deceased Fate Mohammed (PW.3). After inquest proceedings, dead body was sent for postmortem examination and the same was conducted on 7/10/1989 by Dr.I.L.Chandelkar (PW.2). The postmortem report is Ex.P.2. Dr.Chandelkar did not find any external or internal injury and could not be in a position to give any opinion about cause of death, therefore, he preserved viscera and same was sent for chemical examination. In viscera report vide Ex.P.24 it has come that deceased consumed some poisonous substance/pesticide "BHC". On completion of investigation, police filed the charge sheet for commission of offence of dowry death against the appellant.

4. The appellant denied the charges and submitted that he had love marriage with the deceased and never demanded dowry and also did not ill-treat her for demand of dowry. The appellant pleaded his false implication. He has not examined any witness in defence. The learned trial Court, while acquitting the appellant for commission of offence U/Ss.304-B and 306 of the IPC, convicted and sentenced the appellant as mentioned herein above.

5. The learned counsel for appellant has submitted that there is no cogent and reliable evidence on record to establish that the appellant practiced cruelty with the deceased wife and the learned trial Court has erred in convicting the appellant U/S.498-A of the IPC especially when the offence U/Ss.304-B and 306 of the IPC have not been proved by the prosecution and the appellant has been acquitted from these charges. The learned counsel has also urged that the learned trial Court mainly relied upon the letters (Ex.P.9 to P.19) seized by Investigating Officer Laxmansingh Chouhan (PW.7) from the house of the appellant, but no questions were put in accused statement by the learned trial Court recorded U/S.313 of the Cr.P.C, therefore, any contents of the letter cannot be used against the appellant as evidence because he has not been given opportunity of explaining the contents and substantive and material circumstances. According to learned counsel, it has caused prejudice to the appellant.

6. On the other hand, the learned counsel for State has supported the impugned judgment and finding arrived at by the learned trial Court.

7. Having heard the learned counsel for parties and after perusing the entire record, this Court is of the opinion that conviction of the appellant is not sustainable because the letters (Ex.P.9 to P.19) said to have been seized by Laxmansingh Chouhan, Investigating Officer (PW.7) cannot be taken into consideration in evidence because there is no evidence available on record that these letters were written by deceased to appellant. Though, these letters were sent to handwriting expert along with specimen handwriting of the deceased, but handwriting expert report Ex.P.30, 31 and 32 have not been proved in Court by examination of handwriting expert. These reports have been exhibited only in the statement of Shri Chouhan (PW.7). It is well settled legal position that mere exhibition of handwriting expert report is not sufficient to consider it in evidence unless the expert is examined in Court and opportunity of cross examination is given to the defence. Provision of Sec.293 of the Cr.P.C is not applicable for handwriting

expert report. The handwriting expert is not falling under this provision, therefore, examination of handwriting expert was must. The prosecution case further deteriorated because of not putting any question in accused statement to the appellant regarding contents of the letters Ex.P.9 to P.19 and Ex.P.5. The judgment of the learned trial Court for conviction of the appellant U/S.498-A of the IPC is mainly based on the contents of the letter Ex.P.5 and P.9 to P.19. Letter Ex.P.5 was proved by father of the deceased Fate Mohd (PW.3) and he has also stated that it was in the handwriting of his daughter, but this letter is not containing any date and there is no evidence on record that within a reasonable proximity of time from the date of commission of suicide by the deceased letter was written. The contents of the same cannot be used for establishing that appellant practiced cruelty with the deceased and because of which she committed suicide.

8. The oral evidence regarding cruelty by deceased Fate Mohd. (PW.3) is also not sufficient because in cross examination, para seven, he has admitted that he did not disclose to police in his case diary statement about giving information to him by his wife, the mother of the deceased that Jubeda was beaten once or twice by the appellant. He has also admitted about not disclosing the fact to police regarding demand of money by the sister named Sherbanao of the appellant and on refusal, she delivered threat. In para six, this witness has specifically admitted that after his return from Saudi Arabia to Indore , deceased came to him and lived for two and a half months, thereafter appellant took her to his house. After one and a half to two months, she died. There is no evidence on record that during this period of one and a half to two months there was any ill-treatment given to deceased by the appellant. No letter was found written by the deceased to her parents. Under these circumstances, the statement of Fate Mohd. is not sufficient to establish that deceased was ill-treated within reasonable period from the date of her death. About ill-treatment and beating, deceased did not disclose anything to him and he was informed by his wife and this fact is missing in his case diary statement.

9. The another witness is the mother of the deceased Maimunabai (PW.6). This witness, in examination-in-chief, para one, has specifically stated that deceased was killed by administration of poison and this she had heard and came to know, but no evidence has come on record from whom and where she came to know this fact. This shows her prejudice against the appellant. Maimunabai has stated in para three that before one year from the date of death of deceased she was taken to Indore for delivery, at that time she told her that appellant was beating her for demand of dowry and complained for inappropriate dowry given to him by her parents. After six months deceased was sent to the house of the appellant when appellant came to take her back. No evidence has come on record in the statement of this witness that during the period of six months, there was any event of ill-treatment with the deceased by the appellant. She failed to explain the material omission in her case diary statement (Ex.D.1) about demand of dowry and ill-treatment on this count by the appellant with the deceased. Because of this omission, there remain no evidence of this witness against the appellant regarding ill-treatment with the deceased for any reason. On the contrary, in para seven she has stated that appellant and her deceased daughter entered

into love marriage and it was with their consent. Appellant had visited their house and after delivery, deceased did not made any complaint against the appellant regarding ill-treatment or demand of dowry. In view of the material omission and contradictions in the statement of father Fate Mohd (PW.3) and mother Maimunabai (WP.6), their statements are of no use for proving the guilt of the appellant.

10. In view of the aforesaid legal and factual discussion, this appeal is allowed. Conviction and sentence of the appellant passed by the learned trial Court by the impugned judgment are hereby set aside. Appellant is on bail. His bail bond and surety bond stand discharged.

Appeal allowed.

I.L.R. [2008] M. P., 346
APPELLATE CRIMINAL
Before Mr. Justice K.S. Chauhan
20 November, 2007

NANNU ... Appellant*
Vs.
STATE OF M.P. ... Respondent

A. 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. (Paras 12,15 & 19)

B. 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. (Paras 29,32)

Cases Referred :

2001 Cri.L.J. 1572, 2000 Cri.L.J. 3156, AIR 1994 SC 1872
1995 (1) Crimes 858; 1997 Cr.L.J. 1324,

Vijay Shukla, for the appellant
S.K. Kashyap, Deputy Government Advocate for the respondent.

Cur.adv.vult.

JUDGMENT

K.S. Chauhan, J. :–This criminal appeal has been preferred under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment, finding and sentence dated 20.10.1993 passed by the Special Judge, Damoh in Special

*Cr.A. 1039/1993 (Jabalpur)

Case No.116/92 whereby the appellant has been convicted under Section 20(b) of Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to R.I. for one year with fine of Rs.1,000/- in default to further undergo S.I. for one month.

2. The prosecution case in short is that on 30.12.1990 at 5:00 p.m. Shri M.L.Verma, S.H.O., Batiyagarh was on patrolling at village Bakayan where he received an information that the appellant is selling ganja in front of his shop. On this information, he made the raid with witnesses Govind and Teerath and 100 grams of ganja was recovered from his possession vide seizure memo Ex.P/1. Dehati Nalici was written wherein Crime No.0/90 under Section 34 of M.P. Excise Act was registered. The appellant was arrested. After returning therefrom the F.I.R. was written at police station Batiyagarh wherein the Crime No.166/90 under Section 34 of M.P. Excise Act was registered. The statements of the witnesses were recorded. On 31.12.1990 the seized article was sent for chemical examination to Excise Inspector, Hata and the query was also made that whether the seized article was ganja or not. G.P.Bagdi (PW-4) examined it and reported that the examined article was cannabis plants and it was giving the smell of bhang. After completing the investigation, the charge sheet was filed before the Special Judge, Panna.

3. The appellant was charged under Section 20(b) of Narcotic Drugs and Psychotropic Substances Act, 1985 that on 30.12.1990 at 5:10 p.m. at village Bakayan he was found in possession of ganja for selling without any licence.

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

5. The prosecution examined as many as 4 witnesses whereas the appellant did not adduce any evidence. After considering the evidence, the trial Court found the charge under Section 20(b) of Narcotic Drugs & Psychotropic Substances Act, 1985 proved against the appellant and sentenced thereunder as stated in para no.1 of this judgment. Being aggrieved by the judgment of the trial Court, the instant appeal has been filed under Section 374(2) of the Code of Criminal Procedure on the grounds mentioned therein.

6. The learned counsel for the appellant submitted that there is no compliance of Section 42 and Section 50 of the Act. The seized article was not sent for chemical examination to F.S.L., Sagar but was examined by Excise Sub Inspector. It is not evident whether the seized article was ganja, bhang or charas. The seizure witnesses have been turned hostile. The testimony of the Investigating Officer is not above the Board. The finding regarding the guilt is erroneous hence deserves to be set aside and the appellant be acquitted.

7. On the other hand, Shri S.K.Kashyap, Dy.G.A. appearing on behalf of the respondent-State has supported the judgment, finding and sentence passed by the trial Court contending that no any question was put to M.L.Verma (PW-3) regarding the seizure. G.P. Bagdi (PW-4) is a trained Excise Sub Inspector who can very well identify the ganja. The prosecution has proved the case beyond reasonable doubt against the appellant and he has been rightly convicted by the trial Court hence 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 20(b) of Narcotic Drugs & Psychotropic Substances Act, 1985?

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

10. M.L.Verma (PW-3) has stated that he was on patrolling at village Bakayan where he received the information that the appellant is selling ganja in front of his shop, therefore, he went there alongwith the witnesses and seized 100 grams ganja from the possession of the appellant vide seizure memo Ex.P/1. It clearly indicates that after receiving the information he proceeded on to the spot. But, it appears that he has not complied with the provision of Section 42(2) of N.D.P.S. Act.

11. Section 42(2) of the Act runs as follows:

> "Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

12. He has not deposed even a single word regarding the compliance of the provisions of this Section.

13. In the case of *Rajamma v. State of Kerala,* 2001 Cri LJ 1572 it has been held that:

> "Section 42(2) of the NDPS Act provides that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

14. In the case of *K. Venkatesham v. State of A.P.,* 2000 Cri LJ 3156, it has been held that:

> "Recording of information given by a person, in writing, or recording the grounds of his belief from the personal knowledge are mandatory requirements in case of search between sunset and sunrise and failure to comply this requirement, vitiates the entire trial."

15. M.L.Verma (PW-3) nowhere has deposed that he complied with the provisions of Section 50 of the Act.

16. The provisions of the Section 50 of the Act runs as follows :

> "50. Candidates under which search of persons shall be conducted-
>
> (1)When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.
>
> (2)If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
>
> (4), (5), (6)....."

17. In the case of *State of Punjab v. Balbir Singh*, AIR 1994 SC 1872, the Apex Court has held that :

> "Valuable right. - Obligation of an authorized officer to inform the person concerned of his right is a valuable right given to the persons to be searched in the presence of a Gazetted Officer or a Magistrate if he so desires, since such a search would impact much more authenticity and credit worthiness to the proceedings while equally providing an important safeguard to accused."

18. Since ganja is said to have been seized from the personal search of the appellant, therefore, it was mandatory to comply with the provisions of Section 50 of the Act which has not been complied with.

19. There is no any evidence that M.L.Verma (PW-3) sent any report to his official superior within 40 hours, therefore, Section 57 of the act also has not been complied with.

20. It appears that M.L.Verma (PW-3) himself was not aware with the provisions of this Act because he registered the offence under Section 34 of M.P. Excise Act, investigated and filed the charge sheet but it appears that in scrutiny the Section was converted from 34 Excise Act to Section 17 of the N.D.P.S. Act. On this basis, the trial of the appellant was conducted under N.D.P.S. Act.

21. It is evident that no procedure required for this Act has been followed by Investigating Officer and strangely enough the learned Special Judge also did not pay attention towards it.

22. The seizure witnesses Govind (PW-1) and Teerath (PW-2) both have turned hostile and have not supported seizure of ganja from the possession of the appellant. Thus, the independent witnesses have not supported the version of Shri M.L.Verma (PW-3).

23. M.L.Verma (PW-3) has deposed that on 31.12.1990 the seized ganja was sent to Excise Inspector, Hata for examination vide Ex.P/7. G.P.Bagdi (PW-4) has also stated that such packet received for examination wherein the bhang and stock and leaves of bhang which is also known as ganja were found. There was the smelling of bhang. After examination he sealed the packet and returned to the same constable who brought for examination. The examination report is Ex.P/7 which contains his signature.

24. He has admitted in cross examination that on the query of police he wrote that the seized article was ganja. It is not clear from the evidence of the G.P.Bagdi, Excise Inspector whether the seized article was ganja or bhang. The report is not crystal clear.

25. According to Section 2(iii) of the Act "cannabis (hemp)" means-

> "(a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;
>
> (b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and
>
> (c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;"

26. According to Section 2(iv) of the Act "cannabis plant" means any plant of the genus cannabis.

27. Cannabis (hemp) and cannabis plant are two different contraband under NDPS Act. Bhang, Sidhi Patti or cannabis sativa consists of dried leaves and fruiting shoots whereas ganja has rusty green colour and a characteristic odour and consists of flowering or fruiting tops of the female plant quoted with resin."

28. Bhang does not fall within the definition of cannabis (hemp) under the NDPS Act yet it does fall within the definition of cannabis plant.

29. It is evident that no chemical examination was done of the seized article.

30. In the case of *Pili Dilli v. State*, 1995 (1) Crimes 858, it has been held that:

> "In the absence of chemical examination merely on the basis of oral statement of the Excise Inspector it can not be held that the seized article was ganja."

31. In the case of *Subash Suna v. State*, 1997, Cri LJ 1324 (Ori), it has been held that:

> "In a case, ganja recovery sample was not sent for chemical examination but statement of Excise Sub-Inspector regarding nature of contraband from colour, flavour and departmental experience was made. Since, there was non-compliance of mandatory provision regarding chemical examination, conviction and sentence was not sustainable."

32. The seized article was not chemically examined and hence in absence of this it is not established that the seized article was ganja.

33. On appraisal of entire evidence adduced in the case, it can very well be said that Shri M.L.Verma (PW-3) did not follow the mandatory provisions as required under the Act. The sample was not chemically examined. The independent witnesses have not corroborated the prosecution story. It was not safe to convict the appellant on the sole basis of the statement of M.L.Verma (PW-3) who has not followed the mandatory provisions of the Act, therefore, the finding of guilt as recorded by the trial Court is erroneous hence set aside. His conviction is bad in law hence sentence is also set aside.

34. Consequently, the appeal is allowed. The judgment of conviction and

sentence passed by the trial court are hereby set aside. The appellant is acquitted from the charge levelled against him. He is on bail. His bail bonds are discharged.

Appeal allowed.

I.L.R. [2008] M. P., 351
APPELLATE CRIMINAL
Before Mrs. Justice S.R. Waghmare
20 November, 2007

SOHAIL ALI ... Appellant*
Vs.
STATE OF M. P. ... Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 389, Indian 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.

Considering the above submissions, I find that there is substance in the arguments advanced by the Counsel for the Applicant. The applicant is an educated youth aged approximately 24 years and has a bright future before him. Considering the record that the trial Court had keeping these facts in mind, granted bail to the applicant which has not been misused by him is a fact which cannot be blinked away or ignored. Also in the light of the observations made by the Apex Court in the matter of Babusingh (Supra) it is utmost importance that bi-focal interest of justice to the individual and the society affected must be kept in mind and in the instant case I find that the trial Court has convicted and charged him only under Section 365 and not under Section 363, 363 A, 506 or 34 of the IPC the other offences registered against him.

Cases Referred :
AIR 1976 SC 527, 2002 SCC (Cri) 1043, AIR 1990 SC 2147.

Jai Singh with *Rajesh Chouhan,* for the appellant,
Smt. Mamta Shandilya, for the respondent/State.

Cur.adv.vult.

ORDER

SMT. S.R. WAGHMARE, J. :–Heard on I.A. No.6852/07 an application for early hearing. Counsel for appellant has stated that appellant who is an educated youth of 23 years of age is in jail since 27-8-2007 and it was urged by the counsel before me that the entire future of the appellant is likely to be ruined if the application for suspension of sentence is not considered early. Counsel also stated that the accused appellant was granted bail by the trial Court and has not misused the same.

Counsel for the respondent/State Ms. Mamta Shandilya, has not expressed any objection regarding the early hearing of the matter. Looking to the urgency involved the application is allowed.

*Cr. A. No. 961/2007 (Indore)

Heard on question of I.A. 6891/07 which is an application for suspension of sentence.

Counsel for the appellant has urged that the appellant has full chance of success in the appeal and the accused has been falsely implicated in the matter. It is a case of affair of the heart since the Kumari Usha Bhagat, whom the accused is alleged to have abducted as her-self on affidavit (Ex-D/7) stated that the accused was not in any manner responsible for her leaving her home. Further counsel relying on Air 1976 S.C. Pg 527 *BabuSingh and others Vs. State of U.P.* urged that Apex Court has held the personal liberty of the accused was paramount importance and when the bail is refused the liberty is.

> " too precious a value, our constitutional system recognises under Art.21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary, may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. So deprivation of personal freedom, ephemeral or enduring must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the constitution. "

Further in para 16 the court held

> "reasonableness postulates intelligent care and predicates that deprivation of freedom, refusal of bail is not for punitive purpose but for bi-focal interests of justice to the individual involved and society affected." and for criteria germane to exercise of bail 'discretion' was pointed out.

Counsel also relied on 2002 SCC Criminal 1043 *Suresh Kumar and Others Vs. State of (NCT of Delhi)* whereby the Apex Court had held that suspension of sentence should be ordered liberally in absence of any exceptional circumstances and when the sentence was for fixed period of imprisonment. The high Court had erred in refusing the suspension of sentence in absence of any exceptional circumstances.

Counsel urged that the accused appellant was not a common criminal as already stated by him and fully deserves the benefit of the suspension of sentence. Counsel also urged that in the light of *Babusingh* (Supra) any stringent condition could be imposed by this Court in the interest of justice on the young applicant and finally he also stressed that the trial Court had erred in holding and misreading the reference in the impugned order to the AIR manual 5th Edition 1989 Page 409, whereby the conviction was altered from offence under Section 366 of the IPC to under Section 363 of the IPC; stating that in the instant case offence under Section 365 of the IPC was not lesser offence as compared to Section 366 of the IPC and hence the trial Court had erred in convicting the accused under Section 365 of the I.P.C. without charging him under the same.

Counsel for the respondent on the other hand fully supported the judgment

of the trial Court and stated that the appellant was not entitled to suspension since his previous conduct of persuing Usha Bhagat had been taken note by her parents and he had been reprimanded by them earlier. She stated that the background of the applicant was fully considered by the learned Judge of the trial Court and hence conviction was for lesser offence under Section 365 of the IPC.

Considering the above submissions, I find that there is substance in the arguments advanced by the Counsel for the Applicant. The applicant is an educated youth aged approximately 24 years and has a bright future before him. Considering the record that the trial Court had keeping these facts in mind, granted bail to the applicant which has not been misused by him is a fact which cannot be blinked away or ignored. Also in the light of the observations made by the Apex Court in the matter of Babusingh (Supra) it is utmost importance that bi-focal interest of justice to the individual and the society affected must be kept in mind and in the instant case I find that the trial Court has convicted and charged him only under Section 365 and not under Section 363, 363 A, 506 or 34 of the IPC the other offences registered against him.

However, I disagree with the contention of the Counsel for the Applicant that offence under Section 365 of the I.P.C. is not lesser offence than one under Section 366 since the Apex Court in the matter of Faiyaz Ahmed and others Vs. State of Bihar AIR 1990 S.C.C 2147 clearly held thus:-

> "for the reasons stated earlier, we find that the accused were not liable to be convicted for the offecne under Section 366, IPC but of a lesser offence under Section 365 and 368, IPC".

thus clinching, the issue, that offence under Section 365 is lesser offence to Section 366 of the IPC and thus there is no error as such in the judgment impugned regarding the alteration and conviction under Section 365 of the IPC as urged by the Counsel. It goes without saying that this observation shall not affect the mertis of the case. Under the circumstances having bestowed my anxious consideration to the facts of the case and the evidence available on the record the application is allowed. The remaining part of the sentence shall remain suspended during the pendency of this appeal.

It is therefore, directed that the appellant be released on bail subject to payment of fine and executing a personal bond for Rs.25,000/-(Rs twentyfive thousand) and a solvent surety to the like amount to the satisfaction of the Trial Court. It is also further directed that the appellant shall mark his presence at the concerned police station on every Sunday between 9. A.M. To 11. A.M. during the pendency of this appeal.

The accused shall abide all conditions enumerated under section 437 (3) of the Cr.P.C.

C.c as per rules. *Order accordingly.*

I.L.R. [2008] M. P., 354
APPELLATE CRIMINAL

Before Mr. Justice A.P. Shrivastava

30 November, 2007

RADHESHYAM ... Appellant*

Vs.

STATE OF M. P. ... Respondent

A. 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. (Para 20)

B. Penal Code, Indian (45 of 1860) - Section 304(1) - Culpable Homicide not amounting to murder - Appellant causing injury by ballam on head of deceased - Oral testimony supported by medical evidence - Evidence of eye witnesses found trustworthy - Conviction of appellant under Section 304(1) I.P.C. proper - Appeal dismissed. (Para 21)

C. 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. (Para 23)

Cases Referred :

2004 SCC (Cri) 252, 2002 SCC (Cri) 1547, 1991 MPLJ 253, 2004 SCC (Cri) 2032, AIR 1979 SC 135, 2003 SCC (Cri) 801, 2002(1) Current Criminal Judgments 310 (MP), 2004 SCC (Cri) Supp 404, 2004(4) MPLJ 543, 1994 Cr.L.J. 2526, AIR 1994 SC 463, 1999(2) MPWN 214, 2006 AIR SCW 298, 2007(1) Vidhi Bhasvar 264.

Raj Kumar Singh Kushwah, for the appellant,
V.S. Chaturvedi, P.P. for the respondent/State.

Cur.adv.vult.

JUDGMENT

A.P. SHRIVASTAVA, J. :–Appellant has preferred this appeal against the judgment of conviction and sentence,dated 31.1.2001 passed by IVth Additional Sessions Judge, Morena (M.P.) in S.T. No. 95/95, by which the appellant has been convicted under Section 304(I) of IPC and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs. 5,000/- and under Section 324 of IPC, sentenced to undergo rigorous imprisonment for two years with a fine of Rs. 1,000/- with default stipulation.

2. As per the prosecution story, on 20.8.94 in the evening at about 5.30 at village Singpura, Mule Singh, the cousin of informant Sobran Singh(P.W.2) was in the field and appellant Radheshyam along-with co-accused Pappu and Sobir were grazing cattle in the field. Mule Singh opposed for grazing the cattle in the field. Thereafter, the accused and co-accused Sobir (who tried by Juvenile Court)

*Cr.A. No. 174/2001 (Gwalior)

came with ballam, farsa, lathi and gun. Appellant Radheshyam inflicted injury by ballam to the head of Mule Singh by which he fell down on the ground. Co-accused Jai Singh and Ahibaran Singh also inflicted lathi blows to him. On hearing the noise of Mule Singh, Kamal Singh (P.W.1) and Udaybhan Singh (P.W.3) came on the spot. Then Radheshyam inflicted ballam blow to the chest of Kamal Singh(P.W.1) and co-accused Surajbhan inflicted injury to Udaybhan by farsa. Sobran Singh (P.W.2) also sustained injuries by co-accused. Mule Singh was unconscious and thereafter he was taken to the police station by Sobran Singh (P.W.2) and on the same night, report was lodged at the police station which is Ex.P.3 on the basis of which First Information Report was lodged at the police station. Mule Singh was referred to Morena hospital from where he was referred to J. A. Hospital and during the course of treatment, he died on 4.9.94. After completion of investigation, charge-sheet was filed under Sections 302, 307, 147, 148 and 149 of IPC before the competent Court against eight accused persons including the present appellant(accused No.1). After conclusion of trial, the trial Court convicted and sentenced the present appellant accordingly as stated in para one of this judgment but the remaining accused persons were acquitted by learned trial Court.

3. Being aggrieved by the judgment of conviction and sentence, this appeal has preferred by the appellant.

4. The main submission of the learned counsel for the appellant is that the prosecution examined three eye-witnesses, namely, Kamal Singh (P.W.1), Sobran Singh (P.W.2) and Udaybhan Singh (P.W.3). It is submitted by him that independent witnesses, namely, Suresh Singh (P.W.5) and Ram Senhi (P.W.6) who were examined by the prosecution, turned hostile and not supported the prosecution case while Kamal Singh (P.W.1), Sobran Singh (P.W.2) and Udaybhan Singh (P.W.3) are relatives of the deceased and they were reached at the spot after the incident, therefore, they cannot be treated as eye-witnesses. Further, it is submitted that during the testimony of the witnesses, the spot of occurrence has also changed and the statements of the witnesses have recorded after eight days of the incident. Further, the report under Section 157 of Cr. P.C. was sent to the Magistrate after eight days of the incident.

5. On the other hand, learned counsel for the respondent/State submits that it is not correct that the spot of occurrence has changed and the eye-witnesses, namely, Kamal Sigh (P.W.1), Sobran Singh (P.W.2) and Udaybhan Singh (P.W.3) were reached at the spot immediately and saw the occurrence.

6. The case rests only on the testimony of eye-witnesses, namely, Kamal Singh (P.W.1), Sobran Singh (P.W.2) and Udaybhan Singh (P.W.3) while Suresh Singh (P.W.5) and Ram Senhi (P.W.6) turned hostile. Kamal Singh (P.W.1) deposed that the incident took place on 20.8.94 in the evening at about 5:30. The appellant belonged to same village and there was no previous enmity before this incident. The dispute arose due to grazing cattle in the field. Appellant along-with other co-accused came to the spot and there was quarrel took place. Appellant inflicted barchi blow to Mule Singh by which he sustained injury on his Kanpati(temple) of left side of head due to which he fell down on the ground. Other co-accused also

inflicted injuries by lathi. On hearing the cry of Mule Singh, he went to the spot and saw that appellant Radheshyam has also inflicted injury to the chest of Mule Singh by ballam. He also inflicted one ballam blow to his chest. In the incident, Udaybhan Singh and Sobran Singh have also sustained injuries. On the spot, Mule Singh was unconscious. Thereafter, he was taken to the police station and lodged the report by him. Mule Singh was examined at Morena Hospital from where he was referred to J. A. Hospital, Gwalior and he died on 4.9.94 in the hospital. The witness also stated that he along-with Udaybhan Singh, Omkishan came Gwalior along-with Mule Singh. The police seized the blood stained clothes of deceased Mule Singh through seizure memo Ex.P.1. In para 16 of his cross-examination, the witness denied that there is house in name of Himat Singh but Himat Singh was residing separately. In para-17 of his cross-examination, the witness deposed that in his police diary statement he has stated that at the time of incident he was inside the house of Patiram and on hearing the cry of Mule Singh, he came out of the house. If this fact is not mentioned in his police diary statement Ex.D.1, he cannot give any explanation. He also denied that he met the witness after seeing the medical report of the deceased. He told that the house of Udaybhan Singh and his house is one and there was no other portion of the house.

7. Sobran Singh (P.W.2) who lodged the report at the police station, corroborated the version of the prosecution case as written in Ex.P.3. In his examination-in-chief, he told that the quarrel started over grazing the cattle in the field. The appellant along-with other-accused came with deadly weapons. Appellant inflicted injuries by ballam to the head of Mule Singh. Mule Singh also sustained injuries on the other portion of his body. Kamal Singh(P.W.1) also sustained injury on his chest.

8. Similarly, Udaybhan Singh(P.W.3)also corroborated that the appellant inflicted injury on the head of deceased Mule Singh by ballam. He also sustained injuries during the incident. In para 14 of his cross-examination, the witness deposed that he has no documents which shows that in the field of Himat Singh he had share. In para-18, he admits that his statement was recorded at Gwalior. He also denied that he went to the police station. There was contradiction on the spot which recorded in Ex.D.3.

9. The prosecution examined two more eye-witnesses, namely Suresh Singh (P.W.5) and Ram Sanehi (P.W.6) but both of them have declared hostile and not supported the prosecution case. In the cross-examination of Ram Sanehi (P.W.6), it appears that the quarrel took place between the appellant along-with co-accused and Mule Singh. Mule Singh sustained injury by ballam and Kamal Singh sustained injury by lathi.

10. Dr. J. N. Soni (P.W.9) on 04.09.94 examined the body of the deceased Mule Singh. The post mortem report is Ex.P.41. As per the report, duration of death of the deceased was within 6 hrs to 24 hrs since the post mortem examination. Regarding the nature of injury, it is opined by the doctor that it should be decided on the basis of circumstantial evidence. But the cause of death was due to cardio-respiratory failure as a result of head injury. In para-7, it is also deposed by the doctor that the injury sustained on the body of the deceased was caused by sharp and hard object. In para-8 of cross-examination, doctor denied that treatment for

bed-shore was not given. In para-11, he also disclosed that due to failure of respiratory system the blood was clotted on several tissues and turned blue.

11. Dr. B.L. Mahor, who conducted the MLC, also examined by the prosecution as P.W.4. He also examined the deceased Mule Singh on 20.08.94. According to doctor, penetrating wound was found on the left temple(kanpati). Patient was unconscious. He was referred for x-ray to District Hospital, Morena. The report is Ex.P.19. On the same day, he also examined the injured Udaybhan Singh (P.W.3) and found penetrating wound on the upper portion of left shoulder. The report is Ex.P.21. He also examined the injured Kamal Singh (P.W.2) and found lacerated wound below the medial end of right clavicle bone. The injury caused by hard and blunt object and was within 24 hours. The report is Ex.P.23. He was also inquired about the nature of injuries of Mule Singh, in which he gave his opinion vide Ex.P.25.

12. The main grievance of learned counsel for the appellant is that the trial Court has not appreciated the evidence properly because according to him, Kamal Singh(P.W.1), Sobran Singh (P.W.2) and Udaybhan Singh(P.W.3) reached on the spot after the occurrence and their testimony is not reliable. In this regard, he relied on the decision of Apex Court in the case of Mohinder Singh and another V. State of Punjab and others 2004 Supreme Court Cases (Cri) 252, in which it is held that in a case where injured witnesses in the alleged incident examined. The Courts would endeavour to assess the evidence of eye-witnesses first. But, due to some glaring discrepancies in the prosecution case, it should be considered first and thereafter considering the evidence of injured eye-witnesses to have a better perspective of oral evidence. Regarding the appreciation of evidence, he also placed reliance in the case of *Hardeep V. State of Haryana and another,* 2002 Supreme Court Cases (Cri) 1547 and *Chhakki S/o. Ramnath V. State of Madhya Pradesh* 1991 M.P.L.J. Page 253.

13. It is further alleged that there is delay in recording the statements of the witnesses. In this regards, he relied on *Vijaybhai Bhanabhai Patel v. Navnitbhai Nathubhai Patel and others,* 2004 Supreme Court Cases (Cri) 2032 and *Ganesh Bhavan Patel and another V. State of Maharashtra,* AIR 1979 Supreme Court 135.

14. Regarding omission and contradiction and inordinate delay in sending the report to the Magistrate, learned counsel for the appellant relied on *Suresh Chaudhary V. State of Bihar* 2003 Supreme Court Cases (Cri) 801.

15. It is also submitted by learned counsel for the appellant that crime number not mentioned in the medical requisition. He relied on *Nabab Khan @ Nawab and others V. State of M.P.* 2002 (1) Current Criminal Judgments 310 (M.P.).

16. Learned counsel for the appellant also submitted that blood-stained clothes of the deceased were not produced by the prosecution. In this regard, he relied on *State of Rajasthan V. Taran Singh and another* 2004 Supreme Court Cases (Cri) Supp 404.

17. It is also submitted by counsel for the appellant that site plan was not prepared as per the actual point of place of occurrence. In this regard, he relied on *Vijay Singh V. State of M.P.* 2004(4) MPLJ 543 and *Bashir Shah and others V. State of Rajasthan* 1994 Cri. L. J. 2526.

18. In the alternative, it is submitted by counsel for the appellant that in this case, if the appellant found guilty, he prays for relaxation of sentence of the appellant and he may be given benefit of Probation of Offenders' Act. In this regard, learned counsel for the appellant relied on *Kamal Singh V. State of M.P.* AIR 1994 Supreme Court 463 and *State of Karnataka V. Muddappa* 1999(2) MPWN [214].

19. The counsel for the appellant gave much stress on the point that the eye-witnesses were reached at the spot after the occurrence. But, if we go through the evidence of Kamal Singh(P.W.1),Sobran Singh (P.W.2)and Udaybhan Singh (P.W.3), it is clear that the witnesses were present at the spot and they saw the incident. The trial Court has found that the fatal injury which was caused by the appellant on the head of deceased Mule Singh by ballam, is further corroborated by MLC report Ex.P.19 and post mortem report Ex.P.41. As per post mortem report, the injury caused to the deceased by penetrating object which was fatal for the deceased Mule Singh. The presence of witnesses as mentioned above was established by their testimony and the learned trial Court has discussed in detail about their presence in paras 16, 17, 18 of the impugned judgment. Although, there are some contradictions and omissions came out in the testimony of eye-witnesses but they are not material in relevant against the present appellant for causing fatal injuries to deceased Mule Singh and also causing incised injuries to Kamal Singh (P.W.1).

20. The other objection which was raised by learned counsel for the appellant that the report under Section 157 of Cr. P.C. was sent to the Magistrate after eight days of the incident and the statements were also recorded informally. On the other hand, learned counsel for the respondent/State submitted that deceased Mule Singh was taken to the police station by eye-witness and from where he referred to Morena Hospital and thereafter referred to J.A. Hospital for treatment and he died on 4.9.94.Due to this, there is no delay in recording the statements. When the evidence of eyewitnesses are trustworthy, therefore, the delay in sending the report under Section 157 of Cr.P.C. will not affect the prosecution case. In this regard, reliance can be made in the case of Rabindra Mahto V. State of Jharkhand, 2006 AIR SCW 298(B), that mere delay in recording of FIR and sending same to Magistrate is not a circumstance to discard prosecution case in its entirety. It is observed by the Apex Court that there cannot be any manner of doubt that S. 157 of Criminal Procedure Code requires sending of an FIR to be Magistrate forthwith which reaches promptly and without undue delay. The reason is obvious to avoid any possibility of improvement in the prosecution story and also to enable the Magistrate to have a watch on the progress of the investigation. At the same time, this lacuna on the part of the prosecution would not be the sole basis for throwing out the entire prosecution case being fabricated if the prosecution had produced the reliable evidence to prove the guilt of the accused persons. The provisions of S. 157, Cr.P.C. are for the purpose of having a fair trial without there being any chance of fabrication or introduction of the fact at subsequent stage of investigation. The cases cited by the learned counsel for the appellants do not lay down any law that simply because there is a delay in lodging the FIR or sending it to the Magistrate forthwith, the entire case of the prosecution has to be discarded. Thus in the present case the prosecution has led reliable evidence the

veracity of which is not dislodged by delay in recording of the FIR and delay in sending the same to the Magistrate in the facts and circumstances of this case. At best it can be taken to be an infirmity in investigation.

21. In this case, the oral testimony is supported by medical evidence and learned trial Court only found the appellant guilty for causing fatal injuries to Mule Singh, the manner in which the incident took place. The trial Court found the appellant guilty for the commission of offence punishable under Section 304(I) of IPC instead of Section 302 of IPC and secondly, under Section 324 of IPC for causing incised injuries to Kamal Singh. The learned trial Court has given cogent reason in 34 of the impugned judgment in holding the appellant guilty. I found that the finding of conviction as recorded by learned trial Court in this regard is based on legal evidence available on record and trial Court not committed any illegality in holding the the appellant guilty for conviction under Section 304(I) of IPC regarding the death of Mule Singh and under Section 324 of IPC for causing injuries to Kamal Singh. Therefore, in view of the above discussions, the conviction under Sections 304(I) of IPC and 324 of IPC is hereby maintained.

22. Counsel for the appellant also submitted that the sentence of appellant is excessive and he may be given benefit of Probation of Offenders' Act. In this regard, he placed reliance in the case of Kamal Singh (supra).

23. Looking to the gravity and seriousness of offence, it is not proper to give the benefit of Probation of Offenders Act to the appellant. In criminal justice system, there should be a equilibrium between the guilt and punishment. In a recent judgment of Apex Court in the case of *State of M.P. V. Kedar Yadav* 2007(I)Vidhi Bhasvar 264, it is observed that imposing inadequate sentence due to undue sympathy would do more harm to justice by undermining public confidence in the efficacy of law. Society cannot long endure under such serious threats. Every Court has duty to award proper sentence having regard to nature and manner of execution of offence. No formula of foolproof nature is possible for determining just and appropriate punishment. But the object should be to protect society and to deter criminal. Courts should impose such sentence which reflects conscience of society.

24. Therefore, looking to the facts and circumstances of the case and manner in which the offence was committed by the appellant, I think the learned trial Court has awarded proper and adequate sentence. Thus, the conviction and sentence as awarded by learned trial Court is hereby affirmed. The bail bond of the appellant shall stand cancelled. He is further directed to surrender before the trial Court to serve out the remaining part of sentence.

25. In the result, the appeal is dismissed accordingly.

Appeal dismissed

I.L.R. [2008] M. P., 360
APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice S.R. Waghmare

3 December, 2007

DASHRATH & ors. ... Appellants*
Vs.
STATE OF M.P. ... Respondent

A. 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. (Para 7)

B. Homicidal death - Proof - Can be proved by examining the autopsy surgeon.

C. Burden of proof - In Criminal case - Prosecution is required to prove its case beyond all reasonable doubt and has to stand on its own leg - Can't take benefit of weakness of defence - Blood present on the trouser and Shirt of appellants - It is the burden of prosecution to prove that the blood is human blood and how it connects the appellants with crime - Trial Court wrongly shifts the burden on appellants/accused. (Para 10)

Ashish Gupta, for the appellants no. 1 and 2.
R.K. Trivedi, for the appellant no. 2.
Girish Desai, Deputy Advocate General for the respondent/State.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **S.L. Kochar, J** :–The appellants have filed this appeal challenging their conviction under Section 302/34, 201 and 394 of the I.P.C and sentence of imprisonment for life with fine of Rs.500/-, in default of payment of fine additional R.I. for six months, R.I. for four years with fine of Rs.300/-, in default of payment of fine additional R.I. for three months and R.I for ten years with fine of Rs.400/-, in default of payment of fine additional R.I. for five months respectively, passed by the Learned Additional Sessions Judge, Ujjain in Session Trial No.105/1998, dated 20-10-1998.

2. According to the prosecution case, deceased Mohanlal and his second wife Sitabai were residing in a hutment situated outside the village in the field. They were not in their house which was locked from outside. On 25-12-1997 Omkar son of Laljiram Patidar [P.W-6], found a bedding in his well and after extracting it from the well it was seen that same was containing Rajai (quilt), Shawl, Shirt, Paijama, Hankerchief, ladies wrist watch and a child cap tied with stones. He lodged the report on the same day and along with him Harisingh Head Constable [P.W-18], proceeded towards his well. They made a search of the well of Omkar, by throwing anchor and found a gunny bag in which dead body of Mohanlal was wrapped along with bricks and stones. On the basis of this, in Chimanganj, Police

*Cr.A. No. 1350/1998 (Indore)

Station F.I.R. Exhibit P/43, was recorded by Head Constable Ramvilas Singh. Through seizure memo Exhibit P/1, all the articles were seized. The lock of the house of Mohanlal was broken open wherein blood stained, roof, tile and earth soiled with blood and other articles were found which were seized through seizure memos Exhibit P/14. Spot Map Exhibit P/16 and P/17, were also prepared at the instance of the witnesses. Seized articles were got identified in test identification parade vide memos Exhibit P/10, P/11, P/12. The Police and villagers continued the search of wife of Mohanlal and ultimately she was also found wrapped in a gunny bag lying in well of Ayyub [P.W.-8]. It was seized through Exhibit P/21.

3. The accused persons were arrested and on their memorandum statements from Exhibit P/26 to Exhibit P/30 and seizure memo Exhibit P/31, P/32 and P/33 from their possession trouser, Shirt, Silver chain, Paijeb, Golden Pendal, Silver ball were seized. [P.W-12] SurajSingh Patwari, prepared another map Exhibit-P/36. For death of Mohanlal. Dehati Nalish Exhibit-P/42 was recorded. Dead bodies were sent for Postmortem examination which was conducted by [P.W-13] Dr. G.S Dhawan. Dr. Dhawan, performed autopsy on the dead body of Mohanlal. Doctor who performed Postmortem on the dead body of sitabai was not examined before the trial Court. On completion of investigation appellants were charge sheeted for commission of above mentioned offences.

4. Appellants denied the charges and pleaded innocence. They did not examine any witness in defence. The prosecution examined in all nineteen witnesses and got Exhibited 46 documents to prove its case. Learned trial Court after hearing both the parties passed the judgment of conviction of the appellants as mentioned herein above.

5. We have heard the learned counsel for the parties and also perused the entire record carefully.

6. The learned counsel for the appellants have submitted that there was no eye witness of the incident and prosecution case in the charge sheet was based on circumstantial evidence, but in Court, prosecution failed to adduce any cogent, reliable and admissible evidence against the appellants who are entitled for acquittal.

To combat with learned counsel for the state has supported the judgment and finding arrived at by the learned trial court.

7. On going through the impugned judgment and evidence on record we gather that there is absolutely no evidence against the appellants worth for conviction. The learned trial Court placed reliance on the testimony of [P.W-10] BhagwanSingh and [P.W-16] Ram-Narayan, regarding memorandum statements of appellants vide Exhibit P/26 to P/30. BhagwanSingh and Ram-NarayanSingh both turned hostile, but they have admitted their signatures on the memorandum statements. At the same time they have denied recording of any statement of appellants as shown in documents Exhibit-P/26, P/27,P/29 and P/30 for discovering any fact related to crime. They have also denied seizure of any article in pursuance of the memorandum statements vide seizure memo Exhibit P/31, P/32 and P/33. Both the witnesses were cross examined by the prosecutor, but they have denied the contents of memorandum statement and seizure memo. No cross examination was done by the prosecutor as to how and on what basis both the witnesses put

their signatures on all these documents. The learned Trial Court relied upon the contents of these documents which have not been accepted by both the witnesses who have been declared hostile and nothing substantial was elicited in cross examination by the prosecutor. The learned trial Court in paragraph 20 has mentioned that merely because the witnesses turned hostile, prosecution case would not be weakened. The trial Court relied upon the contents of memorandum statement as well as seizure memo which is contrary to the provision of law. The contents of Punchnama itself are not admissible in evidence unless stated by the concerned witnesses in the Court. These documents can be used for refreshing the memory as per provision 159 of Evidence Act and to corroborate the version of its author as per provision under Section 157 of the Evidence Act, see: 1958, M.P.L.J. *Bhagirath Vs. State of Madhya pradesh)* page 745.

8. The appellants have not disputed homicidal death of Mohanlal. The homicidal death of Sitabai has also not been proved by examining the Autopsy Surgeon by prosecution but even then the trial Court has held it as proved.

9. The learned trial Court has also placed reliance on the Forensic Science Laboratory report Exhibit P/46 which is disclosing the presence of simple blood on the trouser and shirt of the appellants and held that the burden is on the appellants to show as to how blood was present on their clothes.

10. The trial Court has held that the appellants have failed to establish as to how blood was found on their clothes and there was no proof that it was not the human blood, therefore, this circumstance is against the appellants who have failed to give explanation and failed to establish that clothes were not containing human blood. In paragraph 22 as well as in paragraph 28 the learned trial court has committed grave error of law by holding that appellants were required to establish that the blood found on their clothes was not the human blood. It is cardinal principle of criminal jurisprudence that burden of proving charge against the accused persons lies on the prosecution and prosecution is required to prove its case beyond all reasonable doubt and that prosecution has to stand on its own leg and cannot take benefit of weakness of defence as well as whenever two sets of evidence or two inferences are possible, one in favour of accused and another against the accused, the evidence or inferences in favour of the accused should be relied upon. The trial Court has given finding contrary to the basic principle of criminal jurisprudence and convicted the appellants, though there is no legal evidence available on record to establish the guilt of the appellants beyond all reasonable doubt.

11. In the result instant appeal is allowed. Conviction and sentence of the appellants are hereby set aside. They are on bail. Their bail and surety bonds stand discharged.

Appeal allowed.

I.L.R. [2008] M. P., 363

APPELLATE CRIMINAL

Before Mr. Justice Deepak Verma & Mr. Justice K.S. Chauhan

4 December, 2007

BHADDU & ors. ... Appellants*

Vs.

STATE OF M.P. ... Respondent

A. Penal Code, Indian (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.

(Paras 44, 46)

B. Penal Code, Indian (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.

(Paras 52, 59)

Cases Referred

AIR 1972 SC 502, AIR 2006 SC 831
AIR 1987 SC 1328, 1976 Cr.L.J. 800.

Raman Patel with *P.C. Patel,* for the appellants,
R.S. Patel, Additional Advocate General, for the respondent/State

Cur.adv.vult.

J U D G M E N T

The Judgment of the Court was delivered by **K.S. Chauhan J.**:–These criminal appeals arise out from the same incident, therefore, they are being disposed of by the common judgment.

2. These criminal appeals have been preferred under Section 374(2) of Cr.P.C. being aggrieved by the judgment, finding and sentence dated 18.01.2001 passed by VII Additional Sessions Judge, Jablalpur in S.T.No.275/98 whereby the appellants have been convicted under sections 147, 302/149, 324/149, 323/149 and 436 of IPC and sentenced thereunder to R.I. for 1 year, life imprisonment with fine of Rs.500/-, in default R.I. for 3 months, R.I. for 2 years, R.I. for 1 year, R.I. for 5 years with fine of Rs.500/-, in default R.I. for 3 months respectively. The sentences are directed to run concurrently.

3. The prosecution case in short is that on 02.03.1998 at about 10.00 a.m.

*Cr.A. 189/2001 (Jabalpur)

Shankar Lal Pandey went to his field which was given on 'Sikmi' to Vishal alias Lata for plucking tomatoes but was refused by his wife Sonibai who abused him. A village Panchayat was convened at Chabutara of Khermai in village Sukri where Shankar Lal Pandey was called through Sonibai, who went at the house of Shankar Lal Pandey with other women in the evening but the wife and mother of Shankar Lal Pandey refused to send him in Panchyat. When Sonibai returned, Lata, Bhaddu Singh, Barelal, Raghuveer Singh, Summat, Gyan Singh, Antar Singh, Bhaddu Singh, Khushilal, Pratap, Latori, Ramsingh, Beeran Singh, Rup Singh, Sone Singh, Jagan Singh, Sonu Singh, Awadhlal, Sonibai, Basori, Hari Singh and 15 - 20 other persons armed with Lathi, Danda, Sickle and Ballam went there at the house of Shankar Lal Pandey and set the houses on fire. They assaulted Shankar Lal Pandey, Awadh Bihari Pandey and Mahendra Prasad Pandey. As a result thereof, Shankar Lal Pandey died on the spot and Awadh Bihari Pandey and Mahendra Prasad Pandey sustained injuries. Mahendra Prasad Pandey (PW-10) lodged the FIR (Ex.P/18) at police station Kundam on 02.03.1998 at 23:45 p.m. wherein Crime No.27/98 was registered under Section 147, 148, 149, 302, 436 of IPC. Marg intimation No.9/98 was registered under Section 174 of Cr.P.C. Kamta Singh Baghel, A.S.I. proceeded to the spot but on account of pelting stones by people he could not reach the spot, hence he informed Police Headquarter at Jabalpur and ultimately Shri Ravindra Kumar Gautam, S.H.O. of police station Kundam went alongwith the force and fire brigade and controlled the situation.

Panchnama of dead body of Shankar Lal Pandey Ex.P/5 was prepared and his dead body was sent for postmortem examination. Dr. K.C. Singhai (PW-5) conducted the post mortem examination and found 5 incised wounds on the head. He opined that his death was on account of haemorrhagic shock due to head injuries with fracture and the death was homicidal in nature. The clothes of deceased Shankar Lal Pandey were seized. Awadh Bihari Pandey and Mahendra Prasad Pandey were sent for medical examination to Kundam Hospital wherein they were also examined by Dr.K.C.Singhai (PW-5). He found 2 incised wounds, 2 lacerated wounds and 6 contusions on the person of Awadh Bihari Pandey and 2 lacerated wounds and 3 contusions on the person of Mahendra Prasad Pandey. The spot map (Ex.P/2) was prepared. Blood stained, controlled soil, sickle, danda were seized. Devdas Vaishno (PW-6), Patwari also prepared the spot map (Ex.P/15) and damage panchnama Ex.P/12 to Ex.P/14 caused by fire to the houses of Shankar Lal Pandey, Narayan Prasad Pandey and Umesh Kumar Burman. The statements of the witnesses were recorded under Section 161 Cr.P.C. After completing the investigation, the charge sheet was filed in the Court of JMFC, Jabalpur, wherein Criminal Case No. 282/98 was registered which was committed to the Sessions Court for trial on 29.06.1998.

4. The appellants were charged under sections 147, 302, 307(2 counts), 302/149, 307/147 and Section 436 of IPC (3 counts) to the effect that on 02.03.1998 at about 11.00 p.m. at village Sukri, police station Kundam, District Jabalpur, they were the members of unlawful assembly and in prosecution of the common object of such assembly, namely to cause the murder of Shankar Lal Pandey and to attempt to cause the murder of Awadh Bihari Pandey and Mahendra Prasad Pandey and also to cause mischief by setting fire on the houses committed offence

of rioting. On the same date, time and place committed the murder of Shankar Lal intentionally (or knowingly). On the same date, time and place they caused the hurt to Awadh Bihari Pandey and Mahendra Prasad Pandey with such intention or knowledge and under such circumstances, had their act caused death of them, they would have been guilty of murder. On the same date, time and place committed mischief by fire causing destruction of the buildings which were ordinarily used as human dwellings of Shankar Lal Pandey, Narayan Prasad Pandey and Umesh Kumar Burman. Thus, thereby committed the offences under the above mentioned Sections.

5. The appellants abjured the guilt and claimed to be tried mainly contending that they have been falsely implicated in this case on account of previous enmity.

6. Prosecution examined as many as 16 witnesses whereas defence examined only 5 witnesses. After considering the evidence, the trial Court found them guilty under Sections 147, 320/149, 324/149, 323/149 and 436 of IPC as stated in para No.1 of this judgment. Being aggrieved by the judgment, finding and sentence, the instant appeals have been preferred under section 374(2) of Cr.P.C. on the grounds mentioned in the memo of appeals.

7. Learned counsel for the appellants has submitted that the trial Court has not appreciated the evidence in proper perspective and has committed an illegality in relying upon the prosecution witnesses and discarded the defence evidence. Six eyewitnesses belong to the same family and hence they are interested witnesses. There are discrepancies in ocular and medical evidence regarding the injuries caused to Mahendra Prasad Pandey and Shankar Lal Pandey. The prosecution has suppressed the incident which was committed by Shankar Lal Pandey and his son Raju by throwing bomb on Sukalu and Charan. They sustained grievous injuries. One eye of Sukalu was completely damaged. Further, it has been submitted that when people assembled in Panchayat, came to know about this incident. Thus, they committed this incident on account of grave and sudden provocation. The appellants have been falsely implicated due to old enmity. Further, it has been submitted that the prosecution has applied pick and choose method. There was no light and, therefore, the identification of the accused persons was not possible. No specific overt act has been attributed by any of the accused persons. It has not been proved that who set the houses on fire. The prosecution has failed to prove the case beyond reasonable doubt. Hence, the finding of guilt is erroneous, deserves to be set aside. Consequently, the appellants are entitled for acquittal.

8. On the other hand, Shri R.S.Patel, learned Additional Advocate General appearing on behalf of the respondent/State submitted that statements of Munnibai (PW-4), Kasturi Bai (PW-8), Jaidevi (PW-13) and Umesh Kumar Burman (PW-11) have been recorded on 03.03.1998 within reasonable time. No explanation has been sought from Investigating Officer as to why the statements of Awadh Bihari Pandey (PW-12) and Mahendra Prasad Pandey (PW-14) were recorded late. He has further submitted that the appellants set the houses on fire and in that light, the appellants were identified. He has further submitted that no circumstances are available so as to attract Exception I of Section 300 Cr.P.C. regarding grave and sudden provocation. The prosecution has established the

guilt beyond reasonable doubt and the trial Court has not committed an illegality in convicting and sentencing the appellants, therefore, it does not call for any interference.

9. The main point for consideration in these appeals is whether the trial court has committed any illegality in convicting and sentencing the appellants under sections 147, 302/149, 324/149, 323/149 and 436 IPC?

10. We have perused the case and the entire evidence recorded therein.

11. Mithilesh Pandey (PW-10) has deposed that Shanker Lal Pandey had gone to pluck tomatoes on his field which was given to Vishal @ Lata on Sikmi but Sonibai refused and some dispute arose. Jaidevi (PW-13) has deposed that Sonabai used filthy language against Shankar Lal Pandey. Munni Bai (PW-4), Kasturi Bai (PW-8), Awadh Bihari Pandey (PW-12) have also given the evidence in this respect. On the other hand, Charan (DW-4) and Sukalu (DW-5) have deposed that Shankar Lal Pandey himself used filthy language against Sonibai who told to panchas in the village. Sukalu (DW-5) himself admitted that he was not present at that field. In such a situation, Sonibai might be the best witness to depose about the misbehaviour, if any, committed by Shankar Lal Pandey with her. But no such evidence has been adduced.

12. Munni Bai (PW-4), Kasturi Bai (PW-8), Mithilesh Pandey (PW-10), Awadh Bihari Pandey (PW-12) and Mahendra Prasad Pandey (PW-14) have deposed that Sonibai came in evening to call Shankar Lal Pandey in Panchayat which was held at the Chabutara of Khermai temple but mother and wife of Shankar Lal Pandey refused to send him in night. Thereafter, Sonibai returned back. This fact also finds support from the statements of Charan (DW-4) and Sukalu (DW-5).

13. Munni Bai (PW-4), Kasturi Bai (PW-8), Mithilesh Pandey (PW-10), Awadh Bihari Pandey (PW-12), Jaidevi (PW-13) and Mahendra Prasad Pandey (PW-14) have deposed that appellants came there, set the houses on fire and assaulted Shankar Lal Pandey, Awadh Bihari Pandey and Mahendra Prasad Pandey As a result thereof Shankar Lal Pandey died on the spot and Awadh Bihari Pandey and Mahendra Prasad Pandey sustained the injuries.

14. Mithilesh Pandey (PW-10) who lodged the report Ex.P/18 at police station Kundam has deposed that all the accused persons came there and set the houses of Shankar Lal Pandey, Narayan Prasad Pandey and Umesh Kumar Burman on fire and when Awadh Bihari Pandey, Mahendra Prasad Pandey and Shankar Lal Pandey came out of their house, the accused persons assaulted them with Lathi, Ballam, sickle etc. On account of which, they sustained the injuries and Shankar Lal Pandey died on the spot.

15. This witness in cross examination has stated that accused persons surrounded Shankar Lal Pandey and assaulted him, therefore, he is not in a position to state specifically as to which of the accused was having Lathi, Ballam and sickle.

16. Similar is the statement of Munni Bai (PW-4) who has deposed that the accused persons pelted stones, set the houses on fire, caused marpeet to Awadh Bihari Pandey, Mahendra Prasad Pandey and Shankar Lal Pandey by Lathi, Ballam

and sickle etc by which they sustained the injuries and Shankar Lal Pandey died on the spot.

17. She has further deposed that when the stones were pelted she was in the house but when they set the houses on fire she came out of the house, saw accused setting fire. On account of which household articles were burnt.

18. Since she stated that Mahendra Prasad Pandey was assaulted by sword and Ballam, therefore, contradictions have been brought from her police statement Ex.D/4.

19. Kasturi Bai (PW-8) has stated that at that time she hid herself behind the bush and saw the accused persons in the light of the burning houses. The accused persons were having Farsa, Ballam, sickle and wooden sticks. Firstly they assaulted Awadh Bihari Pandey, Mahendra Prasad Pandey and then to her husband Shankar Lal Pandey. All the accused persons surrounded him, assaulted and caused the injuries. As a result thereof, Shankar Lal Pandey died on the spot. Her sons Awadh Bihari Pandey and Mahendra Prasad Pandey also sustained the injuries.

20. Jaidevi (PW-13) is the mother of Shankar Lal Pandey. She has specifically deposed the names of the accused persons in para 3 of her deposition. She has specifically stated that firstly they pelted stones then set the houses on fire and when Shankar Lal Pandey and his sons came out of their house, they assaulted them. They were armed with Ballam, Farsi and Lathi etc. Mahendra Prasad Pandey was beaten by Basori and Raghuvir by Lathi. Awadh Bihari Pandey was beaten by Sukhram and Beeran. Shankar Lal Pandey was assaulted by all the accused persons as a result thereof he died on the spot. Awadh Bihari Pandey and Mahendra Prasad Pandey sustained injuries.

21. In the cross examination, some contradiction has been brought from her police statement Ex.D/5 on the point that who assaulted Awadh Bihari Pandey and Mahendra Prasad Pandey.

22. Awadh Bihari Pandey (PW-12) is the injured witness. He has specifically stated that the accused persons set the houses on fire and assaulted his father and his brother. His father Shankar Lal Pandey was assaulted by all the accused persons. He himself was assaulted by Vishal @ Lata and Sukhram by Lathies and by Beeran with Farsa. His brother Mahendra Prasad Pandey was also beaten by Basori, Raghuvir, Latori with Farsa and Lathi. He has further deposed that he sustained the damage amounting to Rs.2-3 lacs on account of burning of household articles.

23. This witness in the cross examination has deposed that he was not in a position to give the statement upto 18-19 days but was in a position to give such statement on 20th day. He denied the suggestion put to him that his statement was recorded nearly after about 1¾ months.

24. Mahendra Prasad Pandey (PW-14) is also an injured witness. He has corroborated the statement given by his brother Awadh Bihari Pandey (PW-12). He has specifically stated that the accused persons set the houses on fire and assaulted him, Awadh Bihari Pandey and Shankar Lal Pandey. On account of which they sustained the injuries and his father Shankar Lal Pandey died on the spot.

25. Thus, it is manifestly clear from the statement of these witnesses that accused persons came there, set the houses on fire, caused the injuries to Awadh Bihari Pandey, Mahendra Prasad Pandey and Shankar Lal Pandey. As a result thereof, Shankar Lal Pandey died on the spot. Since they were injured in the same very incident, their presence on the spot cannot be doubted.

26. Kamta Singh Baghel (PW-16) recorded the FIR (Ex.P/18) lodged by Mithilesh Pandey (PW-10) and registered the marg (Ex.P/19) under Section 174 of Cr.P.C. He proceeded immediately to village Sukri by Jeep but could not reach on the spot on account of pelting the stones by people, therefore, came to village Padariya and informed the Control Room and Police Officer. This fact further finds support from the evidence of Suryapal (PW-9). This clearly shows there existed tense situation on that day. However, Ravindra Kumar Gautam (PW-15), S.H.O. of Kundam went there with force and controlled the situation.

27. Vinod Kumar (PW-3) has deposed that he carried the fire brigade at the spot and extinguished the fire.

28. Umesh Kumar Burman (PW-11) though declared hostile but has supported the fact that his house was also set on fire by the accused persons. As a result thereof, his household articles were burnt.

29. Devdas Vaishno (PW-6) prepared the map Ex.P/11, damage panchnama Ex.P/12 to Ex.P/14 at the instance of complainant and submitted the report Ex.P/15.

30. From this evidence, it reveals that the houses of Shankar Lal Pandey, Narayan Prasad Pandey and Umesh Kumar Burman were set on fire.

31. Ravindra Kumar Gautam (PW-15) prepared the panchnama of dead body of Shankar Lal Pandey and sent his body to Kundam Hospital for postmortem examination where Dr.K.C.Singhai (PW-5) conducted the postmortem examination of Shankar Lal Pandey and found 5 incised wounds on his head. These injuries were caused by hard and sharp object which were anti mortem in nature. The death was homicidal. Cause of death was haemorrhagic shock due to head injury with fracture. Ex.P-10 is post mortem report which contains his signature. Thus, it is evident that death of Shankar Lal Pandey was homicidal in nature.

32. Dr.K.C.Singhai (PW-5) also examined the injured persons Awadh Bihari Pandey (PW-12) and Mahendra Prasad Pandey (PW-14). He found 6 contusions, 2 lacerated wounds and 2 incised wounds on the person of Awadh Bihari Pandey. Out of these injuries, injury Nos.1, 3, 4, 5, 6, 7, 9 and 10 were caused by hard and blunt object whereas injury No.2 and 8 were caused by hard and sharp object. These injuries were caused within 10-15 hours. The detailed description is given in medical report (Ex.P/8).

33. Likewise, on examination of Mahendra Prasad Pandey, he found 3 contusions and 2 lacerated wounds on his person. These injuries were caused by hard and blunt object within 10-15 hours. The detailed description of the injuries is given in the medical report (Ex.P/9).

34. On the other hand, the defence of the appellants is that the prosecution has suppressed the incident which was committed by Shankar Lal Pandey and his son Raju by throwing bomb on Charan and Sukalu. They have adduced the evidence

in this regard wherein Charan (DW-4) and Sukalu (DW-5) have deposed that when they had gone to call Shankar Lal Pandey for Panchayat he abused them and threw bomb and caused injuries to them.

35. Dr.K.C.Singhai (DW-1) examined Sukalu and found 4 contusions on his person. He also examined Charan Singh and found 1 contusion. Keeping in view the seriousness of his injury, he was referred to District Hospital, Jabalpur. The medical reports were submitted in Sessions Trial No.638/98 and their certified copies Ex.D/7 and Ex.D/8 have been filed in this case.

36. Dr.Indu Pandey (DW-2) has stated that one eye of Sukalu has been completely damaged. The report was submitted in Sessions Trial No.638/98. Ex.D/9 is the photocopy of bed head ticket.

37. Dr.H.K.Takiraja (DW-3) on examination of Charan found one injury of bomb blast in his left hand which was grievous in nature. The report was submitted in Sessions Trial No.638/98 and its certified copy Ex.D/10 is filed in this case.

38. Thus, from the defence evidence, it is clear that Charan and Sukalu had sustained grievous injuries but it was submitted that the accused persons in that case have been acquitted.

39. The main contention of the learned counsel for the appellants is that when the people of Panchayat came to know that Sukalu and Charan have been injured by bomb blast, therefore, they lost their power of self control and on account of sudden and grave provocation, committed this incident.

40. We have to consider whether such defence of grave and sudden provocation was available to the appellants in the facts and circumstances of this case?

41. It is not the case of the defence that on account of receiving the serious injuries by Sukalu and Charan they themselves lost their power of control and killed Shankar Lal Pandey. It is also not the case of the defence that seeing the injuries of Sukalu and Charan the appellants lost their power of self control and committed the incident. Their defence is that the people who were assembled in panchayat were suddenly and gravely provoked and committed this incident. It is beyond our comprehension that why those people would lose their power of control for the injuries of Sukalu and Charan and commit this offence.

42. On the facts also, when the mother and wife of Shankar Lal Pandey refused Sonabai to send him in Panchayat in night then Sukalu and Charan again compelled Shankar Lal Pandey to attend the Panchayat. Panchayat was free to take any decision within its jurisdiction in that situation if Shankar Lal Pandey was not coming to attend it. Sukalu and Charan themselves invited the eventualities.

43. The benefit of the 1st Exception of Section 300 of IPC can not be provided to the offenders who sought the provocation as an excuse for killing or doing harm to any person. Moreover, the appellants have not put on record the copy of FIR of Sessions Trial No.638/98 to show the details of the incident regarding causing of injuries to Sukalu and Charan. No record regarding the proceedings of Panchayat has been placed on record.

44. For application of Exception 1 of Section 300 IPC, the act must be done

whilst the person doing it is deprived of the power of self control by grave and sudden provocation i.e., it must be done under the immediate impulse of provocation. Thus, it brings about a sudden and temporary loss of self control. The test is of a reasonable person in circumstances which give rise to grave and sudden provocation. The provocation must be such as will upset not merely a hasty, hot tampered, and hyper sensitive person but would upset also a person of ordinary sense and calmness. The gap between provocation and assault causing death may render this exception inapplicable.

45. In the case of Ganayendra Kumar v. State of U.P., AIR 1972 SC 502, one B made remarks that the father and the uncle of the accused were dishonest, the accused thereon travelled about one furlong to his house, brought a gun, directed other persons who were near the accused to go away lest bullet should hit them, fired towards B but it hit the deceased who in an attempt to interfere fell between, it was held the provocation was far from sudden and the offence is one under Section 302 and under Section 304, Part I I.P.C.

46. In the present case, there were number of persons and, therefore, it can not be said that they all lost their power of control and committed this offence hence we find the defence of sudden and grave provocation would not be available to the appellants in the facts and circumstances of this case.

47. The learned counsel for the appellants has further contended that the Panchayat was convened to resolve the dispute in between Shankar Lal Pandey and Sonibai, therefore, it can not be termed as unlawful assembly. But, this contention is not acceptable for the simple reason that if it was not unlawful at the inception then it became so when they committed mischief by setting the houses on fire and assaulting Shankar Lal Pandey, Awadh Bihari Pandey and Mahendra Prasad Pandey.

48. Explanation provided under Section 141 IPC runs as follows:-

> "Explanation.-An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly."

49. According to Section 141 of IPC an assembly of 5 or more persons is designated as an unlawful assembly if the common object is to do the act mentioned in that section. The object to commit any mischief or criminal trespass or other offence is unlawful object.

50. Thus, from the evidence, adduced in this case, it is clearly established that the appellants formed an unlawful assembly for committing the mischief by setting houses on fire, killing of Shankar Lal Pandey and causing injuries to Awadh Bihari Pandey and Mahendra Prasad Pandey.

51. The learned counsel for the appellants further submitted that there was no source of light and it was very difficult to identify the appellants in mob.

52. On appreciation of evidence, it reveals that firstly the accused persons pelted the stones at the house of Shankar Lal Pandey and when he did not come out, the houses were set on fire. Jaidevi (PW-13) has clearly stated that she saw the appellants setting the houses on fire. As soon as Shankar Lal Pandey and his family members came out, they assaulted him and his sons Awadh Bihari Pandey

and Mahendra Prasad Pandey. As a result thereof, Shankar Lal Pandey died on the spot and Awadh Bihari Pandey and Mahendra Prasad Pandey sustained the injuries.

53. Thus, the eyewitnesses saw the incident in the light emanating from burning houses. Though some discrepancies have been brought as to whether the fire was set on houses and then the assaults were committed but most of the eye witnesses have stated in one voice that the houses were set on fire first then assaults were committed. Therefore, the minor discrepancy brought in this respect is of no consequence and does not affect the merits of the prosecution case. Thus, we find that the witnesses saw the appellants in the light emanating from burning houses.

54. The learned counsel for the appellants further contended that no specific overt act has been attributed to any of the accused persons. On appreciation of evidence, it is manifestly clear that most of the eyewitnesses have stated that the accused persons surrounded Shankar Lal Pandey and assaulted him. The injured persons Awadh Bihari Pandey and Mahendra Prasad Pandey have stated the names of the accused persons who have assaulted them.

55. In the case of *Kallu @ Masih & Ors. V. The State of Madhya Pradesh,* AIR 2006 SC 831, the Apex Court has held thus:

> "14. Though the trial court referred to the evidence of the eye-witnesses, it chose to disbelieve them merely on account of minor inconsistencies in their evidence, relating to the exact site of occurrence and failure to name all who landed blows and the exact nature of injuries. The High Court, on the other hand, held that minor inconsistencies and discrepancies regarding the exact place or the point at which the incident took place or as to who landed the blows is not sufficient to disbelieve the evidence of injured eye-witnesses. It is not necessary that all eye-witnesses should specifically refer to the distinct acts of each member of an unlawful assembly. In fact, it is difficult, if not impossible. This Court in Masalti v. State of U.P. [1964 (8) SCR 133], observed:
>
> "Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault."

56. In the case of *Dalbir Singh v. State of Punjab,* AIR 1987 SC 1328, it has been held that:

> "It is necessary to establish that accused were members of unlawful assembly but it is not necessary to decide as to which of accused persons had inflicted what particular injury and extent of their culpability shall be same.

57. In the case of *Sita Ram Pandey v. State of Bihar,* 1976 CrLJ 800; it has been held that:

> "If persons are in a mob holding lathis and are in company of other persons who are holding deadly weapons like bhalas and if they come together and go together after the occurrence, it cannot be held that they did not share the common object. The provisions contained in Section 149 will be attracted, unless it is established that the persons holding lathis at the place of occurrence were mere sight-seers. It is also well settled that in all cases, it is not necessary that all the persons forming an unlawful assembly must do some overt act."

58. The provisions of Section 149 are as follows:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

59. Since, it has been proved in the instant case that the appellants were the members of an unlawful assembly and committed an offence of rioting hence every member of this unlawful assembly constructively becomes liable for the act of other members of that assembly and hence it was not required to prove the overt act done by each and individual person.

60. The learned counsel for the appellants has further contended that there is some discrepancy in medical and ocular evidence regarding causing injuries to Shankar Lal Pandey and Mahendra Prasad Pandey. But we find such discrepancy not of much importance because it was very difficult to attribute the injuries caused by individual person with a particular weapon in such a mob.

61. The learned counsel for the appellants has further submitted that there is delay in recording the statements of Awadh Bihari Pandey and Mahendra Prasad Pandey, therefore, their evidence be discarded.

62. On perusal of evidence, it reveals that the injured persons Awadh Bihari Pandey and Mahendra Prasad Pandey were hospitalized and from the statements of Ravindra Kumar Gautam (PW-15), it reveals that they were discharged from hospital on 20.03.1998 but their statements were recorded on 25.05.1998 by Shri R.D.Dwivedi.

63. No doubt, there is delay in recording the statements of these injured witnesses but the position in this case is that the report Ex.P/18 was lodged promptly. The statements of other eyewitnesses Munni Bai (PW-4), Kasturi Bai (PW-8), Umesh Kumar Burman (PW-11) and Jaidevi (PW-13) were recorded on 03.03.1998 within reasonable time, therefore, it can not be said that the delay was made by Investigating Officer in recording the statements of Awadh Bihari Pandey (PW-12) and Mahendra Prasad Pandey (PW-14) to give the shape to this case. Therefore, delay is not fatal to the prosecution.

64. The learned counsel for the appellants has further submitted that the alleged eyewitnesses belong to the same family, therefore, they are the interested witnesses and hence the reliance can not be placed on their testimonies but this contention is also not acceptable for the simple reason that the incident is of night where the presence of these witnesses is quite natural and probable. They have seen the incident, therefore their testimonies can not be discarded merely on the basis that they belong to the same family. Mere relationship is not sufficient to discard their testimonies.

65. There is overwhelming evidence against the appellants. They assaulted Shankar Lal Pandey and caused such injuries on account of which he died at the spot. There intention was to kill Shankar Lal Pandey. They also caused the injuries to his sons Awadh Bihari Pandey and Mahendra Prasad Pandey. The ocular evidence of the eyewitnesses finds support from the medical evidence.

66. Apart from this, they also caused the destruction to the dwelling houses of Shankar Lal Pandey, Narayan Prasad Pandey and Umesh Kumar Burman and caused the damage in the huge amount. After this incident, the family members of the Shankar Lal Pandey left the village Sukari and took shelter in another village.

67. The trial Court has considered every aspect in great detail and has not committed any illegality in finding them guilty under Section 147, 302/149, 324/149, 323/149 and 436 of IPC hence, we affirm such finding and sentence passed by the trial Court.

68. We find no merit or substance in these appeals and hence deserve to be dismissed.

69. Consequently, these appeals fail and are dismissed accordingly. The appellant Beeran is on bail. His bail bonds are cancelled. He be directed to surrender before C.J.M., Jabalpur on 31.12.2007 to serve out the remaining part of the sentence.

Appeal dismissed.

I.L.R. [2008] M. P., 373
APPELLATE CRIMINAL
Before Mr. Justice S.L.Kochar and Mrs. Justice S.R.Waghmare
5 December, 2007

ABHAY ...Appellant*
Vs
STATE OF M. P. ...Respondent

A) Penal Code, Indian (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. (Paras 7, 8, 9)

*Cr.A.No. 1353/1998 (Indore)

B) Penal Code, Indian (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. (Paras 13, 14)

C) Penal Code, Indian (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.

Cases referred

AIR 2004 SC 3055, (2003)11 SCC 223
AIR 1979 SC 135, AIR 1982 SC 839.

S. Jaisingh with *Vivek Singh,* for the appellant
G.Desai, Dy.Advocate General for the respondent

Cur.adv.vult

JUDGMENT

The Judgment of the Court was delivered by **S.L. KOCHAR, J.** :–The appellant has lodged his grievance by filing this appeal against the judgment dated 25.09.1998 passed by the learned Third Addl. Sessions Judge, Dhar in Sessions Trial No. 192/97 thereby convicting the appellant under section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs. 1,000/-, in default of payment of fine to suffer additional R.I. for one month with a further direction that on realization of the amount of fine, Rs. 1,000/- be paid to the wife of the deceased Narottam as compensation.

2. The facts of the prosecution case in narrow compass are that on 07.05.1997 there was a verbal altercation between the deceased Narottam and appellant Abhay on the score of not accepting two rupee currency note by the appellant. The accused appellant brought A GUPTI and dealt 4/5 blows to Narottam causing injuries on his hand, legs, abdomen and chest. On hearing the cry, Smt. Rekhabai and Madan reached over on the spot. On raising cry by Smt. Rekhabai, Parwatsingh (PW-5), Soma and others also reached on the spot and on seeing them, the appellant fled away from the spot. Narottam as a result of the injuries became unconscious and was sent to Sardarpur hospital in a tractor. Narottam was primarily examined and treated by Dr M.L.Jain (PW1) and issued Medico Legal certificate (For short 'MLC') Ex.P/1 and referred the injured to Mittal Hospital, Dhar for further treatment from where he was further referred to Indore Choithram Hospital. In Choithram Hospital Narottam breathed his last on 09.05.97.

Station House Officer of P.S. Rajendra Nagar, Indore prepared inquest report of the dead body and sent the body for postmortem examination to M.Y. Hospital, Indore which was conducted by Dr Ravindra Chaudhary (PW-6) and issued postmortem Report Ex. P/11. When Police went to village Tandakheda, Smt Rekhabai (PW-2) reported the matter which was recorded as Dehati Nalishi Ex. P/3 by Asstt. Sub Inspector Kanchansingh Chauhan (PW-4). He also prepared the spot map Ex. P/4 at the instance of Smt.Rekhabai and seized the blood stained and controlled earth vide Ex.P/5. He also recorded the statement of PW-2 Rekhabai. The information sent from Sardarpur hospital was recorded in Roznamcha at P.S. Sardarpur from where requisition for examination and treatment of Naroottam as also for recording of his dying declaration was issued, but since Narottam was not in a position even to speak, his dying declaration could not be recored. All the relevant papers were sent to Police Station Amzera having jurisdiction over the matter.

3. On the basis of Dehati Nalishi, the Station House Officer of P.S. Amzera registered the First Information Report Ex.P/7. He arrested the appellant and on his memorandum statement Ex.P/9 seized one GUPTI at his instance vide Ex.P/10. And made query from Sardarpur Hospital vide Ex.P/12. During investigation, the Baniyan of the deceased soiled with blood was seized and statements of the concerned witnesses were recorded. The seized articles were sent to the Forensic Science Laboratory , report whereof is Ex.P/12. Spot map Ex.P/6 was got prepared by the Patwari. On completion of investigation, the accused was charge-sheeted for the aforementioned offence. The accused/ appellant abjured his guilt and pleaded innocence. His defence was that of false implication. He examined DW-1 Head Constable Halwanshi, Dr Umesh Mittal (DW-2), Banarasi Prasad (DW-3), Head Constable Hiralal (DW-4) and Kamal Kishore Vaishnav Advocate (DW-5) in his defence. In order to prove its case prosecution examined in total 7 witnesses . Learned trial Court on trial and hearing the parties, found the appellant guilty, convicted and sentenced him as indicated herein-above.

4. We have heard learned counsel for the parties and perused the entire record carefully.

5. In the instant case, homicidal death of Narottam could not be and has not been challenged. Even otherwise it has been duly established by the postmortem report issued by Dr Chaudhay (PW7)and his evidence that deceased Narottam sustained as many as 7 injuries on his person. In the opinion of this witness, deceased died of shock and haemorrhage as a result of the injuries to the vital organs, caused within 24 hours from the date and time of postmortem examination. Smt Rekha (PW-2) also stated that the deceased sustained injuries by GUPTI . Thus, it is found fully proved that the deceased met a homicidal death.

6. It emerged from the impugned judgment that the conviction of the appellant is based on the eye witnesses account of sister-in-law of the deceased Narottam namely, PW-2 Smt.Rekha Vaishanav and PW-5 Parwatsingh and the medical evidence. We have scrutinize the evidence of eye witness Sister-in-law of the deceased Narottam with due care and caution and find that she is not a reliable

witness because of her highly unnatural conduct. According to this witness, on the date of incident i. e. 07.05.07 in the noon at 1.00 PM she was in her house and putting the clothes for being dried. She over heard the clamour of quarrel between her brother-in-law deceased Narottam and the appellant on which, she reached on the spot infront of the shop of the appellant which was about 40 to 50 feet away from her house. She asked the deceased Narottam as to why they were quarreling on which the deceased disclosed that in the morning he had purchased cigarette from the shop of the appellant. At that time, the appellant had given him a two rupees torn currency note and when he gave the same note for purchasing cigarette, he (the appellant) refused to accept it. The further say of this witness is that the appellant started hurling abuse to her brother-in-law and also went inside his shop and came out with a GUPTI and struck six to seven GUPTI-blows on the person of Narottam causing in total 7 injuries on chest, hand and both legs. She raised cry attracting PW-5 Parwatsingh and upon his reaching, the appellant fled away. Further narration of this witness is that PW-5 Parwatsingh called the villagers and they all took Narottam to the hospital. She returned back from the hospital to her village where Dehati Nalishi Ex.P/3 was recorded by the police. She also admitted about preparation of spot map Ex.P/4 by the police at her instance and seizure of blood stained and controlled earth from the spot. Their seizure memo is Ex.P/5. According to this witness, the GUPTI was also seized by the police from the spot.

7. In cross-examination, she deposed that her husband Brij Mohan was having two brothers namely one the deceased Narottam and another Kamal Kishore who was a practicing Government Advocate at Sardarpur and her husband was a teacher in Primary School. In para 10, she admitted that in Sardarpur hospital, her brother-in-law Kasmalkishiore (DW-5)also reached, but she had not disclosed about the incident to him as well as to other persons. She has also admitted that after admission of Narottam in Sardarpur Hospital, after half an hour, police also reached at the hospital and her husband Brij Mohan went to the Police Out Post Amzera for lodging report, but no intimation or report lodged by PW-3 Brij Mohan has been filed by the prosecution during the course of trial. She also stated that Brij Mohan did not meet them in Sardarpur Hospital, but met after returning to home. In para 12, she admitted that while going from the village to Sardarpur with so many persons along with Parwatsingh and Soma, she did not disclose about the incident on the way to them. She reached from the hospital to her house in the evening at about 5.30 PM along with the friends of her husband. Thereafter at 7.00 PM police reached in the village with her father-in-law Ramnarayan Vaishnav accompanied by so many villagers and her husband. In para 14, a specific question was put to her as to why she did not give information about the incident to police in Sardarpur hospital, she answered that because the police did not ask her or interrogated her and also did not disclose about the incident to her husband and brother-in-law (JETH/elder brother of her husband) Kamal kishore. We find ourselves unable to accept the explanation given by this witness for non disclosure of witnessing the incident and name of the accused to police in Sardarpur Hospital. Not only this, but she did not disclose to the villagers who had accompanied her from the spot to Sardarpur Hospital and in Sardarpur

Hospital to her husband and brother-in-law Kamal Kishore (DW-5) who was a Government Advocate and while returning from the hospital to the house in the evening. If she had really witnessed the incident, it was not possible for her to keep mum for about six hours having ample opportunity and meeting with so many persons including her near and dear as well as the police and disclose the name of the appellant as assailant for the first time in Dehati Nalishi Ex.P/3 recorded by Kanchan Singh Chauhan ASI (PW-4) in the village..

8. It would be apposite to mention here that according to this witness Smt. Rekhabai (PW-2), the incident was also witnessed by Madan son of Hiralal and Prakash S/o Jhinnala. But both these witnesses have not been examined by the prosecution without showing any cogent and reliable reasons. The normal course of human conduct would have been for witness Rakhabai to have immediately disclose the name of the assailant as well as about witnessing the incident to the villagers who accompanied her as well as in Sardarpur Hospital on arrival of police, brother-in-law Advocate DW-1Kamal Kishore (DW-5) and her husband Brij Mohan who was a teacher. This witness Rekhabai is a woman studied up to 10th standard and she could not be considered to be a rustic villager. It is also a natural conduct of any one who met the victim or brother and relative in the circumstances as narrated by this witness while going to the hospital and also in the hospital to ask or enquire about the incident and name of perpetrator of crime. The police personnel who reached in Sardarpur hospital would have certainly enquired from this witness about the incident, because she had brought the deceased from the spot to the hospital. The brother-in-law Kamal Kishore being a law knowing person would have not kept quiet after reaching at the hospital from enquiring from villagers and this witness Smt.Rekhabai who had brought the deceased Narottam to Sardarpur Hospital and would have also asked the police official to record the First Information Report in the shape of Dehati Nalishi in the Hospital, because he being a Public Prosecutor in Sardarpur Court, must be knowing the importance of the First Information Report and delay of its lodgment as well as delay in disclosure of the name of the assailant. These are all tale tell circumstances to show that Smt.Rekhabai did not witness the incident or did not identify the assailant.

9. That apart, the MLC Report Ex.P/1 proved by its author PW-1 Dr M.L. Jain is disclosing the fact that the deceased Narottam was not brought by any body in the hospital, but he himself had reached at the hospital, it is specifically mentioned in the report after the name, father's name, age, address that he was brought by 'B/B' self. In the MLC report Ex.P/1, there is a specific place required to be fi9led-in by the doctor i. e. name of the person or persons who brought the victim and the person who identified the victim. If the deceased would have been taken by PW-2 Smt. Rekhabai along with the villagers, Dr PW-1 M.L.Jain would have not failed to have mentioned this fact in the report Ex.P/1.

10. The Supreme Court in the case of *Bachhu Narain Singh V/s Naresh Yadav and others* (AIR 2004 SC 3055) about natural conduct of human being in para 12 has observed as under:-

"In the first instance there appears to be no reason why no

one stated before the investigating officer who came to the place of occurrence at 7.20 a.m. that he had witnessed the occurrence as an eye witness. Since they claimed to be eye witnesses and large number of persons had gathered at the place of occurrence when the investigating officer reached that place with police force, the normal course of human conduct would have been , for any of the eye witnesses to immediately inform the investigating officer that he had witnessed the occurrence. We fail to understand why from 7.30 a. m. Till 8.45 p. m. , while the investigating officer was preparing inquest reports no one came before him claiming to be an eye witness."

Also see: *Joseph v/s State of Kerala* [(2003) 11 SCC 223).

11. The second eye witness PW-5 Parwatsingh also cannot be relied upon, because of his unnatural and abnormal conduct about disclosing the incident though he had the meeting with the police in the hospital as well as with brother of the deceased namely, Advocate Kamal Kishore. The say of this witness in para 7 is that since he was not asked about the incident by Advocate Shri Kamal Kishore or any body, he did not disclose the same. In para 8, according to this witness, when the report was lodged by Smt. Rekhabai in the village, he was present and his statement was recorded by the police of Out Post Dasai of Police Station Amzera. But, according to the A.G.P. There was no statement of this witness recorded o' n 07.05.97. The further say of this witness PW-5 Parwatsingh is that after recording his statement on 07.05.97, no other statement was recorded. Again he changed his version and stated that his statement was recorded on the date 13th/14th (13th /14th May, 1997). On this disclosure about recording of statement, counsel for the appellant requested for supply of copy of statement of this witness, if recorded on 13th, 14th or 15th May, 1997. but according to the A.G.P. No such copy of the statement was available. The statement of this witness further demolishes the prosecution case that Rekhabai did not mention in the report about witnessing the incident by him and he also did not ask her as to why she did not mention his name as eye witness of the incident. In para 9, this witness has further admitted that in the night of the incident he did not disclose to the police about witnessing the incident, because the police did not ask him. He further stated voluntarily that he did not disclose about witnessing the incident to the police. This statement of the witness corrodes the complete prosecution case with regard to lodging of the Dehati Nalishi Ex.P/3.by PW-2 Smt.Rekhabai in two ways viz. First in Ex.P/3, the name of this witness Parwatsingh as eye witness ,but according to this witness Smt.Rekhabai did not mention his name and secondly, if he was present at the time of lodging of the report by Smt.Rekhabai to PW-4 Kanchansingh Chauhan ASI as to why his statement was not recorded by the police in the same night after recording the Dehati Nalishi. The statement of this witness in p ara 10 further causes a serious dent to the prosecution case about witnessing the incident by him, because of his unnatural conduct. He admitted that the police reached in the village in the evening on the date of incident and also after two/three days he also met with the police, but did not disclose his name as eye witness, because the police did not ask him. Learned trial Court has mentioned

in para 4 of the impugned judgment that statement of this witness Parwatsingh was recorded by the police after ten days i. e. on 16.05.97 (Ex. D/3). Learned Trial Court has held in para 40 of the judgment that according to PW-6 Investigating Officer PW-6 Pramod Kumar Shinde he had gone on training and returned back on 23.05.97 and during this period, investigation and case-diary was handed over to ASI Yadav (not examined in this case by the prosecution) and because of this, delay has occurred in recording the statement of eye witness PW-5 Parwatsingh. This reasoning given by the trial Court is not the reason for the delay in recording the statement o'f PW-5 Parwatsingh assigned by the prosecution or the Investigating Officer (PW-6) Shri Pramod Kumar Shinde.

12. Shri Pramod Kumar Shinde (PW-6) , in pafra 12 ofhis deposition has stated that after registration of crime on the date of incident in the night at 8.05 pm he made a search of the eye witnesses on 7th and 8th May, 1997 and thereafter, went on training, handed over the case diary to the Yadav. Shri Shinde returned back from training on 23.05.97 and according to his statement in para 14 of his deposition the ASI Yadav mentioned in case-diary that he searched the witnesses on 16.05.97, but they were not available. Apart from this note, nothing was written by Yadav ASI in the case diary. He further stated in para 15 that he cannot assign any reason as to why Shri Yadav did not record the statement of other witnesses during the period of his training. The date of recording of the statement of Parwatsingh (PW-5) might have been gathered by the learned trial Court from his police statement Ex. D/3. But, none of the prosecution witnesses including Investigating Officer Shri Shinde (PW-6) has stated the date of recording of the statement of this witness.

13. The law is well settled that only on ground of delay in recording the statement of material witnesses, their testimony cannot be discarded, but in the case at hand, it is not only the delay in recording the statement by the police, but there is abnormal conduct of the eye witness Parwatsingh who was having meeting with the police on the date of incident and also after two/three days, did not disclose about witnessing of the incident The two inferences are possible on the basis of the statement of PW-5 Parwatsingh and the statement of PW-6 Shri Pramod Kumar Shinde Investigating Officer that either the police was not knowing that Parwatsingh was the eye witness and this inference is drawn on the basis that the Dehati Nalishni Ex. P/3 was recorded later on in anti date and anti time wherein the name of Parwatsingh as eye witness is mentioned and the second inference that Parwatsingh was a got up witness after ten days of the incident under the influence of the complainant-party.

14. The Supreme Court in the cased of *Ganesh Bhawan Patel and another V/s State of Maharashtra* (AIR 1979 SC 135) regarding importance of delay in recording the statement and observed as under :-

> "Delay of a few hours, simpliciter, in recording the statements of eye witnesses may not, by itself, amount to a serious infirmity in the prosecution case. But, it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the

shape to be given to the case and the eye witnesses to be introduced. Thus, under the facts and circumstances of the case delay in recording the statements of the material witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story."

15. In the instant case,. There is absolutely no plausible and reasonable explanation given by Parwatrsingh as well as the Investigating Officer as to why the statement of Parwatsingh could not be recorded at the earliest point of time.

16. There is one more important circumstance in the present case that the appellant was available to the police in the night of 07.05.97, the date of incident, but he was not arrested. If Dehati Nalishi was recorded at the instance of Rekhabai on 07.05.97, itself at 6.30 PM and crime was also registered at 8.30 PM against the appellant, then on his availability why he was not arrested. His arrest was shown on 08.05.97 at 3.00 PM vide Ex. P/8 proved by PW-6 I.O. Shri Shinde . This also shows that on 07.05.97, police was not having clear and sufficient information against the appellant.

17. The Supreme Court has observed in the case of *Mohanlal V/s State of Maharashtra* (AIR 1982 SC 839) in para 23 as under :-

"The witness further admits that although he had come to know the name of the assailant at 00.50 am yet he did not take any step to arrest or cause the arrest of any one of the accused. He has not given any explanation for this unusual conduct It is extremely doubtful if PW-1 had actually named the appellant, Inspector Sawant would not have arrested him immediately after the FIR was lodged or, at any rate, after he returned from the hospital. The evidence, however, shows that A/1 was arrested on 5.4.1972, that is to say, two days after the occurrence. No explanation for this unusual phenomenon has been given by the prosecution."

Also see: *Sadaram V/s State of M.P.* (AIR 1974 SC 2294), *Shankarlal V/s State of Maharashtra* (AIR 1981 SC 765) (Para 25) and *State of U.P. V/s Sukhbasi* (AIR 1985 SC 1224 (Para 13).

18. The version of the eye witness (P.W.-2) Rekhabai is also falsified by (D.W.-5) her brother-in-law advocate Kamal Kishore, who has stated in para 4 that in Sardarpur Hospital (P.W,.-2) Rekhabai and the villagers had narrated the incident to him and the name of the appellant as author of the causing knife injury to deceased Narottam, but after receiving information he did not give the same to the police, because he was busy in the treatment of his brother. This version is just contrary to the statement of Smt. Rekhabai (P.W.-2)

19. In view of the foregoing factual and legal discussion with regard to both the aforesaid witnesses we are of the considered view that both the aforesaid witnesses had not witnessed the incident and introduced by the investigating agency with the help or aid of the relations of the deceased and, therefore, the prosecution has utterly failed to establish its case against the appellant beyond reasonable doubt by adducing cogent and reliable evidence.

20. Resultantly this appeal succeeds and is hereby allowed. The conviction and sentence of the appellant are hereby set aside. He is in jail. Learned trial Court is directed to release him forthwith if not wanted in any other criminal case. A copy of this judgment be transmitted to the trial Court along with its record for immediate compliance.

Appeal allowed.

I.L.R. [2008] M. P., 381
APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava and Mrs. Justice Sushma Shrivastava
5 December, 2007

MANGILAL .... Appellant*
Vs
STATE OF M. P. ....Respondent

Penal Code, Indian (45 of 1860) - Section 302 or 304 - Murder or Culpable Homicide not amounting to murder - Excess land fallen to the share of accused in family partition which was being demanded by complainant and deceased - Deceased assaulted by accused persons by means of Farsi, Ballam, Karpa and lathi - One injury on forehead and remaining 28 injuries were found on different parts of body of deceased along with 5 fractures - Held - Looking to genesis of occurrence as well as evidence of witnesses that deceased was using his hands and legs as shield to stop blows, merely Doctor has not stated that injuries would in ordinary manner sufficient to cause death, *ipso facto* would not dilute the case of prosecution - The real intention of appellants was to cause injuries on the vital organs of deceased - No offence lesser to Section 302 of I.P.C. is made out - Appellants rightly convicted by Trial Court under Section 302/149 of I.P.C. - Appeal dismissed. (Para 22)

Cases Referred :
AIR 1976 SC 2499, AIR 1978 SC 1525, AIR 2004 SC 5064
AIR 2007 SC 432, AIR 1993 SC 400, AIR 2005 SC 1142
AIR 1991 SC 1069, 2006 SAR (Cri)114, J.T. 2007 (9) SC 248
J.R. 2007(8) SC 540, 2007 SAR (Cri) 354.

S.C. Datt with *Siddhartha Datt*, for the appellant,
R.S. Patel, Additional Advocate General and *T.K. Modh*, Dy. Advocate General for respondents,
L.N. Sakle, for complainant.

Cur.adv.vult.

J U D G M E N T

The Judgment of the Court was delivered by **A.K. Shrivastava, J.** :–Feeling aggrieved by the judgment of conviction and order of sentence dated 9.9.2000 passed by learned Additional Sessions Judge, Ashta district Sehore in Sessions Trial No.237/98 convicting the appellants under Sections 148 and 302/149 of IPC and sentencing them to suffer RI of one year and fine of Rs.1000/-, in default, R.I. for 3 months each under Section 148 of IPC

*Cr.A. No. 2408/2000 (Jabalpur)

and life imprisonment and fine of Rs.3000/-, in default, R.I. for one year each under Section 302/149 of IPC, this appeal has been preferred by appellants under Section 374(2) of Cr.P.C. 1973.

2. In brief the case of prosecution is that the partition of ancestral land took place between Inder Singh (hereinafter referred to as 'the deceased') complainant Udai Singh and accused persons Bhairu Singh, Takhat Singh and Narbat Singh one year prior to the date of incident. It is alleged that two acres of land fell excess in the share of accused Bhairu Singh etc. and this excess land was being demanded by complainant Udai Singh and the deceased, however, the accused persons were adamant and were not releasing the said land and this made a point of enmity between the complainant party and the accused persons.

3. It is the further case of prosecution that four days prior to the date of incident (incident took place on 26.9.1998) accused persons Dhiraj Singh, Kumer Singh and Mangilal refrained the deceased to cut the grass and gave threat to him. It is said that again on the date of incident i.e. 26.9.1998 the deceased went to cut the grass and was coming back at 6 in the evening. At that juncture witness Balwan Singh was going little ahead to him and another witness Udai Singh was 25 yards behind the deceased. When these persons reached nearby the field of Madan Singh at that juncture, the accused persons, who were hidden behind the bushes of the field of Takhat Singh, came out and encircled the deceased. It is said that Dhiraj Singh and Mangilal scolded and said "मारो सालों को" thereafter Dhiraj Singh by *'Farsi'* dealt the blow to the deceased which landed on his forehead, Mangilal dealt *'Ballam'* blow on both the legs of the deceased and Kumer Singh dealt the *'Ballam'* blow on his head, Bahadur Singh by axe on the legs, Narbat Singh by lathi dealt the blows on the head, hands and back, Bhairu Singh by *'Karpa'* on the right leg, Narbat Singh by lathi on the hands and legs of the deceased. It is said that Dhiraj and Bahadur rushed to assault Balwan Singh and accused persons Bhairu Singh, Narbat Singh and Mangilal rushed to assault Udai Singh as a result of which these two persons fled from the place of occurrence. Witness Balwan Singh came to the village and told the incident to Jagannath, Jivan Singh and Lakhan Singh and brought them to the place of occurrence. By that time accused persons fled from the place of occurrence. The deceased was lying unconscious in the field of Mardan Singh. Thereafer, Udai Singh and Balwan Singh and the inhabitants of the village brought the deceased in a Metador vehicle to the Government hospital, Ashta where the doctor declared the deceased to be dead. In the night at 9.40 Dr.R.C.Gupta sent the written report to the police station that the deceased has been brought in serious condition for treatment at 9.05 P.M., however, immediately thereafter at 9.15 p.m. the deceased died. The police station Ashta recorded the 'Marg Intimation' under Section 174 Cr.P.C.

4. The investigating agency after registering the case, sent the dead body for postmortem; prepared the spot map; recorded the statement of the witnesses; arrested the accused persons and seized the weapons from their possessions on the basis of their memorandum statement; sent the ordinary and blood stained earth and the clothes of the deceased for chemical examination. After completion of the investigation a charge sheet was submitted in the competent court which on

its turn committed the case to the Court of Session and from where it was received by the trial court for its trial.

5. The learned trial Judge on the basis of the averments made against the appellants in the charge sheet framed charges punishable under Sections 147, 148 and 302/149 of IPC and in the alternative under Section 302 of IPC. Needless to emphasize all the appellants abjured their guilt and pleaded complete innocence.

6. In order to prove the charges the prosecution examined as many as 15 witnesses and placed Ex.P/1 to P/41 the documents on record. The defence of accused persons is of false implication on account of enmity and the same defence they set forth in their statements recorded under Section 313 Cr.P.C.. However, in support of their defence, the accused persons did not choose to examine any witness.

7. The learned trial Judge after appreciating, marshalling and scanning the evidence came to hold that the appellants committed the offence punishable under Sections 148 and 302/149 of IPC and accordingly convicted them and passed the sentences which we have mentioned hereinabove.

8. In this manner the present appeal has been filed.

9. The contention of Shri S.C. Datt, learned senior counsel is that the evidence of eye witnesses is not worth reliable and their evidence cannot be stretched to the extent inasmuch as to hold that the appellants have caused injuries to the deceased which resulted into his death and, therefore, the learned trial Court erred in convicting the appellants.

10. An alternative submission has also been putforth by him that in case this Court comes to the conclusion that the evidence of eye witnesses are worth reliable, since the injuries have been caused by the appellants either on the legs, hands or back of the deceased, except the single injury on the head, at the most the case would come under the clutches of Section 304 of IPC. By inviting our attention to the evidence of autopsy surgeon Dr.M.H.Ansari (PW-7) and postmortem report (Ex.P/24), it has been argued by learned senior counsel that the autopsy surgeon has nowhere opined that the injuries were sufficient in ordinary manner to have caused the death and for this reason also the case would come under the purview of Section 304 IPC. In support of his contention, learned senior counsel has placed reliance on the decisions of Supreme Court in *Molu and others vs. State of Haryana,* AIR 1976 SC 2499 and also *Sarwan Singh and others etc. vs. The State of Punjab,* AIR 1978 SC 1525 and has submitted that in this case two persons were killed, one deceased sustained 14 injuries while second one sustained 16 injuries and in that situation the Supreme Court held that the case would rest under Section 304 part I of IPC. By placing reliance on the decision of Supreme Court *Adu Ram Vs. Mukna and others,* AIR 2004 SC 5064, it has been argued that there were 34 injuries on the persons of the deceased but the Supreme Court convicted the accused for the offence under Section 304 part-I of IPC. By inviting our attention to para 18 and 19 reported in *B.K.Channappa vs. State of Karnataka,* AIR 2007 SC 432, it has been argued that as many as 18 injuries were found on the person of the deceased but the accused was convicted under Section 304 part

I of IPC. Learned senior counsel has also placed reliance on the decision of Supreme Court *Sita Ram and others vs. State of U.P.*, AIR 1993 SC 350 as well as *Subran vs. State of Kerala*, 1993 AIR SCW 1014 and also on the decision of *Sarman and others vs. State of Madhya Pradesh*, AIR 1993 SC 400 and has argued that since the injuries were not on the vital organ of the deceased, in all these three cases, the Supreme Court held the offence to be proved either under Section 304 part I or II of IPC. Learned senior counsel has also placed reliance on *Thangaiya vs. State of Tamil Nadu*, AIR 2005 SC 1142.

11. On the other hand Shri Modh, learned Dy. A.G. invited our attention to the evidence of eye witness Balwan Singh (PW-2) and has submitted that if his evidence, particularly para 8 and 11 of his deposition, is considered in proper perspective, it could be inferred that the intention of appellants was to kill the deceased and, therefore, the trial Court did not commit any error in convicting the appellants under Section 302/149 of IPC as well as u/s 148 IPC. In support of his contention, he has placed reliance on certain decisions of the Supreme Court they are :

(i) *Prabhu and others vs. State of Madhya Pradesh*, AIR 1991 SC 1069

(ii) *Subhash Shamrao Pachunde vs. State of Maharashtra*, 2006 SAR (Cri) 114.

(iii) *Manubhai Atabhai vs. State of Gujarat* J.T. 2007(9) SC 248

(iv) *Ambaram vs. State of M.P.* J.T. 2007 (8) SC 540

Learned State counsel has also placed reliance on the decision of Supreme Court *Imtiaz and another vs. State of Uttar Pradesh* 2007 SAR (Cri) 354 and has submitted that the intention is to be inferred on the basis of the evidence placed on record and the genesis of the occurrence. On these premised submissions, it has been submitted by learned State counsel that this appeal is bereft of any substance and the same be dismissed.

12. Having heard learned counsel for the parties, we are of the view that both the appeals deserve to be dismissed.

13. In the present case, Udai Singh (PW-1) and Balwan Singh (PW-2) have been examined as eye witnesses. PW-1, Udai Singh is also the author of FIR (Ex.P.26) and is the brother of the deceased. Similarly, Balwan Singh (PW-2) is the nephew of the deceased. Since these two witnesses are thickly related to the deceased, therefore, their evidence is to be scrutinized closely. By keeping in mind this well settled principle of law, we shall examine the statement of these two witnesses.

14. According to Udai Singh (PW-1) on the date of incident at 6 in the evening the deceased was going back to the village after cutting the grass and this witness was behind him. The other eye witness Balwan Singh, who is the nephew of this witness, was also coming back from the field and he was going little ahead to the deceased. As soon as these persons reached nearby the field of Madan Singh at that juncture, the accused persons who were hidden behind the bushes of the

field of Takhat Singh, came out and encircled the deceased. Dhiraj Singh was having the stick of *'Farsi'*, Mangilal 'Ballam, Kumer Singh *'Ballam'*, Bahadur Singh axe, Bhairu Singh *'Karpa'*, Takhat Singh and Narbat Singh were armed with lathi. Dhiraj Singh and Mangilal scolded and said "मारो सालों को" and thereafter Dhiraj Singh by *'Farsi'* dealt the blow to the deceased which landed on his forehead. Thereafter Mangilal by *'Ballam'* caused injuries on both the legs, Kumer Singh dealt the *'Ballam'* blow on the head which landed on his hand. Bahadur Singh dealt axe blow on the left calf region, Bhairu Singh dealt 'Karpa' blow on the right leg, Takhat Singh caused injuries by lathi on the hands and legs of the deceased and Narbat Singh dealt lathi blows on the head, hands and back of the deceased. When this witness tried to intervene, accused persons Bhairu Singh and Mangilal rushed to assault him. Thereafter when Balwan also tried to intervene accused Dhraj and Bahadur rushed to assault him also. This witness has further stated that Bahadur threw axe on the person of Balwan which landed on his ankle. Thereafter, Balwan ran away towards the village and brought Jeevan, Jagannath and Lakhan Singh at the spot. This witness has further stated that Balwan Singh told these three persons that appellants are causing injuries by *Farsi, Ballam, lathi, Karpa* and axe etc. to the deceased in the field of Madan Singh. When, Balwan brought these three persons from the village, by that time the accused persons already fled from the place of occurrence and the deceased was lying in unconscious condition in the field of Madan Singh. This witness has further stated that they brought the deceased on a cot to his house and thereafter they hired a Matador and brought the deceased to Ashta hospital where Dr. R.C. Gupta examined the deceased and informed that he had already died.

15. This witness has stated that on account of land rivalry appellants have killed the deceased. He has also proved the FIR (Ex.P/1) lodged by him. This witness was cross-examined at length however despite there being a roving cross-examination over him, he remained vivid and has firmly stated that the appellants have caused the injuries by deadly weapons to the deceased as a result of which he died. A very important fact has crept out from the testimony of this witness is that Kumer Singh dealt the blow of 'Ballam' to the deceased on the head but it landed on the hands of the deceased which would indicate that the intention was to cause the injury on the head but the blow was stopped by the deceased on his hands so that it may not land on his head.

16. The other star eye witness of the incident is PW-2, Balwan Singh. He has also corroborated the evidence of PW-1, Udai Singh and has stated that at the time of incident he was going back to his village and the deceased was coming behind him. As soon as they reached nearby the field of Madan Singh at that juncture the accused persons who were hidden behind the bushes of the field of Takhat Singh came out. Mangilal was having Ballam, Dhiraj Singh Farsi, Bahadur axe, Kumer Singh Ballam, Bhairu Singh Karpa, Takhat Singh and Narbat Singh were having lathis and they encircled the deceased. Thereafter Mangilal and Dhiraj Singh shouted "ekjks lkyksa dks" and started giving blows by the weapons to the deceased. This witness has specifically stated that Dhiraj Singh dealt 'Farsi' blow on the persons of the deceased and the blow landed on his forehead, Mangilal dealt 'Ballam' blow to the deceased on his both the legs, Kumer Singh dealt the

'Ballam' blow on the head but the blow could not be landed on the head because the deceased raised his hands as a result of which the blows landed on his hands. Bhairu Singh dealt 'Karpa' blow on the legs of the deceased, Bahadur Singh dealt blow of axe on the lower side of the left leg, Narbat Singh dealt lathi blow on the head, hands and back. Takhat Singh also dealt lathi blow on both the hands. This witness has also corroborated the evidence of Udai Singh (PW-1) that this witness and Udai Singh, tried to intervene, but, Narbat Singh, Bhairu Singh and Mangilal rushed towards Udai Singh as a result of which Udai Singh ran away and when this witness tried to intervene, accused Dhiraj and Bahadur rushed towards him and Bahadur also threw axe on him which landed on his right ankle. This witness thereafter rushed towards the village and brought Jeevan, Jagannath and Lakhan at the place of occurrence. By the time they could reach the place of occurrence, accused persons already fled. The deceased was lying in the field of Madan Singh. The blood was oozing from his head and legs. It would be profitable to go through para 8 of his cross-examination in which this witness has specifically stated that the deceased was using his hands and legs as shield to save the blows of weapons and in para 11 also he has stated that the deceased was using his hands as shield and was roaming the hands in order to save the blows. Thus, according to us, indeed blows were aimed to be dealt by the accused persons on the vital part, but on account of using hands and legs as shield, they could not be landed on the vital part of the deceased. This witness was also cross-examined at length but he remained embedded in his version despite there being roving cross-examination over him. The learned senior counsel for the appellants could not point out that how and in what manner the evidence of these two eye witnesses should not be relied upon. On the other hand on close scrutiny of their testimony, we find that their evidence is clear, cogent and trustworthy and learned trial court did not commit any error in placing reliance on the unimpeachable testimony of these witnesses in order to hold that the appellants caused injuries by the weapons (description whereof has been given hereinabove) to the deceased resulting into his death.

17. The evidence of these two eye-witnesses is corroborated by the evidence of autopsy surgeon Dr.M.H.Ansari (PW-7) who found as many as 29 injuries on the persons of the deceased. This witness has proved his postmortem report (Ex. P/24). On going through the evidence of the autopsy surgeon as well as the postmortem report, we find following injuries on the person of the deceased:

(1) One incised wound 4 cm x 1 cm x bone deep on the right half of forehead 4 cm above right eye brow. Direction mediolateral

(2) An incised wound 1.5 cm x 0.5 cm x 3.5 cm on the extensor aspect of right arm 4 cm above elbow on dissection veins & arteries cut and extensor gp of muscle cut. Direction lateromedial.

(3) One incised wound 1.5 cm x 0.5 cm x 2.5 cm x 1.0 cm below and on lateral to injury No.2. On the same part, vessels and muscles cut. Direction lateromedial and 0.5 cm below to injury No.1.

(4) One incised wound 2 cm x 1.5 cm x 3 cm on the left arm 2

cm above left elbow, on dissection muscles vessels and nerve cut. Direction mediolateral and superiorly.

(5) Incised wound 5 cm x 1 cm x 1.5 cm on the palmer aspect of left hand over thinner eminence extending to inter phalangeal space of left thumb and left index finger. Direction mediolateral and inferiorly.

(6) An incised wound 0.5 cm x 0.5 cm x 0.5 cm on the right leg on extensor aspect 3 cm below middle of leg. Direction sup. Inferior.

(7) One incised wound 2 cm x 0.5 cm x 2.5 cm on the extensor aspect of right leg middle half and 3 cm above injury No.3. Muscles vessels cut.

(8) One incised wound 3 cm x 1 cm x 1.5 cm on the extensor aspect of left leg 7 cm above ankle. Direction sup. Inferiorly.

(9) One incised wound 1 cm x 0.5 cm x 1 cm on the left leg 10 cm above injury No.8 on the extensor aspect superior inferiorly.

(10) One contusion 2.5 cm x 7 cm on the right arm extended up to elbow and above 6 cm below shoulder. Colour pinkish reddish.

(11) Disfiguration with swelling and contusion 15 cm x 7 cm on the extensor aspect of right forearm. Fracture of right ulna upper part.

(12) Contusion 5 cm x 3 cm with disfiguration and diffuse swelling on the wrist fracture of right radius, ulna lower end.

(13) Contusion 8 cm x 6 cm with disfiguration and swelling over dorsum of right hand. # right meta carpal bone of right ring figure in the upper part.

(14) Contusion 10 cm x 8 cm with disfiguration with diffuse swelling on left forearm below elbow. Crackling sound and breach in continuity. # of left radius ulna bone upper part.

(15) Contusion 6 cm x 4 cm on left forearm 5 cm above wrist with disfiguration and swelling and breach in continuity with # of left radius ulna bone lower end.

(16) One contusion 2 cm x 0.5 cm right finger on lateral aspect.

(17) One contusion 3 cm x 0.5 cm. Injury No.16 on same part.

(18) One contusion 4 cm x 1 cm on right thigh 1 cm below injury No.17.

(19) One contusion pinkish red. 6 cm x 1 cm on the same part 1 cm below injury No.18.

(20) One contusion reddish pink 3 cm x 1 cm on the right thigh and extensor aspect. Transversely placed.

(21) One abrasion 1 cm x 0.5 cm on the right knee.

(22) One contusion 6 cm x 2.5 cm lateral aspect of right thigh 2 cm above right knee.

(23) One contusion 5 cm x 3 cm transversely paced over right leg lateral aspect reddish pink.

(24) One abrasion 1 cm x 0.5 cm on the right leg 7 cm below injury No.23.

(25) One contusion 4 cm x 1 cm on the medial aspect of right leg transversely placed over middle part of right leg.

(26) One contusion 4 cm x 1 cm transversely placed on the extensor aspect of left leg.

(27) One abrasion 1 cm x 0.5 cm on the left knee.

(28) One contusion 7 cm x 4 cm on the left thigh 5 cm above knee.

(29) One contusion 5 cm x 2 cm on the medial side of left thigh 5 cm above injury No.28.

18. According to the doctor the deceased had died due to shock (syncope) on account of excessive bleeding due to multiple injuries over the body. On scanning the evidence of the autopsy surgeon we find that the deceased sustained as many as five fractures. Injuries No.1 to 9 were caused by sharp edged weapon and the rest injuries were caused by hard and blunt objects. Injuries No.11 to 15 were grievous in nature and other injuries were simple. The weapons were also shown to the doctor and in para 8 of his testimony he has opined that the injuries sustained to the deceased could come by Article "A" 'Karpa', Article 'B' ' Farsa', Article 'C' axe, Article 'D' 'Ballam' and Article 'E' 'lathi'. It is worth noticeable that deceased sustained as many as five fractures and all of them are on the hands they are :

(i) fracture in right ulna bone upper end;

(ii) fracture in right ulna bone lower end;

(iii) fracture in right metacarpal bone (right ring finger);

(iv) fracture in left radius ulna bone upper part; and

(v) fracture in radius ulna bone lower part.

In this context we may profitably rely the evidence of autopsy surgeon Dr.M.H.Ansari (PW-7) para 5.

19. At this juncture, we would also like to X-ray the evidence of Jeevan Singh (PW-4) to whom Balwan immediately after seeing the incident informed that how the incident had taken place and brought him to the place of occurrence where the deceased was lying in injured condition. According to this witness on the date of incident at 6.00 in the evening he was in his house at that juncture Balwan came to him in running condition and told that his uncle Inder Singh (deceased) is being beaten by Mangilal, Bhairu Singh, Takhat Singh, Narbat Singh, Dhiraj Singh, Kumer Singh and Bahadur Singh by lathi, axe, Karpa and Ballam etc. Thereafter, this witness along with Lakhan and Jagannath rushed to the place of occurrence and found that the deceased was lying in unconscious condition

in the field of Madan Singh. However, accused persons were not found there. The blood was oozing from the wounds of the deceased. According to this witness he along with other persons brought the deceased firstly to the home and then took him to the hospital where the doctor informed that the deceased had died. This witness was also cross-examined at length but nothing carved out from his testimony in order to disbelieve him. According to us, the statement of this witness is admissible under Section 157 of the Evidence Act. As the eye witness after seeing the incident immediately told and informed this witness that how the incident had occurred.

20. On the basis of the evidence of these above said three witnesses, the singular inference which could be drawn and which has been rightly drawn by learned trial Court that as a matter of fact, appellants by deadly weapons, (description whereof has been given hereinabove) dealt umpteen injuries to the deceased as a result of which he died. The findings of learned trial Court holding and arriving such a conclusion is thus hereby affirmed.

21. We shall now deal the alternative submission of learned senior counsel for the appellants that the offence would not fall under Section 302 of IPC and it would either fall under Section 304 part II or at the most under Section 304 part-I of IPC. We have also given our anxious and bestowed consideration to the decisions of Supreme Court cited by learned senior counsel in that regard. There is no dispute to the preposition that merely because the deceased had sustained several injuries would be the sole criteria to hold that the offence under Section 302 IPC is made out. But, the decisions which are cited by learned senior counsel are not applicable in the present factual scenario because in the criminal cases, what offence has been actually committed by the accused is to be decided on the anvil of the testimony of the evidence placed on record and particularly the evidence of the eye-witnesses. True, the autopsy surgeon found only singular injury on the head which is a vital organ of the body and in that regard we have seen injury No.1 which is an incised wound 4 cm x 1 cm bone deep on the right half of forehead 4 cm above right eye brow. But, there is specific evidence of Balwan (PW-2) that Dhiraj Singh caused injury by Farsi (sharp edged weapon) on the forehead to the deceased. Indeed, para 8 and 11 of the testimony of this witness is the determining factor in order to hold that what offence appellants have committed. Specifically this witness has stated that the deceased was using his hands and legs as shield to save the blows of weapons which were being dealt to him and, therefore, we can infer that the real intention of the appellants was to cause injuries on the vital organ of the deceased, but, the deceased was using his hands and legs as shield to stop the blows to be landed on his vital part of the body and therefore on facts the case laws which are cited by learned senior counsel for the appellants are distinguishable and we are of the considered view that the appellants have been rightly convicted under Section 302/149 of IPC. We may also profitably rely on para 3 of the evidence of Udai Singh (PW-1) who is also an eye witness and who has stated that Kumer Singh dealt Ballam blow on the head but the same was stopped by the deceased on his hand. This piece of evidence also corroborate the evidence of PW-2, Balwan. Thus, we have no scintilla of doubt that the intention of appellants was to kill the deceased and in order to save

himself the deceased stopped the blows and used his hands and legs as shield so that the blows may not cause injuries to his vital organs and hence according to us, the appellants have committed the offence under Section 302/149 of IPC. We may further add that deceased sustained 5 fractures on his hands and therefore we may infer that what was the force used by the appellants.

22. We do not find any substance in the submission of learned counsel for the appellants that the autopsy surgeon did not opine that the injuries were sufficient in ordinary course to cause the death. Looking to the genesis of occurrence as well as paying heed to the evidence of PW-2, Balwan that the deceased was using his hands and legs as shield to stop the blows, even if it has not been so stated by the doctor that the deceased did not receive such injuries which would in ordinary manner sufficient to cause the death, *ipso facto* would not dilute the case of prosecution and it cannot be said that any other offence, lesser to Section 302 of IPC is made out.

23. For the reasons stated hereinabove, we do not find any substance in both these appeals and the same are hereby dismissed by affirming the judgment of conviction and order of sentence passed by learned trial Court. Appellants Bhairu Singh and Takhat Singh are on bail, their bail bonds are cancelled and they are hereby directed to surrender to serve out the remaining part of sentence.

Appeal dismissed.

I.L.R. [2008] M. P., 390
APPELLATE CRIMINAL
Before Mr. Justice Deepak Verma and Mr. Justice K.S. Chauhan
11 December, 2007

SANJAY GOUR .... Appellant*
Vs
STATE OF M. P. ....Respondent

A. Penal Code, Indian (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. (Para 17)

B. Penal Code, Indian (45 of 1860) - Section 302 - Recovery of knife - Knife seized from open field - Seizure of knife in pursuance of disclosure statement not proved. (Para 25)

C. Absconding - Absconding by itself is not conclusive either of guilt or of a guilty conscience.

Cases Referred :
2002(8) SCC 45, (2002) 1 SCC 702, AIR 1979 SC 1620, AIR 1972 SC 975, AIR 1971 SC 1050, AIR 1972 SC 110, AIR 1974 SC 1193.

*Cr.A. No. 1028/1998 (Jabalpur)

S.C. Datt with *Siddhartha Datt,* for the appellant.
T.K. Modh, Dy. Advocate General for respondent/State.

Cur.adv.vult.

JUDGMENT

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

2. These criminal appeals have been preferred under Section 374(2) of Cr.P.C. being aggrieved by the judgment, finding and sentence dated 24.04.1998 passed by Additional Sessions Judge, Begumganj, District Raisen in Sessions Trial Nos.177/97 & 246/97, whereby the appellant Dinesh Pratap Singh and Sanjay Gour have been convicted under Section 302/34 and sentenced thereunder for life imprisonment with fine of Rs.500/-, in default S.I. for 3 months respectively.

3. The brief facts of the case are that on 07.02.1997 at 9:40 a.m. Mannulal Chowkidar intimated Police Station Begumganj that at about 9:30 a.m. he saw dead body of a man aged about 28 years behind old Harijan Hostel, Begumganj lying in a partially burnt condition. Marg intimation No.4/97 under Section 174 of Cr.P.C. was registered and the inquiry was made. Panchnama of dead body of Gauri Shankar Sharma was prepared. Dead body was sent for postmortem examination to P.H.C. Begumganj where Dr.M.R.Khan (PW-2) conducted postmortem examination and opined that death has occurred due to asphyxia, shock caused by incised wound over neck. Death was homicidal in nature which had occurred before 12 to 18 hours. The sealed packet containing clothes of deceased was seized. Spot map was prepared. Blood stained soil and controlled soil were also seized from the spot. After inquiry, the Crime No.38/97 under Section 302 IPC was registered at police station Begumganj. Appellant Dinesh Pratap Singh was arrested on 11.04.1997. His disclosure statement was recorded under Section 27 of Indian Evidence Act. In pursuance to the disclosure statement, the knife was recovered at his instance. The seized articles were sent for chemical examination. The statement of the witnesses recorded under Section 161 of Cr.P.C. Appellant Sanjay Gour absconded. After completing investigation, the charge sheet was filed in the Court of Judicial Magistrate First Class, Begumganj where the Criminal Case No.142/97 was registered which was committed to the Sessions Court for trial on 22.07.1997.

Appellant Sanjay Gour was apprehended on 24.12.1997 and supplementary charge sheet was filed in the Court of Judicial Magistrate First Class, Begumganj wherein Criminal Case No.341/97 was registered which was committed on 24.12.97 to the Sessions Court for trial.

4. The appellants were charged under sections 302/34 and 201/34 of IPC to the effect that in the intervening night of 6/7.02.1997 at Begumganj they in the furtherance of their common intention committed murder by intentionally (or knowingly) causing death of Gauri Shankar Sharma. They were further charged that on the same date, time and place they knowing or having reason to believe that an offence of murder has been committed caused the evidence of the

commission of that offence to disappear by burning his body with intention to save themselves from legal punishment.

5. Accused persons abjured the guilt and claimed to be tried mainly contending that they have been falsely implicate in this case.

6. Prosecution examined as many as 14 witnesses in S.T.No.177/97 and 11 in S.T.No.246/97 and appellants examined 4 defence witnesses in each case. After considering the evidence, the trial Court acquitted appellants from the offence under Section 201/34 but convicted under section 302/34 of IPC and sentenced thereunder as stated in para No.1 of this judgment. Being aggrieved by the judgment, finding and sentence, these appeals have been preferred under section 374(2) of Cr.P.C. on the grounds mentioned therein.

7. Learned counsel for the appellants has submitted that there is no eye witness of this incident. The trial Court has based its judgment mainly on the circumstance of last seen together but the same has not been proved because there are material contradictions and omissions in the statement of Hari Om Sharma. His statement is wholly unreliable and the trial Court has committed an illegality in accepting his evidence. Seizure of knife has also not been proved by prosecution. Abscontion of Sanjay Gour has also not been proved. Learned counsel has further submitted that absconding is not the sole ground to connect accused with the offence. Prosecution has failed to prove the guilt beyond reasonable doubt against the appellants. The finding being erroneous, deserves to be set aside and the appellants are entitled for acquittal.

8. On the other hand, Shri T.K.Modh, learned Dy.A.G. appearing on behalf of respondent/State supported the judgment, finding and sentence passed by the trial Court mainly contending that the prosecution has proved the case beyond reasonable doubt against the appellants, hence they have rightly been convicted and sentenced hence does not call for interference.

9. The main point for consideration in these appeals is whether trial court has committed any illegality in convicting and sentencing appellants under section 302/34 of IPC for causing death of Gouri Shankar Sharma?

10. We have perused the cases and the entire evidence recorded therein.

11. Mannulal Chowkidar has stated that no Marg intimation was given to police station Begumganj by him. However, Krishnakant Sharma has stated that such intimation was given which was recorded as Ex.P/1. Krishnakant Sharma reached at the spot, prepared panchnama of dead body of Gauri Shankar Sharma. The defence has tried to bring on record the fact that the dead body was in burnt condition and hence could not be identified but Hari Om Sharma has clearly stated that dead body was of his brother Gauri Shankar Sharma. He identified by face as well as by clothes and shoes which he was wearing. Thus, it has been well established that dead body was of Gauri Shankar Sharma.

12. Dead body was sent for postmortem examination which was conducted by Dr.M.R.Khan. He found 3 incised wounds which were ante mortem. According to his opinion, death occurred due to asphyxia, shock caused by incised wounds over neck which are homicidal. Death occurred between 12 to 18 hours.

13. Thus, from the ocular and medical evidence adduced in these cases, it is clearly established that death of Gauri Shankar Sharma was homicidal in nature.

14. There is no direct evidence to connect appellants with this offence. Their conviction is mainly based on the circumstantial evidence. The main circumstance is last seen together, recovery of knife at the instance of Dinesh Pratap Singh and abscontion of Sanjay Gour after commission of crime.

15. It is evident from the record that only Hari Om Sharma has given the evidence regarding last seen together. How far his statement is reliable, is a matter of consideration.

16. Hari Om Sharma has stated that on that day his brother Gauri Shankar Sharma and appellants were seen thrice under the intoxicated condition. Firstly at about 2 p.m. at bus stand, Begumganj, secondly at about 5:00 p.m. at Shyamnagar in front of State Bank and thirdly at 7:30 p.m. near house of Balkishan Sahu. This witness in Sessions Trial No.177/97 further deposed that he remained at Begumganj Bus Stand upto 11 p.m. Thereafter he attended marriage of daughter of Balkishan Sahu. His brother and the appellants were also there. They went in a room after seeing him. At about midnight he heard some hot talks in that room. He went there and asked his brother to come out of the room but in turn he told him to go. Since they were prepared to quarrel, hence he went away. In S.T. No.246/97 he has stated that he followed them upto Dussehra ground and then went to his house.

17. This witness in examination-in-chief has given the evidence that he saw deceased with the appellants several times in a day in an intoxicated condition. The contradiction has been brought from his police statement Ex.D/1 wherein he has not stated that he himself saw them on that day. His statement was that he came to know about this fact but it is not mentioned as to from whom he came to know that they were seen together. Therefore, this witness has clearly made an improvement from his police statement Ex.D/1 deposing that he saw them together in intoxicated condition on that day. His entire statement has been contradicted from his police statement Ex.D/1 and the contradictions and omissions are on the very material point which affects the prosecution case. As according to his police statement Ex.D/1, he did not see them together but in the Court statement he has given the evidence in such a way that he himself saw them together. Therefore, no reliance can be placed on such a statement.

18. Balkishan Sahu has clearly stated that no invitation was given to Hari Om Sharma, therefore, there was no occasion for him to remain present in marriage of daughter of Balkishan Sahu. No witness has stated that the appellants were present in that marriage. Hence the statement of Hari Om Sharma becomes false that he saw his brother and appellants in a room and heard hot talks in between them.

19. It is clear that no invitation was extended to this witness by Balkishan of the marriage of his daughter and there was no reason for him to have stayed till midnight at Begumganj whereas he resides at Pachepura. It has also not been brought on record whether he was residing temporarily at Begumganj also. Thus, his entire statement becomes totally false regarding the evidence of last seen together of the appellants with his brother at Begumganj on the day of incident.

20. Learned counsel of the appellants has placed reliance in the case of *Bodhraj @ Bodha and others v. State of Jammu and Kashmir,* (2002) 8 SCC 45 where the Apex Court has held thus:

> "The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conduct that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases....."

21. In the case of *Subhash Chand v. State of Rajasthan,* (2002) 1 SCC 702, it has been held that:

> "To constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of commission of crime."

22. In the case of *Lakhanpal v. State of M.P.,* AIR 1979 SC 1620, it has been held that:

> "the mere fact that the appellant and the deceased were together in the field does not lead to the irresistible inference that the appellant must have murdered the deceased."

23. In the case of *H.P. Admn. v. Om Prakash* , AIR 1972 SC 975, it has been held that:

> "In appreciating the evidence against the accused the prime duty of a court is firstly to ensure that the evidence is legally admissible, that the witnesses who speak of it are credible and have no interest in implicating him or have ulterior motive."

24. On appraisal of evidence of Hari Om Sharma in these cases we find that he is not a reliable witness and the circumstance of last seen together is not well established.

25. Another circumstance against appellant Dinesh Pratap Singh @ Bablu Singh is recovery of knife at his instance. Krishnakant Sharma has deposed that Dinesh Pratap Singh gave the disclosure statement Ex.P/13 and on its basis he recovered knife which was seized vide seizure memo Ex.P/14. But this witness has admitted in cross examination that the knife was seized from the open field. The witnesses of these documents Balram and Murat Singh have not supported his testimony. Thus, this fact is not proved that appellant Dinesh Pratap Singh gave the disclosure statement and in pursuance thereof recovered the knife.

26. Other circumstance against Sanjay Gour is his abscontion after the incident.

The learned counsel of the appellants has submitted that this circumstance alone is not sufficient to connect the accused with the offence.

27. The learned counsel of the appellants has placed the reliance in the case of *Matru @ Girish Chandra v. The State of U.P.*, AIR 1971, SC 1050, wherein it has been held that:

> "The appellant's conduct in absconding was also relied upon. Now mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime: such is the instinct of sell-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. normally the Courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the F.I.R. was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence."

28. In the case of *Rahman v. The State of U.P.*, AIR 1972 SC 110, it has been held that :

> "It is true that the appellant was concealing himself for nearly a month though he must have known that he was wanted by the Police and that he left his wife to face the situation alone. But absconding by itself is not conclusive either of guilt or of a guilty conscience. For, a person may abscond on account of fear of being involved in the offence or for any other allied reason."

29. In the case of *Datar Singh v. The State of Punjab*, AIR 1974 SC 1193, it has been held that:

> "We do not think that inferences from failure to surrender or even absconding of the appellant and the lack of interest shown by his brother. Avtar Singh, or other relations of the appellant in obstructing the prosecution of the appellant could possibly prove the guilt of the appellant. Indeed, the complaint of the prosecution, which is inconsistent with the last mentioned submission, was that the appellant's relations had succeeded in winning over witnesses so much so that neither the 'Tall Keeper' living behind the Naru House, nor even Harinder Singh, the son of Joginder Singh, who were witnesses of the seizure list, appeared as persecution witnesses."

30. Thus, in the light of pronouncements of Apex Court, we find that the

circumstance of mere abscontion is not sufficient to connect Sanjay Gour to this offence.

31. On appraisal of entire evidence adduced in these cases, we find that prosecution has not proved the case beyond reasonable doubt against the appellants, therefore, trial Court has committed an illegality in finding them guilty under Section 302/34 of Indian Penal Code hence we set aside the finding of guilt and sentence awarded by the trial Court.

32. Consequently, these appeals succeed and are allowed. Judgments passed by trial Court in S.T.No.177/97 and S.T.No.246/97 dated 24.04.1998 are hereby set aside. They are acquitted from charge under Section 302/34 IPC. They are on bail. Their bail bonds are discharged. They are set at liberty.

Appeal allowed.

I.L.R. [2008] M. P., 396
APPELLATE CRIMINAL
Before Mr. Justice A.P. Shrivastava
13 December, 2007

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

Penal Code, Indian (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. (Para 14)

Cases Referred :

1979(2) MPWN 82, 1986(1) MPWN 73, 1996(1) MPJR SN 19
2000(1) MPWN 169, 2006 AIR SCW 2814
2005 Cr.L.J. 2561, AIR 1983 SC 753.

R.S. Maurya with *Sameer Maurya,* for the appellant,
Mukund Bhardwaj, P.P. for the respondent/State

Cur.adv.vult.

J U D G M E N T

A.P. Shrivastava, J. :–This appeal has preferred by the appellant under Section 374 of Cr.P.C. against the judgment of conviction and sentence, 7.6.2000 passed by IVth Additional Sessions Judge, Morena (M.P.) in Sessions Trial No. 220/96 by which the appellant has been convicted under Section 376 of IPC and sentenced to undergo rigorous imprisonment for seven years with a fine of Rs. 3,000/- with default stipulation.

*Cr.A. No. 543/2000 (Gwalior)

2. In nutshell, the story of the prosecution is that on 27.05.96 at about 8 pm at village Hamirpura, prosecutrix (P.W. 5) went to bring vegetable from her uncle Tunderam and while she was returning to home, on the way near the well, appellant met her, threw her on the ground and committed sexual intercourse with her. During the commission of act, one hand was put by the appellant on her mouth, therefore, she could not cry. After the incident, prosecutrix (P.W.5) came to her house and informed the incident to her father Banwari(P.W.1) and Jiji(mother) Bhagwan Devi(P.W.6). On the same night at about 11 pm, she along-with her parents went to the police station and lodged the report which is Ex.P.7. Thereafter, she was sent for medical examination. After completion of investigation, charge-sheet was filed before the competent Court. After conclusion of trial, the appellant convicted and sentenced accordingly as stated in para one of this judgment.

3. Learned counsel for the appellant challenged the conviction of the appellant on the ground that there is no eye-witness of the incident. Secondly, the age of the prosecutrix (P.W.5) is above 16 years and the prosecution has not proved that the act of sexual intercourse was done against her consent or will. It is further submitted that the appellant has falsely been implicated, the material witness Tunderam was not examined and the incident took place in the dark night.

4. Prosecutrix examined as P.W.5. In her statement, she deposed that the incident took place in the night at about 8 pm at village Hamirpura. She had gone for taking vegetable from his uncle Tunderam and while she was returning to home, appellant met her, threw her on the ground, and committed sexual intercourse with her and left her after 15 minutes. When she returned to her house, she informed the incident to her Jiji(mother) Bhagwan Devi (P.W.6). Then, at about 10-11 in the night, she went to the police station along-with her father and lodged the report at the police station which is Ex.P.7. On the next day morning, she was examined by lady doctor.

5. Bhagwan Devi (P.W.6) corroborated the same version as narrated by the prosecutrix(P.W.5). She stated that her daughter (prosecutrix) informed that appellant committed sexual intercourse with her. Then, she went to the police station along-with her daughter, her husband Banwari (P.W.1)and Chowkidar of the village for lodging the report.

6. Banwari(P.W.1) who is father of the prosecutrix, corroborated the testimony of the prosecutrix (P.W.5) and Bhagwan Devi(P.W.6). He affirmed that complainant (prosecutrix) informed him about the act committed by the appellant with her.

7. Asst.Sub-Inspector B.S.Yadav(P.W.7)also corroborated that the First Information Report (Ex.P.7) was written by him as informed by the prosecutrix (P.W.5)and Crime No. 34/96 was registered against the appellant/accused at police station Mahua and on the next day, she was sent for medical examination.

8. Dr. Chandra (P.W.3) on 28.5.96 examined the prosecutrix (P.W.5).The report is Ex.P.4. For confirmation of the age of the prosecutrix, x-ray was advised. As per doctor, there was no external or internal injury found on the person of the prosecutrix. According to doctor, her axillary and pubic hair were well developed, her hymen was raptured. The undergarments and slides of vaginal smear were prepared and then sent for chemical examination.

9. Dr. Yogendra Singh (P.W.2) on 28.5.96 conducted x-ray of the prosecutrix (P.W.5) for determining her age. As per report Ex.P.1, her age was found to be 14 to 15 years. In his cross-examination, doctor admits that there may a difference of six months in the age of the prosecutrix on either side. Prosecutrix stated in her deposition-sheet that her age is 19 years on the date of examination i.e. on 2.7.97. Except medical evidence, no other proof was produced by the prosecution regarding the age of the prosecutrix. But as per ossification test and keeping in view the margin of two years on either side, it is found that the learned trial Court has rightly found the age of prosecutrix is above 15 years.

10. Regarding the submission made by learned counsel for the appellant that there is no eye-witness of the incident. The offences like sexual assault are generally committed in utmost secrecy and it is seldom witnesses are found to be present at the time of occurrence of the incident. From the testimony of the prosecutrix (P.W.5), it is nowhere stated that anybody was present at the time of occurrence. The prosecutrix stated that after committing act by the appellant, she came to her house and then she immediately narrated the incident to her mother and father.

11. Counsel for the appellant much stressed on the point that this is a case of consent because she did not cry during the commission of act. She is an young girl. She may resist the act of the appellant while committing rape. She could not identify the appellant due to dark night. Regarding the identification of the appellant in the dark night, the arguments on this count is not acceptable because in the First Information Report(Ex.P.7), the name of the appellant has been mentioned and he is the neighbour of the prosecutrix. Therefore, it cannot be said that she could not identify even at the time of night when the incident took place. It is submitted that there is a chance of false implication against the appellant because on the same night, a report was lodged by the appellant side at the police station bearing Crime No. 35/96. Learned counsel for the appellant made submission that it is a case of either consent or false implication.

12. Counsel for the respondent submits that in this case, the incident took place at 8 pm and report was lodged at the police station in the same night at about 11 pm, while in the case which was reported by appellant side, the incident took place at about 9 pm and the report was lodged at about 12 pm bearing crime No. 35/96, subsequent to crime No.34/96. The incident for which defence was relying, happened subsequent to this incident. This will not affect the prosecution case and the chances of false implication were also ruled out.

13. Counsel for the appellant relied on *Randhir Singh Vs. State of M.P.*, 1979(2) M.P.W.N. [82] in which, it is held that prosecution witnesses failed to give true and correct account of the incident, told lies and attempted to build up a false claim. Prosecution not relied on. Similarly, on the point of solitary statement of prosecutrix, he relied on *Haratlal Vs. State of M.P.* , 1986(I) M.P.W.N. [73] in such case, the testimony cannot be believed in absence of corroboration. Regarding inconsistency in the medical evidence and the testimony of the prosecutrix, learned counsel for the appellant also relied on *Badshah Khan Vs. State of M.P.*, 1996(I) MPJR SN 19 and *Mangusingh Vs. State of M.P.*, 2000(I) MPWN [169].

14. The above citations lay down the general principles regarding the reliability of the statements of the prosecutrix and when it requires corroboration and in case if the testimony of the witnesses found to be unreliable, court may discard the testimony of the prosecution evidence. In this case, the report was lodged promptly by the prosecutrix after the incident and soon after the incident, the incident was narrated by the prosecutrix to her mother and father at the first available time and the story which was written in the First Information Report Ex.P.7 got fully corroborated by the testimony of the prosecutrix (P.W.5). The testimony of prosecutrix(P.W.5) further corroborated by her parents, Banwari (P.W.1) and Bhagwan Devi (P.W.6). The defence could not challenge the testimony of the prosecutrix that no rape was committed and if it was committed, it was with the consent of the prosecutrix as already discussed above. The report which was lodged by the appellant party could not get any assistance, to indicate that she was falsely implicated by the appellant.

15. Regarding false implication, in the case of *Om Prakesh Vs. State of Uttar Pradesh,* 2006 AIR SCW 2814, the Apex Court observed that in a case of rape, when there was no apparent reason for victim, a married woman to falsely implicate accused after scatting her own prestige and honour, Plea of false implication not tenable.

16. In this case, the incident took place when the prosecutrix was returning from his uncle's house. Appellant met her on the way near the well, threw her on the ground and committed sexual assault. At the time of commission of act, the chances of resistance or cry for help depends on various factors. In this case, it is stated by the prosecutrix that the appellant put his hand on her mouth and after throwing her on the ground, she was overpowered and the appellant committed sexual intercourse with her. Therefore, in such circumstances, if no resistance is offered, it does not amount that the act was committed with the consent. In this case, the testimony of the prosecutrix is corroborated by her parents and the report was lodged promptly to be ruled out any chances of false implication. In this regard, we can rely on *State of Rajasthan Vs. Biram Lal* reported in 2005 Cr. L. J. 2561 SC.

17. In the case of *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat,* AIR 1983 Supreme Court 753, in which it is held that:-

> " Corroboration is not the *sine qua non* for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society."
>
> "On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has stained an injury [which is not shown or believed to be self inflicted] is the best witness in the sense that he is least likely to

exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding."

18. If the statement of prosecutrix is reliable and of sterling worth, then a conviction for the offence of rape can be sustained solely on her testimony without any corroboration. In this case, the grounds which were argued, were not convincing to disbelieve the testimony of the victim.

19. In view of the above discussion, it appears that the learned trial Court has rightly convicted the appellant. Therefore, the conviction as recorded by learned trial Court is affirmed. The sentence as awarded by learned trial court is appropriate and does not require any interference. Thus, both conviction and sentence as recorded by learned trial Court is hereby affirmed. Bail bond of the appellant shall stand cancelled. He is further directed to surrender before the trial Court to serve out the remaining part of sentence.

20. The appeal is dismissed accordingly. *Appeal dismissed.*

I.L.R. [2008] M. P., 400
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.L. Kochar
17 August, 2007

AJIT KUMAR ....Applicant*
Vs
STATE OF M. P. ....Non-Applicant

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. (Para 6)

Yeshpal Rathore, for the applicant
G.S. Chauhan, G.A. for the non-applicant/State.

Cur.adv.vult

ORDER

S.L. Kochar, J. :–This is an application for grant of anticipatory bail made under section 438 of the Cr. P.C. By the applicant in connection with Cr. No. 80/2007 registered at P.S. Raipuriya District Jhabua for the offence under section 420 of the Indian Penal Code.

2. It is alleged by the prosecution that in the year 1995State Government made

*M.Cr.C. No.4075/2007 (Indore)

a scheme for irrigation facilities to the agriculturists in village Piplipada. The scheme is called "Samuhuik Udwahan Sinchai Yojana, Piplipada". According to this scheme, 50% amount was to be paid by the Government and 50% by the concerned agriculturist which was advanced as loan to the agriculturists by the Co-operative Bank. After completion of scheme, the concerned officials had submitted the completion report upto about 12 years there was no complaint. Now the concerned Co-operative Bank issued notices to the agriculturists for repayment of the loan amount which they refused to pay on the ground that they had not got any benefit of the scheme and as there was no fitting of pipe-line and electric motor. According to them, the whole scheme was only on paper and they were not given any benefit of the scheme. The agriculturists made a complaint to the Collector and as per the instructions of the Collector, Deputy Collector Shri P.S. Karma initiated the inquiry and submitted his report. According to his report, the concerned Government officials had not executed the scheme made for the development of 100 agriculturists of village Pipllipada Kundwa and Kodata. The total loan sanctioned to the beneficiaries was to the tune of Rs.30,17,000/-. In the inquiry report it is said that the then Sahayak Vistar Vikas Adhikari Kshetra Raipuriya (Jamli) named Omprakash Vikas Khand Petlawad got completed the cases of grant of loan and Block Development Officer recommended for 50% loan and 50% subsidy. Thereafter, the matter was sent to the Adim Jati Seva Sahakari Sanstha Maryadit, Jhaknawada. The bank sanctioned the amount in favour of the beneficiaries and required material for completion of the scheme was also sanctioned which was purchased from Shri Samta Enterprises, Proprietor Ajit Gadiya, Petlawad, the applicant. This agency was not approved by the Government and was also not a technical agency. The scheme failed, because the work was got done by the said agency. After detailed report, the Dy. Collector Shri P.S. Karma,pointing out the reasons for failure of the scheme, namely (1) The irrigation scheme was not got done by a technical agency, (2) no drawing was prepared for the scheme/project, (3) no agreement was entered into by the concerned Government Department with them firm ,(4) The work commenced and loan sanctioned in rainy season, (5) illiterate and poor tribals were not guided properly from time to time, (6) in the block area regional Assistant Development and Extension Officer had not taken any inspection and also did not monitor the work, (7) Ineligible persons were chosen for giving the benefit of the scheme who were not having any agricultural lands and (8) from time to time instructions issued by the Government according to the scheme/project were not followed. On this report, the Collector, Jhabua, sent instruction to the Chief Executive Officer, Janpad Panchayat, against the present applicant and the then Sub-Engineer Shri S.A. Ansari directing for registration of criminal case against them.

3. Learned counsel for the applicant has submitted a bunch of documents along with the application. Copies of the same were supplied to the Government Advocate who in turn for verification of these documents to the Station House Officer Police Station Raipuriya District Jhabua and submitted the report. According to this report, all these documents are showing the supply of requisite material, pipes, wire,motor etc. in total about 25 bills and documents which were issued in the months of June and July, 1995 regarding supply of material by Samta Enterprises and all these bills and documents have been certified as genuine by

the present Chief Executive Officer, Janpad Panchayat, Petlawad District Jhabua as well as Branch Manager of Zila Sahakari Kendriya Bank Maryadit Jhauba Brach Jhaknawada. All these bills and documents were issued in the name of Samuhik Udwahan Sinchai Yojana, Piplipada. Along with these documents, there are complaints of the then Chowkidar Dhanna, Babusingh and Babulal regarding keeping of electric motor, starter, cable and board with Babu Mehtab Banjara, Mukhiya village Piplipada. There is a complaint made by Babusingh Nayak dated 13.11.97 to the Station House Officer, P.S. Jhaknawada. The electric motor was taken by one Kaniram for irrigation in his field and he did not return the same. The beneficiaries had also lodged a complaint on 23.04.97 in regard to non supply of electricity because of which they were not able to get the benefit of the scheme of irrigation. Dhanna Chowkidar made a complaint that Banjaras of Piplipada were not allowing him to start motor/electric pump for irrigation. Wh en-ever in the night there was availability of electricity, he was starting electric irrigation motor, but one of the villagers Babu Mehta and other Banjaras were not allowing him to run the motor by which water was reaching in the well and Mahi River and the beneficiaries were not coming to take the benefit of the scheme.

4. Learned counsel for the applicant has vehemently submitted that the applicant asked to supply required material for which he submitted valid cash memos in the name of the Department and scheme. On inquiry, all these documents have been found to be correct and genuine by the present Chief Executive Officer Janpad Panchayat, Petlawad as well as the Branch Manager of Zila Shakari Kendriya Bank Maryadit Jhabua, Jhaknawada. The material was supplied by the applicant and he was p aid for that. He has not committed any fraud or cheating with the Department. He was not the in charge or Government Official for execution of the scheme and looking after the success of the said scheme. He was not a registered contractor or Government contractor and he is not at fault. This was for the officials of the Department to see whether they could have placed the order for supply of the required material to his firm or not. If they had not chosen the registered agency with the Government, it is their fault and not the fault of the applicant. Therefore, according to the learned counsel, no case is made out against the applicant and as a matter of fact, the bank officials who had sanctioned the loan after verification, in-charge of the scheme concerned, Engineer, Block Development Officer and all the concerned officials of the Government who were required to commence the scheme would be responsible for that and the applicant is being made a scape-goat after 12 years when the beneficiaries did not deposit the loan amount with the bank. All the issues pointed out by the Deputy Collector Shri P.S. Karma on the second page of his report clearly throw the responsibility and liability lying with the Government and bank officials and the applicant is in no way responsible for failure of the scheme or illegal disbursement of loan amount to ineligible persons having no agricultural lands and supervising agency of the scheme.

5. On the other hand, learned State counsel has submitted that the matter is under investigation. At present, the case is registered only against two persons i.e. The applicant and Sub Engineer S.A. Ansari who is posted at present at Agar District Shajapur.

6. Having heard learned counsel for the parties and also perusing the entire case diary as well as verification report submitted by the learned State counsel Shri Chauhan, this Court is of the view that the Collector, Jhabua has not looked into the inquiry report submitted by the Deputy Collector Shri P .S. Karma in its proper perspective and superfluously ordered for taking criminal action against the applicant and Sub Engineer Ansari. No order was passed for taking action against the loan sanctioning authority, Block Development Officer, Assistant Block Development Officer, Executive Officer of Janpad Panchayat etc. who were responsible for launching the Government Scheme of irrigation and for success thereof. Now the matter is being inquired into after 12 years whereas the documents are showing that regular complaints were made by Chowkidar and concerned persons for not allowing them to work by the villagers, but no action was taken on all those complaints. The beneficiaries would also be responsible for commission of cheating and fraud if they had taken loan and had no agricultural land. The scheme was under the control and supervision of District Rural Development Agency. Learned counsel for the parties have submitted that the Collector is the head of this agency.

7. It would be apposite to mention here that the Central Government, State Government as well as several autonomous bodies and the Local Self Government are making several schemes for up-enlistment and socio-economical progress of down-trodden and poor persons especially for uneducated persons, agriculturists, scheduled caste and scheduled tribe community and backward class, but because of ineffective implementation of the scheme and corruption, the required persons, groups, communities are not getting appropriate benefit. India is a country whose economy is depending upon agriculture and lot of legislation as well as schemes and programmes are being made continuously after independence, but the agriculturists are not getting the required benefit and very negligible amount is reaching up to them because of inefficiency of executives as well as corruption. Thousands of agriculturists have committed suicide and the same is continued and the Government is taking the matter sincerely, but the problem lies for its effective and honest implementation. We can take this case as an illustration. Now after sixty years of independence we must take some sound and bold steps to eradicate all the problems, reasons and hinderences which are causing failure to the schemes and plans regarding agricultural, educational, health, transport/communication, roads etc.

8. In view of the aforementioned facts and circumstances of the case, in the considered opinion of this Court, the applicant deserves to be released on anticipatory bail. Therefore, his prayer is allowed. The applicant, in the event of his arrest, is directed to be released on his furnishing a bail bond in a sum of Rs.25,000/- (Twenty five thousand) with one surety in the equal sum to the satisfaction of the arresting officer for his appearance before the Investigating Agency as and when he is called on during the coursed of investigation and to co-operate in investigation and subject to the conditions enumerated in section 438(2) of the Cr. P.C.

9. Let a copy of this order be sent to (1) The Chief Minister, Government of M.P. Vallabh Bhawan, Bhopal (2) Minister, Agriculture, Government of M.P. Vallabh Bhawan, Bhopal, (3) Minisater, Irrigation, Vallabh Bhawan Bhopal (4)

D.G.P. (Police Head Quarters, Bhopal and Collector, Jhabua for information, perusal, and taking appropriate steps in the matter.

Certified copy of this order be supplied to the applicant on usual charges as per rules. *Order accordingly.*

I.L.R. [2008] M. P., 404
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
7 December, 2007

MANOJ ... Applicant*
Vs.
STATE OF M.P. ... Non-applicant

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.

There were five persons accused of murder, one arrested accused was tried and other four accused persons were declared absconding. There after applicant and two other accused persons were arrested and when their trial is at defence stage, fifth absconding accused produced. Court started joint trial of fifth accused along with other three accused. A objection was raised at the time of final argument that evidence which was recorded in the absence of fifth accused cannot be read against him. Trial Court rejected the objection, however, High Court allowed the application and directed to re-summon all prosecution witnesses. Trial Court proceeded to recall all witnesses but trial could not be completed for variety of reasons. Trial Court there after directed that case of fifth accused shall be tried separately. That order challenged by applicant that once joint trial started it was not open to trial court to direct a separate trial. High Court held that in the fact and circumstances of the case splitting of join trial is permissible.

(Paras 9 to 12)

S.C. Datt with *Manish Datt,* for the applicant
Ramesh Shukla, Dy. G. A. for the Non-applicant.
H.S. Dubey, for the objector/Complainant.

Cur.adv.vult.

ORDER

R.C. Mishra, J. :–This is a petition, under Section 482 of the Code of Criminal Procedure (for short, the 'Code'), for having the order dated 24.09.2007 passed by Ist Additional Sessions Judge, Narsinghpur in S.T. No. 77/98 for a separate trial of co-accused Munna @ Surendra quashed.

2. The facts leading to the filing of this petition may be summarized as under:-

(a) The petitioner namely Manoj is one amongst the five accused

*M.Cr.C. No. 10114/2007 (Jabalpur)

of murder of one Om Prakash, whose death was caused by shooting as early as on 11.12.1995. As per the prosecution version, the other offenders are : Ramkishan, Kamal Singh, Raju @ Rajesh and Munna @ Surendra (hereinafter referred to as Ramkishan, Kamal, Raju and Munna respectively). However, during investigation, only Ramkishan could be apprehended, and thereafter, showing the other four accused as absconding, the charge-sheet was put up in the Court of JMFC, Narsinghpur. In turn, the Magistrate committed the case to the Court of Session. The petitionerwas declared as absconding and, under Section 299 of the Code, the evidence was recorded in his absence. However, upon a full trial, Ramkishan was acquitted of the charge.

(b) Later on, Kamal, Raju and the petitioner were also arrested and tried jointly. The petitionerwas charged with the offence under Section 302 whereas the charge of the offence punishable under Section 302 read with 34 of the IPC was framed against Kamal and Raju. The prosecution sought to prove its case by examining as many as 20 witnesses. After being questioned under Section 313 of the Code, the accused entered upon the defence and summoned a witness namely Ram Gopal, who was examined on 07.01.2004. Thereafter, the case was posted for recording of the remaining defence evidence on 27.1.2004. In the meanwhile, upon the information that co-accused Munna was detained in the jail at Narsinghpur, a warrant requiring his production was issued by the CJM and he was also committed to the Court of Session to stand trial.

(c) On 12.1.2004, alternative charges of the offences punishable under Sections 302 and Section 302 read with 34 of the IPC were framed against Munna. After recording his plea of not guilty, learned trial Judge proceeded to ascertain as to which of the witnesses examined already by the prosecution in his absence were to be re-summoned. In response, the defence counsel submitted that he wanted to cross-examine only four witnesses namely, Babulal (PW1), Deokumar Bai (PW4), Sattu @ Satyanarayan (PW11) and Vishwas Parihar (PW12). Accordingly, these witnesses were recalled and after their cross-examination on behalf of Munna, the prosecution closed its evidence. Munna was also examined and called upon to adduce evidence. Thereafter, the remaining defence evidence was recorded.

(d) On 03.08.2004, the date fixed for the final arguments, an objection was raised to this effect that the evidence of other prosecution witnesses, recorded in absence of Munna, could not be read against him as all the conditions precedent for utilizing the evidence were not in existence. However, observing that it was at his request only that four witnesses were re-summoned for cross-examination, learned trial Judge rejected the objection. This

order was challenged not only by Munna but also by the other 3 accused by filing a petition, under Section 482 of the Code, before this Court.

(e) The petition, registered as MCrC No. 6085/2004, was allowed vide order 07.11.2006. Accordingly, the impugned order, passed on 03.08.2004 by the trial Judge, was set aside and he was directed to re-summon all the prosecution witnesses examined in absence of co-accused Munna for being cross-examined on his behalf. The operative part of the order also contained the following guidelines:-

"If at subsequent stage of trial, the trial Court with regard to some particular witness finds that he is dead or incapable of giving evidence or cannot be found or his attendance cannot be procured without an amount of delay, expense or inconvenience which under the facts and circumstances of the case are unreasonable, it shall be at liberty to read the evidence of that particular witness under Section 299 of the Code. The trial Court shall also have an option to separate the trial of petitioner Munna @ Surendra and decide the case against other accused persons on the basis of the evidence already recorded in their presence" (emphasis supplied by me).

(f) In compliance, learned trial Judge proceeded to recall all the 20 prosecution witnesses examined earlier for cross-examination on behalf of co-accused Munna. However a bare perusal of the order-sheets would reveal that this exercise could not be completed for variety of reasons. Ultimately, on 22.09.2007, the defence counsel declined to cross-examine the witnesses namely Manohar and Munnalal on the ground that in the light of the provisions of Section 273 of the Code, the trial Judge was first required to record their Chief-Examinations in presence of Munna. After hearing the arguments, learned trial Judge ordered that Munna's case shall be tried separately.

3. The legality and propriety of the order for splitting up of the trial have been questioned on the ground that after trying the petitioner and other co-accused Kamal and Raju jointly with him, it was not open to the learned trial Judge to direct a separate trial of Munna.

4. Learned Senior Counsel for the petitioner has strenuously contended that the guideline to exercise discretion for separating the trial, as contained in this Court's order dated 07.11.2006, was not consistent with the well-settled position of law on the point. This apart, according to him, even in pursuance of the order, the trial could have been split up only on 14.03.2007, the first date of hearing after receipt of the copy thereof. Reference has also been made to the Allahabad Authority in *Mangal Singh and others vs. Rex* AIR 1949 Allahabad 599, to fortify the contention that legality of joint trial depends on allegations and not on the result of the trial.

5. In reply, learned Dy. Govt. Advocate as well as learned counsel for the objector/complainant have submitted that this is yet another device to protract the

trial by the main accused of murder who was able to remain out of the clutches of law for a considerable period of more than 6 years. Inviting attention to the relevant order-sheets, they proceeded to contend that there was no other alternative left with the trial Judge except to separate the trial of co-accused Munna. According to them, the order in question would cause no prejudice to the petitioner whose trial, in accordance with law, is nearing completion.

6. As pointed out already, the present petitioner was also one of the petitioners in the earlier petition. Since, the legality of the guideline contained in the operative part of the corresponding order was not questioned by any one of them that order has attained finality. Even otherwise, it is well settled that this Court has no jurisdiction even under the inherent powers to alter its judgments in view of Section 362 of the Code (*Moti lal vs. State of M.P.* AIR 1994 SC 1544 relied on).

7. Joint trial is contemplated under Section 223 of the Code whereas the power to split a joint trial has been conferred by sub-Section (2) of Section 317 thereof. Section 223 reads thus :-

> "223. The following persons may be charged and tried together, namely :-
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> (a) persons accused of the same offence committed in the course of the same transaction;
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> (b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;
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> (c) persons accused of more than one offence of the same kind, within the meaning of Section 219 committed by them jointly within the period of twelve months;
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> (d) persons accused of different offences committed in the course of the same transaction;
>
> (e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last named offence;
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> (f) persons accused of offences under Sections 411 and 414 of the Indian Penal Code (45 of 1860), or either of those sections in respect of stolen property the possession of which has been transferred by one offence;
>
> (g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860), relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges :
>
> Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories

specified in this section, the Magistrate may, if such persons be any application in writing, so desire, and if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together."

8. The ambit and scope of Section 223 of the Code has been considered by the Apex Court in *Lalu Prasad v. State through C.B.I.* AIR 2003 SC 3838, The relevant extracts of the judgment may be quoted as under :-

> ".....It is thus be seen that irrespective of the applicability of clauses (a) to (g), Section 223 gives to the magistrate a discretion to amalgamate cases. The Magistrate has to be satisfied that persons would not be prejudicially affected and that it is expedient to amalgamate cases.....
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> .....It is the trial Court, which would have to consider the stand of the other accused persons who have not prayed for joint trial"

9. Accordingly, joint or separate trial is always in the discretion of the trial Judge only. Further, the power given by Sub-Section (2) of Section 317 of the Code is indicative of the fact that division of an integrated trial is not unknown to criminal procedure. This apart, as observed by the Apex Court in *A.R. Antulay vs. R.S. Nayak* AIR 1988 SC 1531, an accused cannot assert any right to a joint trial with his co-accused.

10. To sum up, Section 223 of the Code gives the discretion to trial Judge to try the offenders either jointly or separately but the exercise of the discretion would depend upon the facts and circumstances of the case. Moreover, splitting up of a joint-trial is permissible if it does not result in prejudice to anyone of the affected parties.

11. Applying these well-settled prepositions of law as to the facts and circumstances of the case, I am of the view that the order for separate trial is not going to result into any prejudice to the present petitioner, whose trial had already reached the stage of defence even before Munna was put to a joint trial with him.

12. For these reasons, no interference, under the inherent powers, is called for.

13. Consequently, the petition stands dismissed and the impugned order for splitting up of the trial is hereby upheld.

Petition dismissed.

I.L.R. [2008] M. P., 408
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Vyas
14 December, 2007

M/S SSR PIRODIA & ors. ....Applicants*
Vs.
UNION OF INDIA ....Non-Applicant

Income Tax Act, Indian (43 of 1961) - Sections 276-C, 277, 278-B -

*M.Cr.C. No. 683/2007 (Indore)

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. (Para 12)

Cases Referred :

(2004) 186 CTR Reports 721, (1) MPLJ 49, 1997 (224) ITR 687.

Shailendra Mukati, for the applicant

R.L. Jain, for the non-applicant

Cur.adv.vult

ORDER

S.C. VYAS, J. :–By this petition filed under S. 482 of the Code of Criminal Procedure the order dated 25.7.05 passed by Chief Judicial Magistrate Ratlam in criminal case No. 15 of 1996 and order dated 14.7.06 passed by IIIrd Addl. Sessions Judge Ratlam in criminal revision No.180 of 05 are called in question with a prayer to quash these orders and to quash the proceedings of criminal case No.13 of 1990 which is pending in the court of Chief Judicial Magistrate against the present petitioners under Secs. 276-C, 277 read with 278 B of the Income Tax Act 1961. **(Hereinafter referred to as the 'Act')**

2. Short facts of the case are that a private complaint at the instance of Income Tax Officer Ratlam under S. 276-C, 277 read with 278 B of the Act has been filed which was registered and petitioners were summoned. The complaint was filed on the ground that during the accounting year and relevant for assessment year 1980-81, certain income was concealed by petitioners No. 2 & 3, who are the partners of petitioner No.1. Petitioner No.1 was engaged in the business of sale and purchase of Timber. The survey was conducted under S. 133A of the Act and on 30-31st Oct.1979 stock checking of timbers was carried out and stock inventory has been prepared. Petitioners were asked to furnish the stock position of the Timber as on 31.10.1979. They had filed their Trading account for the period 1.4.1979 to 31.10.1979 and worked out closing stock of timber at Rs.2,33,982/- and stock of timber was shown as 219.561 Cubic Mtrs. on the date of survey. While according to the Respondent department the stock on the date of survey was arrived at 373.481 Cubic Meters, which valued @ 1,300/- per Cubic Meters. And total value of which arrived at Rs. 4,85,525/-. The assessment was completed under S. 143 (3) read with S.144 B of the Act on 9.8.1983. For the purpose of assessment taking, the average gross profit @ 17%. The Assessing Officer worked out the difference in valuation of closing stock at Rs. 27,985/-.

3. For suppression of value of closing stock of Rs.27,985/-, penal proceedings under S. 271 (1) © of the Act were initiated and prosecution was also launched.

4. Petitioners preferred an appeal against the assessment year before the CIT (Appeals) on 21.5.85 who has confirmed the addition. On 17.3.1986 ITO levied the penalty of Rs.22, 226/- under S. 271 (1) © of the Act. On 2110.1988 CITA confirmed the levy of penalty. Petitioners further preferred an appeal before ITAT

who vide its order dated 13.8.1993 set aside the order of levied penalty and found that addition was made on the basis of mere estimate wherefrom it can not be positively said that there was concealment of income. The stock could be known at the time of survey. The assessee furnished return of income when it was due. The assessee had come with certain explanation which could not be said lacking bona fide. No penalty is therefore leviable and has been deleted.

5. Learned counsel appears for petitioners has contended that since the penalty imposed by the department has already been set aside by ITAT and held that it was not a case of concealment of income, the very basis of prosecution goes away when ITAT has deleted the penalty. He has placed heavy reliance on the judgment reported in the matter of *KC Builders and Anr. Vs. Assistant Commissioner of Income Tax* [(2004) 186 CTR Reports 721] in which the Apex Court has clearly laid down the law on the subject to the effect that the finding of Tribunal was conclusive and prosecution cannot be sustained. Since the penalty having been cancelled by the complainant following the Tribunal's order, no offence survives under the IT Act and thus quashing of prosecution is automatic.

6. To counter the aforesaid arguments, learned counsel appeared for respondent submitted that though the ITAT has cancelled the penalty, but, even, then prosecution of present petitioners can be continued, because there is also a charge of false verification of Income Tax Return which is punishable under S.277 of the Act. It has also been submitted that the facts of present case are quite different and it was known to the petitioners from the very beginning that they are deliberately concealing the income for the relevant assessment year.

7. I have taken into consideration the arguments advanced by counsel appearing for both the parties and perused the record. I am of the view that petition is required to be allowed and prosecution of present petitioners should be quashed in the light of above referred decision of Apex Court reported in the matter of *KC Builders* (supra).

8. Some other features of the case are also required to be mentioned here. This is not the first round of litigation before this court. Earlier also the matter has come up twice in the form of petition under S. 482 of the Code which was withdrawn by petitioners with liberty to take action before appropriate forum. Thereafter petition under Article 226/227 of the Constitution of India was filed for quashment of the proceedings. The petition was heard and decided by learned Single Judge on 30.10.1998 and it was observed in para 8 that Trial Court is seized of the matter, has not refused to consider the petitioners' prayer in this regard which is manifest from the order of trial court dated 2.3.1994. Thereafter LPA No.484 of 1998 was filed against the aforesaid order passed in WP No.1382 of 98. While deciding the aforesaid LPA 484 of 98 on 25.1.1999 the Division Bench of this court has observed as under:-

> "We have perused the order of learned Single judge with which we do not interfere. However we direct the trial court that it must consider the changed situation wherein it is pointed out that the basis of the complaint had been knocked out by the Tribunal. The Trial Court shall take up the matter and dispose of within three

months and it shall not be influenced by the observations made in the earlier orders. The appeal is dismissed with above observations".

9. After it an application was filed by the petitioners before the Trial Court praying therein that prosecution against them be quashed in the light of judgment of ITAT. The application has been dismissed by the Trial court and Revisional court has also confirmed the same.

10. From perusal of the orders of two courts below, it can very well be seen that both the courts have not consider the question and issue in its right perspective and the judgment of Apex Court reported in the matter of *KC Builders* (supra) has also not been considered in its proper spirit. Learned Magistrate has simply dismissed the application on the ground that as the stage of S. 245 (2) of the Code has already been passed and charges have been framed, therefore, the court can only consider the matter on merits after recording evidence. The revisional court also confirmed the said order of trial court and while doing so the Judgment of KC Builders (supra) was considered and observed that as the charge of S. 277 of the Act is also there against the petitioners and stage of S. 242 has already passed, therefore, the charge could not be quashed by the Trial Court and courts does not possess the inherent powers available under S.482 of the Code. But that hardly makes a difference if a wrong section of the Code was quoted in the application even; then, the Trial Court as well as the Revisional Court were not precluded from considering the effect of the judgment of ITAT for quashing the penalty and for holding that it is not a case of suppression of income.

11. It is also worth mentioning here that in the case of *KC Builders* (supra) also the prosecution was under S. 276©, 277 and 278(b) of the Act. The Apex Court has considered all these provisions and the word "deliberately" and "concealment" were also considered. The judgments of various High Courts were also taken note of and then in Para 18, 19 and 20 it has been held as under:-

> "18. In the instant case, the penalties levied under S.271 (1) © were cancelled by the respondent by giving effect to the order of the Tribunal in ITA Nos.3129-3132. It is settled law that levy of penalties and prosecution under s. 276C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under s. 276C is automatic".
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> "19. In our opinion, the appellants cannot be made to suffer and face the rigors of criminal trial when the same cannot be sustained in the eyes of law because the entire prosecution in view of a conclusive finding of the Tribunal that there is no concealment of income becomes devoid of jurisdiction and under s. 254 of the Act, a finding of the Tribunal supersedes the order of the AO under s. 143 (3) moreso when the A0 cancelled the penalty levied ".
>
> "20. In our view, once the finding of concealment and subsequent levy of penalties under s. 271 (1)© of the Act has been struck down by the Tribunal, the A0 has no other alternative except to correct his order under s. 154 of the Act as per the directions of

the Tribunal. As already noticed, the subject matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the A0. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Asstt. CIT cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of Tribunal exhibited as defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable".

12. In view of aforesaid law settled by Apex Court it is clear that when ITAT has already held that it was not a case of concealment of income and petitioners have given explanation of the Return which was filed by them and excess income was assessed on the basis of estimate on account of survey conducted by the department and penalty imposed for concealment has been cancelled. Now and it will be an idle and empty formality to require the petitioners to have the order of Tribunal exhibited as defence document and thereafter to wait for the judgment of acquittal after a long full fledged trial. When the matter has been adjudicated and settled by Tribunal, then petitioners need not be dragged into criminal court unless their act could have been described as culpable.

13. In the matter of *SC Gupta Vs. Union of India* [1998 (1) MPLJ 49] this court also expressed the similar view and prosecution launched under S. 276(1) ©, 277 and 278 of the Act against all the petitioners was quashed on the ground that Tribunal in appeal deleted the penalty holding that there was no concealment of income on the part of assessee. Similar view has also been expressed in the matter of *G.L. Didwania and anr. Vs. I.T.O and anr.* [1997 (224) ITR 687].

14. In view of aforesaid discussions, the petition succeeds and is allowed. The impugned orders passed by trial court as well as by revisional court are hereby set aside and prosecution of the petitioners in criminal case No.13 of 90 pending in the court of CJM, Ratlam is hereby quashed.

Petition allowed.
