I. L. R. (2008) MADHYA PRADESH

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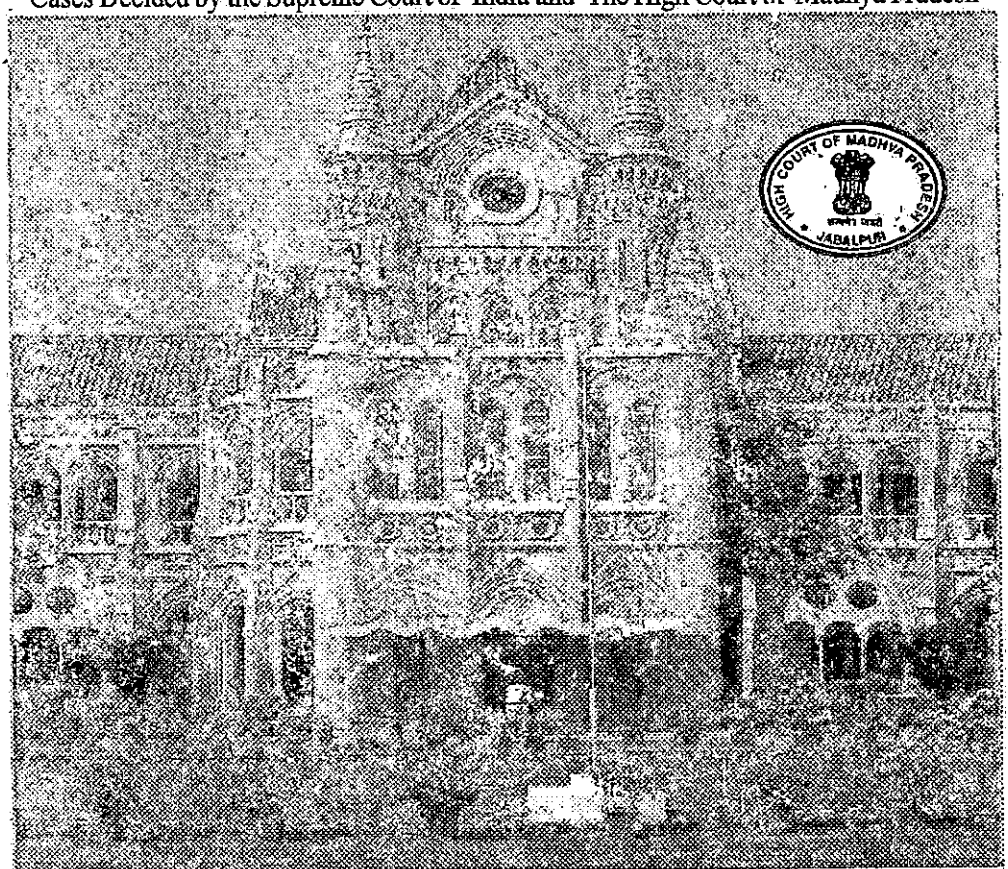

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I.L.R. [2008] M. P., 1

SUPREME COURT OF INDIA

Before Mr. Justice Ashok Bhan & Mr. Justice D.K. Jain

2 November, 2007

SUNIL KUMAR ....Appellant*

Vs.

RAM SINGH GAUD and ors. ...Respondents

Motor Vehicles Act (59 of 1988)–Section 166–Compensation - Future Income - Truck Dumper hit the mini truck driven by Injures appellant as a result of which appellant suffered three fractures including one at tibia - Claims Tribunal awarded total sum of Rs. 72,000/- by way of compensation - Held - After fracture of tibia, it is doubtful if appellant can even drive again - Even if he pursues some other vocation, he would not be able to earn as such as he was earning - Disability suffered by appellant would surely reduce his earning capacity - Appellant required to be compensated for loss of earning - Loss of income assessed at Rs. 2,59,200 in addition to sum already awarded by Tribunal - Interest at the rate of 6% p.a. on enhanced amount be paid from the date of filing of claim petition till realization - Appeal allowed.

We find substance in the submission put forth by the counsel for the appellant. The Tribunal as well as the High Court have not awarded any compensation towards loss of future income. After the fracture of tibia, it is doubtful if the appellant can even drive again. Even if he pursues some other vocation, he would not be able to earn as much as he is earning now. The disability suffered by the appellant would surely reduce his earning capacity. Therefore, the appellant is required to be compensated for the loss of earning due to the injuries suffered by him in the accident. (Para 8)

Cur.adv.vult.

ORDER

1. Leave granted.

2. Factual background of the case is that on 10th July, 2003, appellant was driving his mini truck No.MP 20 G-7705 towards Bargi along with one Ramesh Prajapati. When the mini truck reached Chulha Gulhai, a truck dumper bearing No.MP 18-6392 came from the opposite side, which was being driven in rash and negligent manner and hit the mini truck of the appellant with the result that the appellant sustained grievous injuries on his leg. He suffered three fractures including one at tibia. He was examined by the Medical Board. After examining the injuries, Board came to the conclusion that the appellant had suffered 45% permanent disability. Appellant was 29 years of age at the time of accident and was working as a driver and earning Rs.4,000/- per month.

3. FIR was lodged. A claim was also filed against the owner of truck dumper as well as the insurance company before the Motor Accident Claims Tribunal (for short the Tribunal) for compensation under Section 166 of the Motor Vehicles Act, 1998 (for short the Act), *inter alia,* stating that in the accident, appellant suffered fracture in his tibia and two other places. Appellant claimed Rs.8,20,000/- by way of compensation.

*C.A. No. 5108/2007.

4 Tribunal by its order dated 25th June, 2004 awarded a compensation of Rs.45,000/- for the 45% permanent disability suffered by the appellant; Rs.21,000/- towards the amount spent on the treatment and Rs.6,000/- for physical pain and mental agony suffered by the appellant. Thus, a total sum of Rs.72,000/- was awarded as compensation along with interest @ 6% per annum from the date of the claim petition till payment.

5. Being aggrieved, appellant filed an appeal in the High Court of Madhya Pradesh at Jabalpur which has been dismissed by the impugned order.

6. Learned counsel appearing for the appellant contends that as a result of the impact of injuries suffered by the appellant, the appellant cannot pursue his vocation of driving any longer and the Tribunal as well as the High Court have grossly erred in not awarding any compensation towards the loss of his earning capacity. That, keeping in view the injuries suffered by him, the compensation awarded is too low. Counsel appearing for the Oriental Insurance Company Limited, Respondent No.3, has supported the judgment and order passed by the courts below.

7. Learned counsels for the parties have been heard at length.

8. We find substance in the submission put forth by the counsel for the appellant. The Tribunal as well as the High Court have not awarded any compensation towards loss of future income. After the fracture of tibia, it is doubtful if the appellant can even drive again. Even if he pursues some other vocation, he would not be able to earn as much as he is earning now. The disability suffered by the appellant would surely reduce his earning capacity. Therefore, the appellant is required to be compensated for the loss of earning due to the injuries suffered by him in the accident.

9. Taking into consideration the present income of the appellant as Rs.4,000/- per month; and the permanent disability of 45% suffered by him, we are of the view that the capacity of the appellant to earn in future would be reduced by Rs.1,800/- per month approximately. If 1/3rd is deducted towards miscellaneous expenses, the loss of income comes to Rs.1,200/- per month which, in turn, comes to Rs.14,400/- per annum. Appellant was 29 years of age at the time of accident. Taking the multiplier to be 18 [as per the Second Schedule to Section 163A of the Act], the total loss of income comes to Rs.2,59,200/-.

10. For the reasons stated above, the loss of income is assessed at Rs.2,59,200/-. The appellant would be entitled to the aforesaid amount in addition to the sum already awarded by the Tribunal, which has been upheld by the High Court. The appellant would be entitled to interest at the same rate, i.e., 6% per annum on the enhanced amount as well from the date of filing of the claim petition till realization.

11. Accordingly, the appeal is accepted and the order passed by the Courts below stands modified to the extent indicated above.

I.L.R. [2008] M. P., 3

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat &
Mr. Justice Lokeshwar Singh Panta

27 November, 2007

CHIEF COMMISSIONER OF INCOME TAX & ors. ....Appellants*

v.

SMT. SUSHEELA PRASAD & ors. ...Respondents

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

In view of what has been stated in *Uma Devi's case* (supra), we deem it proper to remit the matter to the High Court to consider the case afresh in the light of the said decision. (Para 9)

Cases referred :

(1) (2006) 4 SCC 1, (2) (2006) 11 SCC 350.

Cur.adv.vult

JUDGMENT

The Judgment of the Court was delivered by DR. ARIJIT PASAYAT, J. :-

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the High Court of Madhya Pradesh at Jabalpur in Writ Petition No.13440 of 2004. The appellants had challenged the composite order dated 13.11.1997 passed in OA No.691/1995 and OA No.89/1996 by the Central Administrative Tribunal, Jabalpur Bench, Jabalpur (in short 'CAT'). The respondents had moved CAT under Section 19 of the Administrative Tribunals Act. 1985 (in short 'the Act') seeking regularization of their services.

3. The stand of the respondents before the CAT was that they have been on duties as Data Entry Operators on contract basis and were being paid at a rate of Rs.10 per hour up to the maximum of Rs.50/- per day. They have sought for regularization placing reliance on the factum of long rendition of service.

4. In response, the present appellants contended that the respondents were not departmental employees and their grievances cannot be agitated before the CAT. Placing reliance on some other decisions rendered by the CAT, the stand of the present appellants was turned down and direction was given for considering their cases for appointment on regular basis.

5. A writ petition was filed before the High Court, by the appellants which was dismissed by the impugned order.

6. In support of the appeal, learned counsel for the appellants submitted that

*C.A. 5422/07.

the decision of the High Court is contrary to law as laid down by the Constitution Bench of this Court in *Secretary v. State of Karnataka and Others v. Uma Devi and Others* (2006 (4) SCC 1).

7. Learned counsel for the respondents on the other hand submitted that since the CAT had relied on an earlier judgment and High Court rightly did not find any distinguishable feature, the appeal, therefore, deserves to be dismissed.

8. The question of regularization on the ground of long rendition of service was the subject matter in *Uma Devi's case* (supra). The said issue has been elaborately dealt with in the judgment. It was inter alia held as follows:

> "33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency and *ad hoc* appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.
>
> xxx xxx xxx
>
> 45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible. Given the exigencies of administration, and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment, moreover when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in

search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for Public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

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47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or Procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a Person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

XXX XXX XXX XXX

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda*

College (1962) Supp. 2 SCR 144. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may be issued to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

9. In view of what has been stated in *Uma Devi's case* (supra), we deem it proper to remit the matter to the High Court to consider the case afresh in the light of the said decision.

10. In the connected case decided by the High Court in O,A. No.89/1996 which related to Writ Petition No.1474 of 1998, this Court had dealt with the matter in *Chief Commissioner of Income Tax, Bhopal and Ors. Vs. Leena Jain and ors.* (2006.(11) SCC 350), where a similar direction, as contained above, was given.

11. The appeal is allowed to the aforesaid extent with no orders as to costs.

I.L.R. [2008] M. P., 6

SUPREME COURT OF INDIA

Before Mr. Justice C.K. Thakker & Mr. Justice Altamas Kabir

3 December, 2007

STATE OF M.P. ...Appellant*

Vs

BABULAL ...Respondent

A. Penal Code, Indian (45 of 1860)-Section 376 (1)-Rapist should be handled with a heavy hands-Court must be conscious and mindful of proportion between an offence committed and penalty imposed as also its impact on society and victim of crime-Rapist conviction upheld by High Court but jail sentence reduced up to period already undergone (i.e. two months and three days)- sentence inadequate- Supreme Court set-aside the sentence and restored it to the sentence awarded by the trial court (i.e.7 years) .

Once a person is convicted for an offence of rape, he should be treated with a heavy hand. An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court *[Dinesh v. State of Rajasthan,* (2006) 3 SCC 771*]*.

For the foregoing reasons, the appeal filed by the State is allowed. The

*Cr. A.1658/2007

order of conviction recorded by the trial Court and confirmed by the High Court is upheld. The High Court was, however, wrong in reducing the sentence and the trial Court rightly imposed rigorous imprisonment of seven years on the respondent-accused. We, therefore, restore that part of the order of the trial Court directing the respondent to suffer rigorous imprisonment for seven years. It goes without saying that the period of sentence already undergone by the respondent-accused will be given set off. (Para 26, 32)

B. Penal Code, Indian (45 of 1860) Section 376 (1)-Proviso-"Adequate and special reasons"-Depends upon several factors-There may not be straight jacket formula-Rapist is an illiterate agriculturist, fined Rs 2500/- - Reasons neither special nor adequate.

In the instant case, 'special' and 'adequate' reasons according to the learned Judge of the High Court were; (i) the respondent was an 'illiterate agriculturist from rural area' and (ii) an amount of fine of Rs.2,500/- was imposed on him. No other reason whatsoever has been mentioned in the judgment, nor is found from the record of the case. With respect to the learned Judge, in our considered opinion, the so called reasons can neither be said to be 'special' nor 'adequate'. On the contrary, in the Special Leave Petition seeking leave to appeal, the applicant-State has averred that the learned Judge was in the habit of passing such orders by reducing sentence to the period 'already undergone' in serious offences punishable under Sections 304, 307, 376, etc. A list is also given of some of the matters decided by him. Our attention was also invited by the learned Government Advocate that in several cases, this Court has set aside the decisions rendered by the same learned Judge. (Para 30)

Cases referred :

(1) (1983) 3 SCC 217, (2) (1992) 3 SCC 615, (3) (1974) 3 SCC 85 (4) (2006) 3 SCC 771.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **C. K. Thakker, J. :–**

1. Leave granted.

2. The present appeal reminds us observations of Hon'ble Mr. Justice S. Ratnavel Pandian in *Madan Gopal Kakkad v. Naval Dubey & Anr.*; (1992) 3 SCC 204 that "offenders of sexual assault who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms". Dealing with a case of sexual assault, His Lordship emphasized on Courts of Law their duty to handle offenders of such crimes with a heavy hand. His Lordship concluded:

> "We feel that Judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so demand".

3. The case on hand, in our considered view, exhibits not only casual, indifferent and perfunctory approach but insensitive attitude adopted by the High Court in

awarding sentence on an offender who perpetrated a heinous crime of committing rape on a married woman in broad daylight. The case of the prosecution was that respondent Babulal was residing at village Daulatpur, Tehsil Ikchavaar, District Sehore in Madhya Pradesh. On July 23, 2002, at about 12.00 noon in his own tapri, he criminally intimidated the prosecutrix-PW5, aged about 22 years, a married lady (hereinafter referred to as 'PW5-X')and committed rape on her. According to the prosecution, PW5-X was living with her husband in the house of the accused. On the day of the incident, she was washing a drum on tapri when the accused caught her from behind and threw her on the ground. The prosecutrix-PW5 shouted and resisted, but the accused threatened her with knife and committed rape on her. Even thereafter, he threatened to kill her if she reported the incident to anyone else. In the evening, PW5-X told about sexual assault to her husband and her mother-in-law Dallubai, a blind lady. PW8-Ramcharan, who was the employer of PW7-Shiv Narayan-husband of PW5 was also informed who assured that he would talk to the accused and PW5 should not leave the place due to fear. On the next day, i.e. July 24, 2002, when the elder brother of Shiv Narayan arrived, the prosecutrix (PW5-X) and her husband (PW7) went to the police station, Ikchavaar and lodged a complaint. PW5-X was then sent for medical examination, site plan was prepared and statements of witnesses were recorded. PW5 was medically examined. The accused was also sent for medical examination. It was found that he was absolutely competent to commit sexual intercourse. After completion of usual investigation, charge-sheet was submitted for offences punishable under Section 376 read with Section 506, Part II, Indian Penal Code (IPC). The accused denied the charge. In his statement under Section 313 of the Code of Criminal Procedure, 1973, he contended that in order to avoid repayment of loan taken from Ramcharan-PW8, the prosecutrix (PW5-X) had falsely implicated him in the case.

4. The trial Court considered the evidence adduced by the prosecution and particularly sworn testimony of PW5-prosecutrix, PW7-Shiv Narayan-husband of prosecutrix and PW9-Dr. Madhu Sharma, immediate Assistant Surgeon, Public Health Centre, Ikchavaar and held that it was proved beyond reasonable doubt that the accused had committed the offence of rape. So far as PW8-Ramcharan is concerned, he did not support the prosecution and was declared 'hostile'. The trial Court, however, acquitted the accused of the charge under Section 506, II IPC.

5. On sentence, the trial Court heard the accused who prayed for grant of probation which, in our opinion, was rightly refused by the Court. In the light of mandate in sub-section (1) of Section 376, IPC, the trial Court imposed minimum sentence of seven years' rigorous imprisonment and to pay fine of Rs.2,500/- (two thousand five hundred). In default of payment of fine, the accused was ordered to undergo rigorous imprisonment for six months more. The amount of fine was ordered to be paid to the prosecutrix X.

6. The aggrieved accused preferred an appeal before the High Court of Madhya Pradesh. The learned counsel for the accused did not challenge the finding of conviction but prayed for mercy and leniency in sentence. The learned Judge of the High Court upheld the argument of the learned counsel for the appellant and

observed that the accused was initially in custody from September 11, 2002 to October 10, 2002 and again after the pronouncement of the judgment, he was sent to jail on January 23, 2003 till he was enlarged on bail on February 26, 2003. The learned Judge also observed that the accused was an 'illiterate agriculturist from rural area' and fine of Rs.2,500/- was also imposed on him. According to the learned Judge, on the facts of the case, the imprisonment for two months and three days which had already undergone by the accused could be said to be 'just and proper' and accordingly the appeal was partly allowed.

7. Aggrieved by the said order passed by the High Court, the State has approached this Court.

8. On November 21, 2005, notice as also bailable warrant was issued against the respondent which was duly served upon him. The respondent also appeared through an advocate. On March 19, 2007 when the matter was called out, the advocate appearing for the respondent-accused stated that he had no papers. The Court, therefore, ordered that papers be given to the learned counsel appearing for the respondent by the counsel for the State. The matter was then called out for final hearing.

9. We have heard learned counsel appearing for the parties.

10. The learned counsel for the State contended that the High Court had committed a serious error of law in reducing the sentence imposed by the trial Court. He submitted that sub-section (1) of Section 376, IPC provides minimum sentence of rigorous imprisonment for seven years which was imposed by the trial Court and there was no reason for the High Court to interfere with the said order. Maximum imprisonment imposable on the offender under the said provision is ten years. The High Court was, therefore, not right in reducing the sentence and that too when the accused had undergone only for two months and three days. It was also submitted that no 'adequate and special reasons' were recorded by the High Court for reducing the sentence and even on that ground also the order is vulnerable. The counsel submitted that the High Court ought to have appreciated the fact that the offence was committed in broad daylight. He, therefore, submitted that the order passed by the High Court deserves to be set aside by restoring the order of the trial Court.

11. The learned counsel for the respondent-accused submitted that the discretion exercised by the High Court considering the position of the accused, cannot be said to be illegal and deserves no interference.

12. Having heard the learned counsel for the parties, in our opinion, the High Court had manifestly erred in allowing the appeal and in reducing the sentence imposed on the offender to the period 'already undergone'.

13. So far as conviction of the respondent is concerned, we find no infirmity in the reasons recorded and the conclusion arrived at by the trial Court. The trial Court rightly held that on the fateful day, at 12.00 noon, the accused committed the crime. In her testimony on oath, prosecutrix narrated the incident and stated that when she was washing the kothi on tapri, the accused came from the behind, caught her, pulled her down on the earth and committed rape on her. The trial

Court rightly observed that the prosecutrix informed her husband about the incident, who in turn contacted PW8-Ramcharan-employer, but Ramcharan-PW8 did nothing. The matter was also reported by prosecutrix to her mother-in-law Dallubai who was blind. PW7-Shiv Narayan-husband of the prosecutrix intimated his elder brother about the incident when he came next day and thereafter First Information Report (FIR) was lodged. The trial Court rightly held that there was no unexplained delay in filing the complaint. The 'straightforward' evidence of prosecutrix-PW5 was believed by the Court and accordingly the accused was convicted. We are fully satisfied that in recording a finding of guilt against the respondent, the trial Court had not committed any error, either of fact or of law.

14. As held by this Court in several cases, if a Court of Law finds evidence of prosecutrix truthful, trustworthy and reliable, conviction can be recorded solely on the basis of her testimony and no further corroboration is necessary. In this connection, we may refer to only two leading decisions of this Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,* (1983) 3 SCC 217 and *State of Rajasthan v. Narayan,* (1992) 3 SCC 615.

15. In the first case, this Court, speaking through M.P. Thakkar, J. stated:

> "9. 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. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :
>
> (1) The female may be a 'good digger' and may well have an economic motive to extract money by holding out the gun of prosecution or public exposure.
>
> (2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed".

16. In the second case, which was also of rape, there was delay of three days in lodging FIR. This Court held that it was not a factor causing doubt on the story of the prosecution in view of the generally known fact that the rape victim or her husband would hesitate to approach the police. It was also held that unless the evidence discloses that she and her husband had strong reasons to falsely implicate the accused, ordinarily the court should have no hesitation in accepting her version regarding the incident.

17. In the case on hand, the defence put forward by the respondent-accused was that the husband of the prosecutrix had taken advance money from PW8-Ramcharan-employer towards labour charges and since he had no intention to return the said amount, the prosecutrix falsely implicated the accused in the case. In our considered opinion, the trial Court rightly rejected the defence. Hence, in our opinion, the order of conviction recorded by the trial Court and confirmed by the High Court cannot be said to be faulty and conviction of the respondent-accused cannot be said to be illegal.

18. The next question relates to adequacy of sentence. Let us consider it on principle as well as in practice, in the light of statutory provisions.

19. Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefor.

20. The object of punishment has been succinctly stated in Halsbury's Laws of England, (4th Edition; Vol.II; para 482) thus;

"The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion

> to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided". (emphasis supplied)

21. In justice-delivery system, sentencing is indeed a difficult and complex question. Every Court must be conscious and mindful of proportion between an offence committed and penalty imposed as also its impact on society in general and the victim of the crime in particular.

22. In *B.G. Goswami v. Delhi Administration,* (1974) 3 SCC 85, this Court stated:

> "Now the question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and re-claim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining this question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentences both lose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal". (emphasis supplied)

[see also Salmond on Jurisprudence, (2004); p.94]

23. Penal laws, by and large, adhere to the doctrine of proportionality in prescribing sentences according to culpability of criminal conduct. Judges in principle agree that sentence ought always to commensurate with the crime. In practice, however, sentences are determined on other relevant and germane considerations. Sometimes it is the correctional need that justifies lesser sentence.

Sometimes the circumstances under which the offence is committed play an important role. Sometimes it is the degree of deliberation shown by the offender in committing a crime which is material. Sentencing is thus a delicate task which requires skill, talent and consideration of several factors, such as, the nature of offence, circumstances extenuating or aggravating- in which it was committed, prior criminal record of the offender, if any, age and background of the criminal with reference to education, home life, social adjustment, emotional and mental condition, prospects of his reformation and rehabilitation, etc. All these and similar other considerations can, hopefully and legitimately, tilt the scale on the propriety of sentence.

24. Moreover, social impact of the crime, particularly where it relates to offences against women, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude of imposition of meager sentence or too sympathetic view may be counter productive in the long run and against social interest which needs to be cared for, protected and strengthened by string of deterrence inbuilt in the sentencing system.

25. Sexual violence apart from being a dehumanizing act is also an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and leaves behind a traumatic experience. It has been rightly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female. The courts are, therefore, expected to try and decide cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge is a better armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and complicated provisos.

26. Once a person is convicted for an offence of rape, he should be treated with a heavy hand. An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court *[Dinesh v. State of Rajasthan,* (2006) 3 SCC 771*]*.

27. Now, let us consider the legal position in the light of statutory provisions and amendments made. The Law Commission took note of various decisions rendered by this Court from time to time wherein it was observed that considering the rise in crime and the growing menace to sexual abuse, necessary change should be made. The Law Commission, therefore, in its 84th Report stated:

> "It is often stated that a woman who is raped undergoes two crises- the rape and the subsequent trial. While the first seriously wounds her dignity, curbs her individual, 'destroys her sense of security and may often ruin her physically, the second is no less potent of mischief, inasmuch as it not only forces her to relive through the traumatic experience, but also does so in the glare of publicity in a

totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her.

In particular, it is now well established that sexual activities with young girls of immature age have a traumatic effect which often persists through life, leading subsequently to disorders, unless there are counter-balancing factors in family life and in social attitudes which could act as a cushion against such traumatic effects.

Rape is the 'ultimate violation of the self'. It is a humiliating event in a woman's life which reads to fear for existence and a sense of powerlessness. The victim needs empathy and safety and a sense of re-assurance. In the absence of public sensitivity to these needs, the experience of figuring in a report of the offence may itself become another assault.

Forcible rape is unique among crimes, in the manner in which its victims are dealt with by the criminal justice system. Raped women have to undergo certain tribulations. These begin with their treatment by the police and continue through a male-dominated criminal justice system. Acquittal of many de facto guilty rapists adds to the sense of injustice.

In effect, the focus of the law upon corroboration, consent and character of the prosecutrix and a standard of proof of guilt going beyond reasonable doubt have resulted in an increasing alienation of the general public from the legal system, who find the law and legal language difficult to understand and who think that the courts are not run so well as one would expect.

28. Pursuant to the Law Commission's Report, Parliament amended Sections 375 and 376, IPC by the Criminal Law (Amendment) Act, 1983. (ACT 43 of 1983). Sub-section (1) of Section 376 now prescribes minimum sentence of rigorous imprisonment of seven years on the person convicted under Section 376(1) unless the case is covered by proviso. Sub-section (1) read with proviso is material which reads thus:

376. Punishment for rape

(1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years. (emphasis supplied)

29. The proviso to sub-section (1) of Section 376, IPC thus enjoins the Court if

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it imposes less than the minimum sentence of seven years rigorous imprisonment on an offender of rape to record 'adequate and special reasons' in the judgment. Recording of reasons is, therefore, *sine qua non* or condition precedent for imposing sentence less than the minimum required by law. Moreover, such reasons must be both (i) 'adequate' and (ii) 'special'. What is 'adequate' and 'special' would depend upon several factors and no strait-jacket formula can be laid down as a rule of law of universal application.

30. In the instant case, 'special' and 'adequate' reasons according to the learned Judge of the High Court were; (i) the respondent was an 'illiterate agriculturist from rural area' and (ii) an amount of fine of Rs.2,500/- was imposed on him. No other reason whatsoever has been mentioned in the judgment, nor is found from the record of the case. With respect to the learned Judge, in our considered opinion, the so called reasons can neither be said to be 'special' nor 'adequate'. On the contrary, in the Special Leave Petition seeking leave to appeal, the applicant-State has averred that the learned Judge was in the habit of passing such orders by reducing sentence to the period 'already undergone' in serious offences punishable under Sections 304, 307, 376, etc. A list is also given of some of the matters decided by him. Our attention was also invited by the learned Government Advocate that in several cases, this Court has set aside the decisions rendered by the same learned Judge.

31. In our judgment, by passing the order impugned in the present appeal and by reducing the sentence imposed on the respondent by the trial Court to the 'period already undergone' which was only two months and three days, the learned Judge of the High Court has committed grave illegality which had resulted in 'miscarriage of justice'. There were no reasons much less 'adequate' and 'special' reasons to reduce the sentence less than the minimum required to be imposed under sub-section (1) of Section 376, IPC. The order is, therefore, liable to be set aside. On the facts and in the circumstances of the case, in our opinion, the trial Court was wholly right and fully justified in awarding rigorous imprisonment for seven years as envisaged by sub-section (1) of Section 376, IPC and there was no earthly reason to interfere with the said order by the High Court. The appeal, therefore, deserves to be allowed.

32. For the foregoing reasons, the appeal filed by the State is allowed. The order of conviction recorded by the trial Court and confirmed by the High Court is upheld. The High Court was, however, wrong in reducing the sentence and the trial Court rightly imposed rigorous imprisonment of seven years on the respondent-accused. We, therefore, restore that part of the order of the trial Court directing the respondent to suffer rigorous imprisonment for seven years. It goes without saying that the period of sentence already undergone by the respondent-accused will be given set off.

33. Ordered accordingly.

I.L.R. [2008] M. P., 16
SUPREME COURT OF INDIA
Before Mr. Justice Arijit Pasayat and Mr. Justice R.V. Raveendran
12 December, 2007

M.P. STATE ELECTRICITY BOARD & anr. ... Appellants*
Vs.
GRASIM INDUSTRIES LTD. ... Respondent

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

Obviously, the Division Bench of the High Court has not considered the effect of the underlined observations of this Court regarding the permissibility to delete provisions for payment on security deposits, as noted in the said paragraph 158. This has to be decided on the factual position of each case. We find that in the order of the learned Single Judge which formed the subject matter of challenge in the LPAs, there are certain factual conclusions arrived at by learned Single Judge. The Division Bench has not dealt with the acceptability or otherwise of the view and has only referred to paragraph 158 to hold that it cannot be done, overlooking the underlined portion relating to the permissibility for such a course to be adopted.

In the aforesaid circumstances, we deem it proper to set aside the impugned judgment in each case and remit the matter to the High Court for a fresh consideration in the light of what has been stated in paragraph 158 so far as it relates to the Boards' powers to delete provision relating to payment of interest on security deposits on the factual scenario. We make it clear that we have not expressed any opinion on the merits of the case. (Paras 15 and 16)

Case Referred :

(1) (1993) Supp. (4) SCC 136.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by DR. ARIJIT PASAYAT, J.:–In each of the appeals challenge is to the order passed

*C. A. 1019/2006.

by a Division Bench of the Madhya Pradesh High Court, Indore Bench, in Letters Patent Appeals/writ petitions filed by the respondents in each case. CA nos. 1033 and 1034 of 2006 have been filed with leave to file special leave petition. It is to be noted that while allowing the writ petitions filed, the High Court placed reliance on the judgment rendered in the Letters Patent Appeal filed under clause 10 of the Letters Patent by Grasim Cement, Raipur, i.e. LPA 20207 of 1997. In the cases where the Letters Patent Appeals were filed, learned Single Judge had decided in favour of the appellant-Board.

2. Challenge in the writ petitions filed, which were decided related to the illegality of action taken by the appellant-Board in deleting Clauses 21(f) & 21(g) of the Board's General Conditions for Supply of Electrical Energy and The Sale of Miscellaneous and General Charges. These related to agreement for payment of interest on security deposits. The notification is dated 24.1.1996. Learned Single Judge in the cases which were subject matter of the Letters Patent Appeal held that such a course was permissible. Reliance for the purpose was placed on a decision of this Court in *Ferro Alloys Corpn. Ltd. V. A.P. State Electricity Board and Anr.* (1993 Supp (4) SCC 136). While deciding the appeals and the writ petitions, the Division Bench held that the view of the learned Single Judge is not correct and for the purpose relied on paragraph 158 of the judgment in *Ferro Alloys case* (supra).

3. Mr. C.S. Vaidyanathan, learned senior counsel for the appellant-Board submitted that the Division Bench read only apart of paragraph 158 of the judgment and not the relevant part which empowers the Board to delete such a condition.

4. It is submitted that notification dated 24/1/1996 was issued in exercise of powers conferred under Section 49 of the Electricity (Supply) Act, 1948 (in short the 'Supply Act').

5. Learned counsel for the respondent, on the other hand, observed that this Court categorically in paragraph 158 noted the lack of power to delete the condition relating to payability of interest on security deposits.

6. It is to be noticed that in *Ferroy Alloys case* (supra), this Court was dealing with two categories of consumers in different States. One category related to Boards' regulations for the States of Andhra Pradesh, Uttar Pradesh and Bihar, where there was provision for payment of interest. In respect of some other States such as, Rajasthan and Orissa, there was no such provision. This Court in paragraphs 143 and 145 held that where there is no provision for payment of interest, the same is not illegal. We are not concerned with that category of cases.

7. Since the fate of these appeals primarily depends upon the view expressed by this Court in *Ferro Alloys case* (supra) at paragraph 158, this paragraph needs to be noticed. The same reads as follows:

> "In view of the above finding, upholding the clause relating to non-payment of interest, for example, Rajasthan and Orissa, what is to happen to such of those cases where interest is provided like Andhra Pradesh, Uttar Pradesh and Bihar? In all those cases, wherever the Electricity Boards have framed a provision for payment of interest after adjusting its finances at a stated rate

they cannot be allowed to delete such a clause. The provision for interest has been made by the various Boards having regard to the overall budgetary and financial position and further, keeping in view the quantum and mode of security deposit and billing and recovery practice. Nor again, could the Board withhold payment of interest on the basis of this judgment. However, if there is any change in the circumstances affecting the budgetary and financial position, the Board can examine the case and decide the future course of action. But any change resulting in non-payment or reduction of interest will have to be justified by cogent reasons and materials having a bearing on the financial position of each Board and facts and circumstances of each case."

(Underlined for emphasis)

8. Indisputably a bare reading of paragraph 158 quoted above shows that it is permissible for the Board to take a decision relating to the desirability for payment of interest on security deposits or otherwise.

9. Each of the Electricity Boards before us is a State within the meaning of Article 12 of the Constitution of India. The Boards are different from licensees. Each of the Boards has framed its own terms and conditions of supply. One such condition relates to security deposits. Such a deposit varies from Board to Board. For example, under the terms and conditions notified by Andhra Pradesh Electricity Board under Condition No. 28.1.1, the consumer is required to deposit with the Board a sum in cash equivalent to estimated three months consumption charges. In the case of Rajasthan, the security is in the form of cash for one month and bank or insurance guarantee for two months.

10. The legislative sanction behind the power of the Board to direct a consumer to furnish security may be examined. It has already been seen that the Supply Act is complementary to the Electricity Act, 1910. Section 26 of the Supply Act states that the Board shall have all the powers and obligations of a licensee under the Electricity Act. And this shall be deemed to be a licence of the Board for the purpose of the Act. Under the regulations framed by the Board in exercise of powers of Section 49 read with Section 79(j) the consumer is only entitled and the Board has an obligation to supply energy to the consumer upon such terms and conditions as laid down in the regulations. If, therefore, the regulations prescribed a security deposit that will have to be complied with. It also requires to be noticed under Clause (6) of Schedule II of the Electricity Act that the requisition for supply of energy by the Board is to be made under proviso (a) after a written contract is duly executed with sufficient security. This, together with the regulations stated above, would be enough to clothe it with legal sanction. In cases where regulations have not been made Rule 27 of the Rules made under the Electricity Act enables the adoption of model form of draft conditions of supply. Annexure VI in Clause 14 states that the licensee may require any consumer to deposit security for the payment of his monthly bills for energy supplied and for the value of the meter and other apparatus installed in his premises. Thus, the Board has the power to make regulations to demand security from the consumers.

11. The next question will be: what is the object in demanding security? The deposit though called security deposit is really an adjustable advance payment of consumption charges. The payment is in terms of the agreement interpreting the conditions of supply. This security deposit is revisable from time to time on the basis of average consumption charges depending upon the actual consumption over a period. This is the position under the terms of supply of energy with reference to all the Boards.

12. For supply of electricity the Board needs finance for production, supply and other charges necessary for supply of electricity. For this purpose, it takes loans from various financial institutions. This is best illustrated if one looks at the transactions of Punjab Electricity Board where electric energy is generated through hydro as well as thermal plants for ultimate sale to the consumers. Of the total power generated about 50 per cent is through hydro plants. The remaining energy is generated through thermal power plants which are operated on coal/oil. Due to limited hydro resources within the State of Punjab the dependency on power on thermal plants is on the increase. The present requirement for working of thermal plants is more than 52 lakh tonnes of coal per annum. In addition, 60 thousand kilo litre of furnace oil is required. The coal companies/Coal India Limited together with major suppliers or power plant like M/s. BHEL demand cost of coal/spares/ projects in advance for the supply of material. The Board is also required to purchase power from Central projects N.T.P.C., N.H.P.C. in order to meet the demand for power by the consumers. For purchase of such power again advance payments are made by the Board. On such advances the Board is not paid interest. The effect is, the Board is obliged to bear the liability of hundreds of crores of rupees per annum. It has no option but to pay the charges and deposits in order to keep the power available at a level to meet with the demand of the consumers. It is the case of the Board that it has opened letters of credit by making advance deposits in favour of National Thermal Power Corporation and the suppliers. Coal India Limited has also asked the Board to open revolving letters of credit in favour of coal companies/Coal India Limited. Despatch of coal is only against the letter of credit.

13. In the above premises, it follows that there is nothing to indicate under the scheme of the Electricity Act or Schedule VI of the Supply Act that interest must be paid on the security deposit.

14. These aspects have been highlighted in *Ferro Alloys case* (supra).

15. Obviously, the Division Bench of the High Court has not considered the effect of the underlined observations of this Court regarding the permissibility to delete provisions for payment on security deposits, as noted in the said paragraph 158. This has to be decided on the factual position of each case. We find that in the order of the learned Single Judge which formed the subject matter of challenge in the LPAs, there are certain factual conclusions arrived at by learned Single Judge. The Division Bench has not dealt with the acceptability or otherwise of the view and has only referred to paragraph 158 to hold that it cannot be done, overlooking the underlined portion relating to the permissibility for such a course to be adopted.

16. In the aforesaid circumstances, we deem it proper to set aside the impugned judgment in each case and remit the matter to the High Court for a fresh consideration in the light of what has been stated in paragraph 158 so far as it relates to the Boards' powers to delete provision relating to payment of interest on security deposits on the factual scenario. We make it clear that we have not expressed any opinion on the merits of the case.

17. The appeals are disposed of accordingly with no orders as to costs.

Appeal disposed of.

I.L.R. [2008] M. P., 20
FULL BENCH
Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice Dipak Misra, Mr. Justice Abhay Gohil, Mr. Justice S. Samvatsar and Mr. Justice Rajendra Menon
2 November, 2007

STATE OF MADHYA PRADESH and anr . ...Applicants*
Vs.
M/S SHEKHAR CONSTRUCTIONS ...Non-applicant

A. Constitution of India - Articles 226/227 - Academic Issues - Courts should be reluctant to decide constitutional points merely as matters of academic importance. (No Para)

B. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983)–Section 19, Limitation Act, 1963, Section 5,29(2) - Question whether in view of Section 29(2) of Adhiniyam, 1983, provisions of Sections 4 to 24 applies to revision filed under Adhiniyam, to condone delay referred to Larger Bench - Held - Provisions of Limitation Act do not apply to revision preferred under Section 19 of Adhiniyam, 1983.

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

(Para 16)

*C.R. 142/2005. Gwalior

C. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983)–Section 19 - *Suo Motu* power of Revision - High Court can exercise the power of revision *suo motu* within a reasonable period of time.

Be it placed on record in the case of *Pandey Construction Co.* (supra) the Full Bench has expressed the opinion that the High Court can exercise the power of revision *suo motu* and call for the records and award from the Tribunal and a such a power can be exercised within a reasonable period of time considering the facts and circumstances of the case and the nature of the order which is being revised. The said view is in accord with the language employed under Section 19 of the 1983 Act and hence, we concur with the same. (Para 17)

Cases Referred :

(1) 2005(2) MPLJ 550, Affirmed, (2) 2004(1) MPJR 373 = 2004(2) MPHT 179 (3) 2004 (II) MPJR 374, (4) (1997) 8 SCC 31, (5) AIR 1960 SC 378, (6) 2004(II) MPJR SN 55, (7) (2003) 2 SCC 577, (8) (2001) 8 SCC 470, (9) Civil Revision 155/2003 decided on 25-8-03, (10) (2002) 8 SCC 361, (11) (2002) 3 SCC 202, (12) AIR 2003 SC 1455, (13) (2004) 9 SCC 100, (14) (1993) 3 SCC 114, (15) (2002) 4 SCC 638, (16) AIR 1970 SC 1002, (17) (199) 4 SCC 139.

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

Ankur Mody, Adv. alongwith *Vijay Sunderam, Deependra Raghuvanshi* for the Non-applicant.

Cur.adv.vult

ORDER

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

> "(i) Whether after amendment in section 19 of the Adhiniyam application for extending the period of limitation in filing revision can be entertained if court is satisfied that petitioner was prevented from sufficient cause can be examined by the court in cases where cause of action for filing revision is accrued to the petitioner under the unamended provision of section 19 and period of limitation is expired before the amendment in the Adhiniyam?
>
> (ii) Whether the application to condone the delay will be maintainable and the amended provision of section 19 of the Adhiniyam will have retrospective operation for pending petitions before the court.?"

2. The matter was placed before the Bench consisting of three Judges. The Full Bench while answering the question expressed its doubt with regard to the

legal substantiality of the decisions rendered by another Full Bench in *M.P.State Electricity Board, Jabalpur Vs. Pandey Construction Company,* 2005 (2) MPLJ 550. This led to framing of the following question for consideration by a larger Bench:-

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

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

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

> "6. In our view, the submissions of learned counsel for the appellant are liable to be accepted. The High Court had noticed that the matter had become academic and in fact, observed at the end of the judgment as follows:
>
> "Mr.Dattu, learned government pleader, pointed out that 1977 notification had since been superseded by 1984 notification which extended the benefit to all and therefore, striking down 1977 notification would be academic. It may appear to be so."
>
> But the High Court went on to observe that it was nonetheless deciding the issue, so that in future when power is exercised by the State, the State could benefit by what was stated in the judgment."

Thereafter, their Lordships proceeded to state as follows:-

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

Again their Lordships in paragraph 8 held as under:-

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

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

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

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

7. To appreciate the controversy in proper perspective the factual backdrop in the case of *Pandey Construction Co.* (supra) needs to be exposited. A Civil Revision was filed under Section 19 of the 1983 Act before this Court. The said revision was barred by limitation. An application was filed seeking condonation of delay. On behalf of the respondents a preliminary objection was advanced that the delay was not condonable in view of the decision rendered in *Nagar Palika Parishad, Morena vs. Agrawal Construction Co.*, 2004(II) MPJR SN 55. It is worth-noting a Special Leave Petition was preferred against the decision of the Division Bench in *Nagarpalika Parishad Morena* (supra) and the Apex Court dismissed the Special Leave Petition. Regard being had to the preliminary objection raised, two questions were referred by the Division Bench for consideration by the Full Bench:-

> "(a) Whether the power of High Court for exercise of revisional jurisdiction under section 19 of the M.P. Madhyastyam Adhikaran Adhiniyam, 1983 is totally constricted and restricted to a period of three months of the passing of the award which is the limitation prescribed for an aggrieved party or it can exercise such power of revision *suo motu* within a reasonable period of time that can travel beyond three months ?

(b) Whether the decision rendered in the case of *Nagarpalika Parishad vs. Agrawal Construction Co.*, 2004(2) MPLJR 374 would be a binding precedent ?

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

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

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

> "31. We, thus, answer the questions referred thus:
>
> (i) The decision rendered in *Nagarpalika Parishad, Morena vs. Agrawal Construction Co.*, 2004(II) MPJR 374, by the Apex Court while dismissing the special leave petition is a binding precedent. The High Court cannot condone the delay if revision is preferred by an aggrieved party beyond a period of three months under Section 19 of the Act of 1983.
>
> (ii) It is, however, open to the High Court to exercise *suo motu* revisional power under section 189 of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 even beyond period of three months of passing of award. However, such power has to be exercised within reasonable time considering the facts and circumstances of the case and the nature of the order which is being revised. While rejecting the revision petition filed by an aggrieved party as barred by limitation, if the circumstances so warrant, the High Court may decide to exercise the power of revision *suo motu* and call for the record and award from the Tribunal."

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

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

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

> "Petitioner by Shri D.K.Katare, Advocate.
>
> Respondent by Shri D.P.S. Bhadoriya and Shri Kamal Jain, Advocate.
>
> Heard on M.C.P. No. 795/2003. This application is under section 5 of the Limitation Act. Preliminary objection has been raised by respondent that provisions under section 5 of Limitation Act are not applicable to the proceedings arising out of Madhya Pradesh Madhyastham Adhikaran Adhiniyam. In support of their contention Counsel for respondent referred a case of *Nasiruddin and others vs. Sitaram and others*, reported in (2003) 2 SCC 577, and submitted that this being provisions of Limitation Act are not applicable. The Act has not provided any provision for condoning delay in filing the revision.
>
> Counsel for the petitioner submitted that since the powers under section 115 of the Code of Civil Procedure are conferred upon the High Court, therefore, provisions of Limitation Act will be applicable to the present case. Section 19 of the Adhiniyam clearly specifies that the revision shall be filed within three months from the date of passing of the award but this section does not provide for extension of time or condoning the delay in filing the revision filed beyond the period of three months. In the absence of any specific provision for condoning delay in filing revision cannot be condoned.
>
> The petitioner acquired knowledge of the award on 10-4-2003 after notice of execution was received. Thereafter they approached the Tribunal for certified copy on 5-5-2003 and received the certified copy on the same day and the revision is filed on 30-5-2003. Thus, the petitioner has not explained the delay between 10-4-2003 to 5-5-2003 and from 5-5-2003 till 30-5-2003. As such in the application sufficient cause has also not been shown. Even otherwise since provisions of Limitation Act are not applicable to the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, the application is dismissed.
>
> Consequently, M.C.P. No.794/2003 is also dismissed and the Civil Revision is dismissed as barred by limitation."

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

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

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

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

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

"12. Mr.Rao then placed reliance on yet another decision of this Court in the case of *A-One Granites v. State of U.P.* to which one of us (Pattanaik J.) was a party. In that particular case the applicability of Rule 72 of the U.P. Minor Minerals (Concession) Rules, 1963 was one of the bones of contention before this Court, and when the earlier decision of the Court in *Prem Nath Sharma v. State of U.P.* was pressed into service, it was found out that in *Prem Nath Sharma case* the applicability of Rule 72 had never

been canvassed and the only question that had been canvassed was the violation of the said Rules. It is in this context, it was held by this Court in Granite case as the question regarding applicability of Rule 72 of the Rules having not been referred to, much less considered by Supreme Court in the earlier appeals, it cannot be said that the point is concluded by the same and no longer res integra (SCC p. 544, para 14).

This dictum will have no application to the case in hand on the question whether the judgment of this Court in Civil Apepal No.398 of 1972 can be held to be a law declared under Article 141."

Thereafter, their Lordships proceeded to state as follows:-

"15. Bearing in mind the host of decisions cited by Mr.Rao and on examining the judgment of this Court dated 6-2-1986 in Civil Appeal No. 398 of 1972 we have no doubt in our mind that the conclusion of the Court that the amendments are constitutionally valid and the view expressed by the Andhra Pradesh High Court is erroneous is a conscious decision of the Court itself on application of mind of the provisions of the Act. It is no doubt true that the counsel for respondent Venkatagiri had indicated that the respondent will have no objection to the judgments and orders of the High Court under appeal, being set aside. But that by itself would not tantamount to hold that the judgment is a judgment on concession. Even after recording the stand of the counsel appearing for Venkatagiri when the Court observed "we are also of the view that the two amendments referred to above, are constitutionally valid", the same is unequivocal determination of the constitutional validity of the amended Act, it cannot be dubbed as a conclusion on concession, nor can it be held to be a conclusion without application of mind, particularly when the very constitutionally of the Amendment Act was the core question before the Court. It is also apparent from the further direction when the Court holds

"we further make it clear that the period during which interim payments are payable under the abovesaid Act ends with the date of the original determination by the Director under Section 39(1) thereof."

This conclusion is possible only after application of mind to the provisions of Section 39 as well as other provisions and the amendment that was brought into the statute-book. In the aforesaid premises, our answer to the first question is that the decision of this Court dated 6-2-1986 must be held to be a "law declared" within the ambit o Article 141 of the Constitution and the constitutional validity of the amendment Act, 1971 is not open to be reagitated and that the judgment of the Andhra Pradesh High Court holding the amendment Act to be constitutionally invalid had been set aside by this Court."

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

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

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

I.L.R. [2008] M. P., 28
WRIT APPEAL
Before Mr. A.K. Patnaik Chief Justice and Mr. Justice Ajit Singh
20 November, 2007

MADHYA PRADESH STATE ELECTRICITY BOARD & anr ... Appellants*
Vs.
M/S. ANAND TRANSFORMERS PVT. LTD. & ors. ... Respondents

A. Constitution of India, Article 226-The Petitioner/Appellant supplied goods to Respondent-Respondent executed sixteen promissory notes in favour of Petitioner/Appellant for price of goods–The Respondent not paid the amount of PN on due date-A petition under Article 226 of Constitution filed-Petition allowed by Single Judge-Order challenged in Writ Appeal-Held-It is undisputed that petitioner has supplied goods in time and the respondent has executed P.N.-In the matter High Court can exercise Jurisdiction under Article 226-Order of Single Judge affirmed-Writ Appeal dismissed.

The exact language used by the learned Single Judge in the impugned order is as follows:

*W.A. 719/2007, Jabalpur

"Accordingly, it is hereby directed that the balance amount of promissory notes be paid to the petitioner along with interest at the rate of 15.97% per annum on or before 30th June, 2007. If the said amount is not paid to the petitioner within that period, the rate of interest shall be enhanced to 18% per annum. The security amount of Rs.5,00,000/- (Rs.Five lacs) of the petitioner which is with respondent no.2- M.P.State Electricity Board shall be refunded to the petitioner on or before 31st March, 2007, failing which it shall carry interest at the rate of 6% per annum w.e.f. 1st April, 2007."

It is clear that by the impugned order the learned Single Judge has directed that the balance amount of promissory notes has to be paid along with interest at the rate of 15.97% per annum on or before 30-6-2007 and if the amount is not paid to the respondent no. 1, the rate of interest has to be enhanced to 18% per annum. As we have seen, the total amount covered under the 16 promissory notes was Rs.1,04,43,764/- and admittedly, no amount in addition to Rs.1,04,43,764/- has been paid by the appellants to the respondent no. 1. Thus, only the amount of the promissory notes has been paid and no interest in addition to the amount of promissory notes has to be paid to the respondent no. 1 as per the directions of the learned Single Judge in the impugned order. Therefore, the appellants are liable to pay interest over and above the amount of Rs.1,04,43,764/- to the respondent no. 1. (Para 13)

B. Negotiable Instrument Act (26 of 1881)-Section 80-No rate of interest shown in PN-Section 80 will come into play-interest @ 18 p.a. is payable w.e.f. due date of payment till realization.

We find on a reading of the writ petition, particularly paras 3 and 6.5 thereof, that the claim of respondent no. 1 to the interest on the outstanding amount at the rate of 18% per annum is based on section 80 of the Negotiable Instruments Act, 1881 which is quoted herein below:

"80. Interest when no rate specified. - When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of eighteen per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs."

The language of section 80 is clear that when no rate of interest is specified in the instrument, the interest on the amount due thereon shall, be calculated at the rate of eighteen per centum per annum, from the date at which the same ought to have been paid by the party charged. The promissory notes in the present case mention the rate of interest on the original amount due up to the date of payment of the promissory notes and such interest has been included in the amounts of the promissory notes The 16 promissory notes do not specify any rate of interest on the amounts due under the promissory notes. Hence, section 80 of the

Negotiable Instruments Act, 1881 is applicable and the learned Single Judge was right in directing the appellant to pay interest at the rate of 18% per annum on the amounts of promissory notes if the same were not paid by 30-6-2007. (Para 16).

Case Referred :

(1) (2002) 10 SCC 210.

Mukesh Agarwal, for the appellants.
J.P. Sanghi, for the respondents.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A. K. PATNAIK, C. J.** :–This is an appeal against the order dated 1-3-2007 passed by the learned Single Judge in Writ Petition No. 8449/2005 *(M/S Anand Transformers Pvt. Ltd. Vs. State of M. P. and others).*

2. The relevant facts briefly are that orders for supply of transformers were placed on respondent no. 1 by the Madhya Pradesh Electricity Board and the respondent no.1 supplied the transformers at Jabalpur in the State of Madhya Pradesh. The Madhya Pradesh Electricity Board could not pay the price of the transformers to the respondent no. 1 due to financial difficulties. Thereafter sixteen promissory notes were executed by the Madhya Pradesh Electricity Board for various amounts towards the dues inclusive of interest at the rates specified in the promissory notes payable by the Madhya Pradesh Electricity Board to the respondent no. 1 and the payments under the promissory notes were guaranteed by the State Government.

3. Thereafter the erstwhile State of Madhya Pradesh was bifurcated into Madhya Pradesh and Chhattisgarh by the Madhya Pradesh Reorganisation Act, 2000. After such bifurcation, the Madhya Pradesh State Electricity Board and Chhattisgarh State Electricity Board were constituted under section 58 of the Madhya Pradesh Reorganisation Act, 2000. When the amounts of promissory notes were not paid, respondent no. 1 filed Writ Petition No. 8449/ 2005 before this Court under Article 226 of the Constitution of India contending *inter alia* that the Madhya Pradesh State Electricity Board and the State Government were liable to pay the amounts mentioned in the promissory notes and interest on the outstanding amounts at the rate of 18% per annum from the dates when the amounts were to be paid. The Madhya Pradesh State Electricity Board filed a return and contended *inter alia* that the writ petition was for recovery of dues arising out of commercial transactions and was not maintainable under Article 226 of the Constitution and the remedy of the respondent no. 1 was to file a civil suit. The Madhya Pradesh State Electricity Board also contended in the return that the Madhya Pradesh Electricity Board, which executed the promissory notes, was no longer in existence because after the Madhya Pradesh Reorganisation Act, 2000 two new Boards viz Madhya Pradesh State Electricity Board and Chhattisgarh State Electricity Board have come into existence and the respondent no. 1 is trying to enforce the liability of Madhya Pradesh Electricity Board against the Madhya Pradesh State Electricity Board. The Madhya Pradesh State Electricity Board also contended in the return that the guarantee for the payment of the

amounts mentioned in each of the promissory notes was given by the erstwhile State of Madhya Pradesh before its bifurcation and the new States of Madhya Pradesh and Chhattisgarh after Madhya Pradesh Reorganisation Act, 2000 had not been impleaded as parties and, therefore, the writ petition was liable to be dismissed.

4. In the impugned order dated 1-3-2007 the learned Single Judge held that it was not in dispute that the amounts under the promissory notes, inclusive of interest at the rate of 15.97% per annum, were agreed to be paid to the respondent no. 1 and that the promissory notes were guaranteed by the State of Madhya Pradesh and, therefore, both the Madhya Pradesh State Electricity Board and the State of Madhya Pradesh were jointly and severally liable to make the requisite payment to the respondent no. 1. By the impugned order, the learned Single Judge directed that the balance amount of promissory notes be paid to the respondent no. 1 along with interest at the rate of 15.97% per annum on or before 30th of June, 2007 and if the balance amount is not paid to the respondent no. 1 before 30th of June, 2007 the rate of interest shall be enhanced to 18% per annum. By the impugned order the learned Single Judge further directed that the security amount of Rs. 5,00,000/ - (Rs.Five lacs) which is with the Madhya Pradesh State Electricity Board shall be refunded to the respondent no. 1 on or before 31st March, 2007 failing which it shall carry interest at the rate of 6% per annum with effect from 1st April 2007. Aggrieved, the Madhya Pradesh State Electricity Board and its Chief Engineer (appellant nos. 1 and 2) have filed this appeal.

5. Mr. Mukesh Agarwal, learned counsel for the appellants, submitted that the liabilities of the erstwhile Madhya Pradesh Electricity Board are yet to be apportioned between the Madhya Pradesh State Electricity Board and Chhattisgarh State Electricity Board and that a civil suit between the Madhya Pradesh Electricity Board and Chhattisgarh State Electricity Board is pending and an order of *status quo* has been passed by the Supreme Court. He submitted that until the liabilities of erstwhile Madhya Pradesh Electricity Board are apportioned between the Madhya Pradesh State Electricity Board and the Chhattisgarh State Electricity Board, no directions can be issued to the Madhya Pradesh State Electricity Board to make any payment to the respondent no. 1.

6. Mr. J. P. Sanghi, learned Senior Counsel for the respondent no. 1, on the other hand, submitted that the respondent no. 1 is in no way concerned with the apportionment of liabilities of the erstwhile Madhya Pradesh Electricity Board between the Madhya Pradesh State Electricity Board and Chhattisgarh State Electricity Board. He submitted that respondent no. 1 has supplied the transformers at Jabalpur to the erstwhile Madhya Pradesh Electricity Board within the State of Madhya Pradesh and the respondent no. 1 is not a party to any agreement or arrangement with regard to apportionment of liabilities between the Madhya Pradesh State Electricity Board and Chhattisgarh State Electricity Board and the Madhya Pradesh State Electricity Board and the State Government of Madhya Pradesh are jointly and severally liable to the respondent no. 1 under the promissory notes and the Negotiable Instruments Act, 1881 to pay the amounts under the promissory notes and interest to the respondent no. 1.

7. We agree with Mr. Sanghi that apportionment of liabilities is a matter between

the Madhya Pradesh State Electricity Board and Chhattisgarh State Electricity Board and the dispute between the two electricity boards with regard to any liability cannot have any effect on the liabilities under the promissory notes executed by the erstwhile Madhya Pradesh Electricity Board and under the Negotiable Instruments Act, 1881. Section 62 of the Indian Contract Act, 1872 provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. Illustration (c) under section 62 of the Indian Contract Act, 1872 states that if A owes B 1,000 rupees under a contract, B owes C 1,000 rupees, B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement, B still owes C 1,000 rupees, and no new contract has been entered into. Hence, unless the respondent no. 1 gives its assent to any new contract or arrangement between the Madhya Pradesh State Electricity Board and Chhattisgarh State Electricity Board for apportionment of liabilities of the Madhya Pradesh Electricity Board, the Madhya Pradesh Electricity Board is liable to pay to the respondent no. 1 all dues under the promissory notes and Negotiable Instruments Act, 1881. No case has been made out before us that this particular liability under the promissory notes executed by the erstwhile Madhya Pradesh Electricity Board and the guarantee documents issued by the State Government has not been taken over by the Madhya Pradesh State Electricity Board and the Madhya Pradesh Government after the Madhya Pradesh Reorganisation Act, 2000, or that the liability under the promissory notes and the guarantee documents stands partly transferred to the Chhattisgarh State Electricity Board and the Chhattisgarh Government. On the other hand, there are clear provisions in sub-section (4) of section 58 to show that upon dissolution of the existing Board meaning thereby the erstwhile Madhya Pradesh Electricity Board the assets, rights and liabilities which shall pass to the new Board and the Madhya Pradesh State Electricity Board has, in fact, already paid a total amount of Rs. 1,04,43,764/- to the respondent no. 1 towards the liabilities of the Madhya Pradesh Electricity Board under the 16 promissory notes.

8. Mr. Agarwal next submitted that the amounts inclusive of interest under the promissory notes totaling to Rs.1,04,43,764/- have been paid to respondent no. 1 through the Central Bank by 30-6-2007 during the pendency of the writ appeal. He further submitted that this amount of Rs.1,04,43,764/- included the principal amount of Rs.82,57,960/- and interest of Rs.21,85,804/-. Mr. Sanghi, on the other hand, submitted that the sum of Rs.1,04,43,764/- is the total amount of the promissory notes inclusive of interest up to the date of maturity of the promissory notes.

9. The 16 promissory notes, which were executed by the Madhya Pradesh Electricity Board in favour of respondent no. 1, are all identically worded and the first promissory note no. 665 dated 5-11-1997 is extracted herein below:

> "MADHYA PRADESH ELECTRICITY BOARD
>
> No.MPEB/SIDBI/97-98/665, Jabalpur, dated 5 NOV. 1997
> Rs. 2,57,221/-
>
> 57 months after date (inclusive of days of grace), we, the Madhya Pradesh Electricity Board, Jabalpur, promise to pay at Central Bank of India, Faizabad, or at the Small Industries Development

Bank of India, Bhopal, to M/s Anand Transformers Pvt. Ltd., Faizabad, or order the sum of Rupees Two lacs fifty seven thousand two hundred twenty one only inclusive of interest at 15.97% per annum for value received."

FOR & ON BEHALF OF
MADHYA PRADESH ELECTRICITY BOARD"

It will be clear from the language of the promissory note dated 5-11-1997 extracted above that the total amount for which the promissory note has been executed is Rs. 2,57,221/- inclusive of interest at the rate of 15.97% per annum and the interest was added to the original amount because the promissory note was due and payable after 57 months.

10. All other promissory notes are identically worded except that the rate of interest in some promissory notes was different. The details of the sixteen promissory notes are given in the chart below:

Sl. No.	Annexure in W.A.No. 719/07	Amount of pronote	Rate of interest	Year	Pronote No. & Date
1	2	3	4	5	6
1	P-7	257221	15.97	97-98	665/05.11.1997
2	P-9	534390	15.97	97-98	695/18.11.1997
3	P-11	279256	15.97	97-98	755/25.11.1997
4	P-13	1070171	15.97	97-98	1205/21.02.1998
5	P-15	788596	15.97	97-98	1550/28.03.1998
6	P-16	1684346	15.97	98-99	1434/28.11.1998
7	P-17	826472	15.97	98-99	1819/01.01.1999
8	P-18	809584	15.97	98-99	2144/16.02.1999
9	P-20	660225	15.12	99-2000	1723/23.02.2000
10	P-21	522875	15.12	99-2000	725/23.02.2000
11	P-23	708194	15.12	99-2000	1728/24.02.2000
12	P-24	560865	15.12	99-2000	1730/24.02.2000
13	P-26	350318	15.12	99-2000	1803/08.03.2000
14	P-27	277439	15.12	99-2000	1805/08.03.2000
15	P-29	621559	15.12	99-2000	1798/09.03.2000
16	P-30	492253	15.12	99-2000	1800/09.03.2000
	TOTAL	**10443764**			

The total amount of Rs.1,04,43,764/- includes the interest on the amount originally due towards supply of transformers, but since the total amount due towards the supply of transformers were to be paid after the period mentioned in the promissory notes, interest at the rate mentioned therein was added on to the amount originally payable towards the supply of transformers and this original amount together with interest constitutes the amount of promissory notes.

11. Mr. Agarwal next submitted that the learned Single Judge ought not to have directed in the impugned order for payment of interest at the rate of 15.97% per annum when interest payable on some of the promissory notes was 15.12% per annum instead of 15.97% per annum. We find a lot of force in the submission of

Mr.Agarwal. It will be clear from the aforesaid chart that in the first eight promissory notes the rate of interest was mentioned as 15.97% per annum but in the second eight promissory notes the rate of interest was mentioned as 15.12% per annum. Hence, the impugned order passed by the learned Single Judge directing the payment of interest at the rate of 15.97% per annum in the case of all promissory notes was not correct. Mr. Sanghi, however, submitted that this mistake in the impugned order of the learned Single Judge is of no consequence because the amounts of pronotes of all the 16 promissory notes have been mentioned in the pronotes and the amounts include the interest calculated upto the dates on which the amounts were to be paid.

12. Mr. Agarwal next submitted that since the entire amount of the promissory note was paid by 30-6-2007 no amount was further payable towards interest to respondent no. 1. Mr. Sanghi, on the other hand, submitted that the learned Single Judge has directed that the balance amount of promissory notes be paid to the respondent no. 1 along with the interest at the rate of 15.97% per annum on or before 30-6-2007 and this would mean not only the amount of promissory note but also interest at the rate of 15.97% per annum from the calculation of the date of maturity of promissory notes has to be paid to the respondent no. 1 on or before 30.6.2007.

13. The exact language used by the learned Single Judge in the impugned order is as follows:

> "Accordingly, it is hereby directed that the balance amount of promissory notes be paid to the petitioner along with interest at the rate of 15.97% per annum on or before 30th June, 2007. If the said amount is not paid to the petitioner within that period, the rate of interest shall be enhanced to 18% per annum. The security amount of Rs.5,00,000/- (Rs.Five lacs) of the petitioner which is with respondent no.2- M.P.State Electricity Board shall be refunded to the petitioner on or before 31st March, 2007, failing which it shall carry interest at the rate of 6% per annum w.e.f. 1st April, 2007."

It is clear that by the impugned order the learned Single Judge has directed that the balance amount of promissory notes has to be paid along with interest at the rate of 15.97% per annum on or before 30-6-2007 and if the amount is not paid to the respondent no. 1, the rate of interest has to be enhanced to 18% per annum. As we have seen, the total amount covered under the 16 promissory notes was Rs.1,04,43,764/- and admittedly, no amount in addition to Rs.1,04,43,764/- has been paid by the appellants to the respondent no. 1. Thus, only the amount of the promissory notes has been paid and no interest in addition to the amount of promissory notes has to be paid to the respondent no. 1 as per the directions of the learned Single Judge in the impugned order. Therefore, the appellants are liable to pay interest over and above the amount of Rs.1,04,43,764/- to the respondent no. 1.

14. Mr. Agarwal next submitted that the claim of respondent no. 1 to interest on Delayed Payments to Small-Scale and Ancillary Industrial Undertaking Act, 1993 and such claim cannot be allowed by the High Court in exercise of the

powers under Article 226 of the Constitution of India. He cited the decision of the Supreme Court in *Equipment Conductors and Cables Ltd. Vs. Haryana State Electricity Board and another* (2002) 10 SCC 210 in support of his submission that the claim of interest under the Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 can only be made in a suit or other proceeding but not in a writ petition.

15. Mr. Sanghi, on the other hand, submitted that in the writ petition interest at the rate of 18% per annum was claimed under section 80 of the Negotiable Instruments Act, 1881 and the language of section 80 is clear that when no rate of interest is specified in the instrument, interest on the amount due thereon shall, be calculated at the rate of 18% per annum from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon.

16. We find on a reading of the writ petition, particularly paras 3 and 6.5 thereof, that the claim of respondent no. 1 to the interest on the outstanding amount at the rate of 18% per annum is based on section 80 of the Negotiable Instruments Act, 1881 which is quoted herein below:

> "80. Interest when no rate specified. - When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of eighteen per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs."

The language of section 80 is clear that when no rate of interest is specified in the instrument, the interest on the amount due thereon shall, be calculated at the rate of eighteen per centum per annum, from the date at which the same ought to have been paid by the party charged. The promissory notes in the present case mention the rate of interest on the original amount due up to the date of payment of the promissory notes and such interest has been included in the amounts of the promissory notes. The 16 promissory notes do not specify any rate of interest on the amounts due under the promissory notes. Hence, section 80 of the Negotiable Instruments Act, 1881 is applicable and the learned Single Judge was right in directing the appellant to pay interest at the rate of 18% per annum on the amounts of promissory notes if the same were not paid by 30-6-2007.

17. In the decision of the Supreme Court in the case of *Equipment Conductors and Cables Ltd. Vs. Haryana State Electricity Board and another* (supra) cited by Mr.Agarwal, the Haryana State Electricity Board contended that Equipment Conductors and Cables Ltd. did not supply the goods within time and, therefore, is not entitled to the interest. The disputes whether the supply of goods had been made in time or not and whether Equipment Conductors and Cables Ltd. were defaulters and were entitled to interest were matters which could not be decided under Article 226 of the Constitution of India as has been held by the Supreme Court. In the present case, on the other hand, it is not in dispute that the

transformers have been supplied by respondent no. 1 and that the Madhya Pradesh Electricity Board had executed 16 promissory notes for a total amount of Rs.1,04,43,764/- inclusive of interest mentioned therein payable to respondent no. 1 on the dates mentioned in the promissory notes. It is also not in dispute that the promissory notes did not specify the rate of interest on the amounts due under the promissory notes. We find that the amounts were not paid on the due dates as per the promissory notes. The result is that the appellants were liable to pay interest at the rate of 18% per annum calculated from the dates on which the amounts were to be paid as per the promissory notes. We cannot, therefore, interfere with the directions of the learned Single Judge in the impugned order that in case the amounts of the promissory notes are not paid to respondent no. 1 before 30-6-2007, the rate of interest shall be enhanced to 18% per annum and we direct that the balance of the amount due as per the impugned order of the learned Single Judge be paid by the Madhya Pradesh State Electricity Board as well as the State Government by the 28th of February, 2008.

The appeal stands disposed of.

I.L.R. [2008] M. P., 36
WRIT APPEAL
Before Mr. A.K. Patnaik, Chief Justice and Mr. Justice Ajit Singh
21 November, 2007

SMT. MAHMOODAN KHAN .....Appellant*
Vs.
STATE OF M.P. and ors. ....Respondents

Fundamental Rules - Rule 54-B - Payment of Salary and allowances on re-instatement - Appellant placed under suspension as she was found absent from duty - Appellant was re-instated and thereafter disciplinary proceedings were initiated - Charge of absence was found proved and D.E.O. ordered that appellant shall not be entitled for pay and allowances during period of her suspension on principle of "no work no pay" - Writ petition dismissed on the ground that appeal is pending - Held - When competent authority finds some justification for suspension of Government servant he has to pass specific order indicating what amount of pay and allowances he would be entitled to during period of suspension after giving notice to government servant of quantum of pay and allowances proposed - Competent authority has to pass specific order in that regard after considering the representation submitted by Government Servant - Provisions of F.R. 54-B not followed before issuing direction that appellant shall not be entitled to pay and allowances during period of suspension - Direction quashed - However appellant shall pursue her appeal against finding of guilt - Competent Authority to pass fresh orders in accordance with F.R. 54-B within one month - Appeal allowed.

It is thus clear that the authority competent to order re-instatement has to form an opinion whether the suspension was justified or unjustified and if he finds that the suspension was wholly unjustified, he will treat the period of suspension

*W.A. No. 1715/2007. Jabalpur

as spent on duty for all purposes and in that case the Government servant would be entitled to his full pay and allowances subject to the provisions of sub-rule (8). But in cases where he finds some justification for the suspension of the Government servant he has to pass a specific order indicating therein what amount of pay and allowances he would be entitled during the period of suspension after giving notice to the Government servant of the quantum of pay and allowances proposed and after considering the representation, if any, submitted by the Government servant in that connection. It appears that these provisions of Fundamental Rule 54-B have not been complied with by the District Education Officer, Rewa, in the present case before issuing the direction in the order dated 23.2.2007 that the appellant will not be entitled to pay and allowances during the period of suspension on the principle of "no work no pay".

The District Education Officer, Rewa will now pass fresh orders in accordance with the Fundamental Rule 54-B as explained in this order within one month from the date of the certified copy of this order. (Paras 7 and 9)

Dilip Pandy, for the appellant
Kumaresh Pathak, Dy. A.G. for the respondents

Cur.adv.vult

JUDGMENT

The Judgment of the Court was delivered by **A. K. Patnaik, C. J.**:–This is an appeal against the order dated 28.9.2007 passed by the learned Single Judge in Writ Petition No.12876/2007 (s).

2. The relevant facts briefly are that the appellant has been working as Investigator in the office of Block Education Officer, Rewa. The District Education Officer, Rewa suspended the appellant as well as other persons who were found absent from duty. The appellant was also re-instated in service by order dated 17.3.2006. Thereafter disciplinary proceeding was initiated against her and after enquiry the District Education Officer, Rewa passed an order dated 23.2.2007 holding that the charge against the appellant was found proved and she was not entitled for pay and allowances during the period of her suspension on the principle of "no work no pay". Aggrieved, the appellant filed Writ Petition No.12876/2007 (s) and contended that the District Education Officer, Rewa could not have directed that the appellant will not be entitled to pay and allowances during the period of suspension on the principle of "no work no pay". In the impugned order, the learned Single Judge found that against the order dated 23.2.2007 passed by the District Education Officer, Rewa, the appellant filed an appeal before the Joint Director, Public Instructions, Rewa Division which is still pending and directed the Joint Director, Public Instructions, Rewa Division to decide the appeal of the appellant within a period of two months by passing a speaking order.

3. Mr.Dilip Pandey, learned counsel for the appellant submitted that the writ petition of the appellant was directed only against the direction in the order dated 23.2.2007 of the District Education Officer, Rewa that the appellant will not be entitled to pay and allowances during the period of suspension on the principle of "no work no pay" and against this direction no appeal was available under Rule 23 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules,

1966 (in short "the Rules of 1966") and, therefore, the Joint Director, Public Instruction, Rewa Division had no authority to decide the question whether the District Education Officer, Rewa could have directed that the appellant will not be entitled to pay and allowances during the period of suspension on the principle of "no work no pay".

4. Mr.Kumaresh Pathak, Deputy Advocate General, very fairly conceded that no appeal was available under Rule 23 of the Rules of 1966 against any orders by the disciplinary authority directing that the government servant placed under suspension will not be entitled to pay and allowances during the period of suspension on the principle of "no work no pay". He submitted that if the suspension of the government servant is revoked then a specific order will have to be passed by the disciplinary authority under Fundamental Rules 54-B.

5. Fundamental Rule 54-B of the Fundamental Rules is reproduced herein below:

> "F.R.54-B (1) When a Government servant who has been suspended, is re-instated or would have been so re-instated but for his retirement on superannuation while under suspension, the authority competent to order re-instatement shall consider and make a specific order -
>
> (a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with re-instatement or the date of his retirement on superannuation, as the case may be; and
>
> (b) Whether or not the said period shall be treated as a period spent on duty.
>
> (2) Nothwithstanding anything contained in rule 53, where a Government servant under suspension dies before the disciplinary or court proceedings instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid.
>
> (3) Where the authority competent to order re-instatement is of the opinion that the suspension was wholly unjustified, the Government servant, shall subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled, had he not been suspended:
>
> Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within 60 days from the date on which the communication in this regard is served on him and after

considering the representation, if any, submitted by him direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay, only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule (3), the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules (2) and (3), the Government servant, shall subject to the provisions of sub-rules (8) and (9) be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served as may be specified in the notice).

(6) Where suspension is revoked pending finalization of the disciplinary or Court proceedings, any order passed under sub-rule (1) before the conclusion of the proceedings, against the Government servant, shall be reviewed on its own motion after the conclusion of the proceedings by the authority mentioned in sub-rule (1) who, shall make an order according to the provisions of sub-rule (3) or sub-rule (5), as the case may be.

(7) In a case falling under sub-rule (5), the period of suspension shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if, the Government servant so desires, such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

Note.- The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of -

(a) extraordinary leave in excess of three months in the case of temporary Government servant; and

(b) leave of any kind in excess of five years in the case of permanent or quasi-permanent Government servant.

(8) The payment of allowances under sub-rule (2), sub-rule (3) or sub-rule (5), shall be subject to all other conditions under which such allowances are admissible.

(9) the amount determined under the proviso to sub-rule (3) or under sub-rule (5), shall not be less than the subsistence allowance and other allowances admissible under rule 53."

6. It will be clear from the provisions of Fundamental Rule 54-B quoted above that the aforesaid Fundamental Rule makes elaborate provisions how a government servant will be dealt with after revocation of his suspension and on re-instatement in service. Sub-rule (1) of Fundamental Rule 54-B provides that when a Government servant who has been suspended is re-instated or would have been so re-instated, the authority competent to order re-instatement shall consider and make a specific order; (a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with re-instatement and (b) whether or not the period of suspension shall be treated as period spent on duty. Sub-rule (3) of Fundamental Rule 54-B further provides that where the authority competent to order re-instatement is of the opinion that the suspension was wholly unjustified, the Government servant shall subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled, had he not been suspended. Sub-rule (4) of Fundamental Rule 54-B states that in a case falling under sub-rule (3), the period of suspension shall be treated as a period spent on duty for all purposes. Sub-rule (5) of Fundamental Rule 54-B further states that in cases other than those falling under sub-rule (3), the Government servant, shall subject to the provisions of sub-rules (8) and (9) be paid such amount of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period as may be specified in the notice. Sub-rule (7) of Fundamental Rule 54-B states that in a case falling under sub-rule (5), the period of suspension shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose.

7. It is thus clear that the authority competent to order re-instatement has to form an opinion whether the suspension was justified or unjustified and if he finds that the suspension was wholly unjustified, he will treat the period of suspension as spent on duty for all purposes and in that case the Government servant would be entitled to his full pay and allowances subject to the provisions of sub-rule (8). But in cases where he finds some justification for the suspension of the Government servant he has to pass a specific order indicating therein what amount of pay and allowances he would be entitled during the period of suspension after giving notice to the Government servant of the quantum of pay and allowances proposed and after considering the representation, if any, submitted by the Government servant in that connection. It appears that these provisions of Fundamental Rule 54-B have not been complied with by the District Education Officer, Rewa, in the present case before issuing the direction in the order dated 23.2.2007 that the appellant will not be entitled to pay and allowances during the period of suspension on the principle of "no work no pay".

8. The appeal is, therefore, allowed and the impugned order dated 28.9.2007 of the learned Single Judge in Writ Petition No.12876/2007(s) is set aside and the direction in the order dated 23.2.2007 of the District Education Officer, Rewa that the appellant will not be entitled to pay and allowances during the period of suspension on the principle of "no work no pay" is quashed. We make it clear that we have not quashed the finding of the District Education Officer, Rewa in the

order dated 23.2.2007 that the appellant was guilty of charges and it will be open for the appellant to pursue her appeal against the said finding of guilty recorded by the District Education Officer.

9. The District Education Officer, Rewa will now pass fresh orders in accordance with the Fundamental Rule 54-B as explained in this order within one month from the date of the certified copy of this order.

I.L.R. [2008] M. P., 41
WRIT PETITION
Before Mr. Justice Viney Mittal
7 September, 2007

MAHESH KUMAR ...Petitioner*
Vs.
STATE OF M.P. and ors. ...Respondents

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

It is thus, apparent that the only controversy in the present petition raised before this Court is as to whether while offering compensation in terms of Section 17-(3A)(a) of the Act, 80% of the compensation amount has to be calculated on the basis of value of the land, as evaluated by the land owners themselves, or as estimated by the Collector.

In my considered view, at the stage while offering the said 80% of compensation, the estimated value, as suggested by the Collector, has to prevail. It is obvious that under the provisions of the Act, even if 80% of the said evaluated amount has been offered to the land owners, notices under Section 9 of the Act are to be issued by the Land Acquisition Collector, affording the land owners an opportunity to file their claim petitions with regard to the market value of the acquired land. In response to the said notices, the land owners can always give their own valuation of the land/super structures/trees and tube-wells etc. and also can claim compensation for loss of business and for any other such deprivation as may be felt by them. (Paras 12 & 13)

Sunil Jain, for the petitioner.
Umesh Gajankush, G. A. for the respondents.

Cur.Adv.vult

ORDER

VINEY MITTAL, J. (ORAL):–This order shall dispose of two writ petitions being W.P.No.3621/2007 and W.P.No.4407/2007, as identical facts and common

*W.P. 3621/07. Indore

controversy is raised in these petitions. For the sake of convenience, the facts are borrowed from W.P.No.3621/2007.

2. The petitioners before this Court feel aggrieved by acquisition of their land for construction of main canal of Omkareshwar project.

3. The land owned by the petitioners is situated in village Jaimalpura. According to them, for the purpose of establishment of a school on the land in question, they had applied for diversion of user of the said land. Vide order dated April 26, 2005, the aforesaid permission was granted to the petitioners and their land was permitted to be diverted for establishing a school, hostel etc. According to the petitioners, after the diversion order had been passed, they constructed the building of school and claim to have spent substantial amount for the construction and for development of the land.

4. The State of Madhya Pradesh with an intention to construct water canal in Omkareshwar Project issued a notification under Section 4(1) read with Section 17 (1)(4) of the Land Acquisition Act, 1894 (hereinafter referred to as Act), on January 23, 2007 proposing to acquire certain lands including the land of the petitioners. Urgency provisions were also invoked. On February, 14, 2007, a declaration under Section 6 of the Act was issued whereby some land of the petitioners was also declared to have been acquired for the said purposes.

5. The land Acquisition Officer on April 28, 2007 issued notices under Section 17-(3A)(a) of the Act asking the land owners to accept the advance compensation in terms of the said provisions. The petitioners claim that the aforesaid notices had treated the land of the petitioners as mere agricultural land and as such, had proposed the payment of compensation on that basis. According to the petitioners, the respondents had not complied with the mandatory provisions contained in Section 17-(3A)(a) of the Act, in as much as, the diverted land was liable to be assessed @ Rs.300/-Sq.Ft., whereas the Land Acquisition Officer had proposed compensation at a very low rate.

6. It is in these circumstances, the petitioners have approached this Court challenging the acquisition proceedings.

7. A reply to the petition has been filed by the respondents. In the reply, a specific stand has been taken that the land acquisition officer, while issuing the notices under Section 17-(3A)(a) of the Act, had duly complied with the aforesaid provisions and had offered 80% of the compensation as estimated by the Collector. Respondents have maintained that 80% of the compensation for the acquired land under Section 17-(3A)(a) of the Act was to be calculated on the basis of the estimation of the Collector and not on the basis of self evaluation by the land owners. The respondents have also pleaded that the petitioners would have opportunity to submit claim/objections under Section 9(3) of the Act when notices under Section 9 are issued to them before the pronouncement of the award, and therefore, all the pleas raised by the petitioners can be adjudicated by the Land Acquisition Collector while pronouncing the award.

8. The petitioner have even filed a rejoinder to the reply filed by the respondents. Various pleas raised in the petition have been reiterated.

9. I have heard Shri Sunil Jain, learned counsel for the petitioners and Shri Umesh Gajankush, learned Government counsel for the respondents and with their assistance have gone through the record of the case.

10. The facts are not in dispute. It is not in dispute that while issuing notification under Section 4 of the Act, urgency provisions were invoked. Thereafter, a declaration under Section 6 of the Act was issued and published. The petitioners have not at all taken any objections with regard to any procedural deficiency or default committed by the respondents in issuance of the notifications under Sections 4/6 of the Act. It is thus, apparent that entire procedure with regard to issuance of the aforesaid two notifications has been duly followed by the respondents.

11. The only objection raised by the petitioners in the present petition is based upon the provisions of Section 17-(3A)(a) of the Act, when it is claimed by them that the respondents had not deposited 80% of the valuation of the acquired land, since urgency provisions had been invoked. The said claim made by the petitioners has been refuted by the respondents in their reply. The respondents have maintained that the aforesaid 80% compensation had been offered to the petitioner-land owners and the aforesaid 80% compensation was calculated on the basis of estimated value given by the Collector.

12. It is thus, apparent that the only controversy in the present petition raised before this Court is as to whether while offering compensation in terms of Section 17-(3A)(a) of the Act, 80% of the compensation amount has to be calculated on the basis of value of the land, as evaluated by the land owners themselves, or as estimated by the Collector.

13. In my considered view, at the stage while offering the said 80% of compensation, the estimated value, as suggested by the Collector, has to prevail. It is obvious that under the provisions of the Act, even if 80% of the said evaluated amount has been offered to the land owners, notices under Section 9 of the Act are to be issued by the Land Acquisition Collector, affording the land owners an opportunity to file their claim petitions with regard to the market value of the acquired land. In response to the said notices, the land owners can always give their own valuation of the land/super structures/trees and tube-wells etc. and also can claim compensation for loss of business and for any other such deprivation as may be felt by them.

14. On receipt of aforesaid claim petition/s, the Land Acquisition Collector is required to take into consideration the said objections and thereafter, pronounce an award under Section 11 of the Act. If the land owners are still dissatisfied by assessment of the market value by the Collector, then they can seek further reference under Section 18 of the Act before the Civil Court.

15. If any such application under Section 18 is filed by the land owners, within the period specified under the Act, then a reference shall be made by the Collector to the Court. In the reference proceedings, the land owners as well as the State have right to lead evidence to prove their respective claims with regard to the compensation/market value awardable for the acquisition of land. There is a further right of appeal against the award/order passed by the reference Court. Thus, the entire scheme of the Act clearly visualizes that there is no right of adjudication of

valuation/market value at the stage prior to the pronouncement of the award, which in fact is now being claimed by the petitioners, when a grievance is made that the assessment/estimation made by the Collector is on the lower side. Granting of such an additional right is neither envisaged under the Act nor can be so inferred from the various provisions of the Act.

16. It is not in dispute that notices under Section 9 of the Act have yet to be issued by the Land Acquisition Collector to the land owners. In these circumstances, as and when such notices are issued, the land owners including the petitioners, can always raise their claims against estimation/valuation with regard to the compensation/market value of the acquired land and can even object to the estimation suggested by the Collector with regard to valuation of the land.

17. In view of the aforesaid fact, I find that the grievance made by the petitioners at this stage, cannot be accepted.

18. Consequently, the writ petitions are dismissed.

19. However, before parting with this order, it is again made clear that the petitioners would be at liberty to make appropriate claim in accordance with law, when notices under Section 9 are issued by the Land Acquisition Collector.

C.C.as per rules.

I.L.R. [2008] M. P., 44
WRIT PETITION
Before Mr. Justice Abhay M. Naik
29 October, 2007

M.N. SINGH ...Petitioner*
Vs.

THE SOUTH EASTERN COAL FIELDS and ors. ...Respondents

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

Object of clause 31.1 to 31.3 quoted hereinabove, is to ensure the payment to the labourers/workmen. It is stated on oath that SECL is making payment to its employees through the bank. If payment is directed to be made to the labourers or workmen by similar mode, there would not occur any illegality or injustice. It is further liable to be noted that labourers/workmen have not approached this court. It is the contractor who submitted the present petition who by stretch of no imagination can be treated as an aggrieved person by virtue of Annexure P/3. Learned counsel for the petitioner has been unable to make out any illegality and/

* W.P. No. 5966/2007. Jabalpur

or breach of any statutory provision. Moreover, clause 12 at page 56 of the writ petition provides for settlement of dispute. It clearly lays down that it is incumbent upon the contractor to avoid litigation and he should make request in writing to the Engineer-in-charge for settlement of disputes/claims within 30 days. (Para 10)

Case Referred :

(1) AIR 2002 SC 350.

A.M. Trivedi, Sr. Adv. with *Abhishek Chaubey,* for the petitioner
Tulika Gulati, for the respondents

Cur.adv.vult

O R D E R

Abhay M. Naik, J. :–This petition has been preferred to challenge the impugned order -cum-notice dated 3.4.2007 contained in Annexure P/3 whereby the contractors are required to make payment to his employees of labour charges for the period with effect from 1.4.07 by account payee cheques.

2. Petitioner is a contractor who was awarded work contract by the respondents. Copy of the agreement is on record as Annexure P/1. Copy of the terms and conditions of the contract is stated to be contained in Annexure P/2. Contract is in respect of District Anooppur which is a scheduled and tribal area as declared by the Hon'ble President of India. Respondent no. 3 being senior labour officer (Administration S.E.C.L.) issued an order-cum-notice dated 3.4.2007 with direction to contractors of S.E.C.L. to pay the wages by account payee cheques. It is stated in the petition that the condition of payment of wages by account payee cheques was not stipulated either in the agreement contained in Annexure P/1 or in the terms and conditions contained in Annexure P/2. Thus, the respondent no. 3 is stated to have exceeded his power which has been challenged on account of being unreasonable and unjustified. It is further stated that most of the labourers are illiterate and destitute. They need wages, virtually, everyday to meet out the ends for the purpose of survival. Accordingly, every contractor is required to make payment daily of the daily wages irrespective of clearance of bills. It is very impractical to ask the daily wages labourers to open the bank account and collect the wages through bank because the labourers need the wages virtually day-today. It is further pleaded that for opening a bank account, identification of the proposed account holder is required. Petitioner being the contractor would be required to identify the labourers and in case of any kind of fraud on the part of labourers, the petitioner may be held guilty of various offences under law. Further, the bank in the absence of satisfactory material for identification may refuse to open the account. This would also cause harassment to the labourers who would then be not entitled to seek encashment of the cheques. Moreover, for opening of the account, the petitioner will have to deposit minimum amount for the operation of the bank account. Thus, it is stated in the writ petition that the impugned order marked as Annexure P/3 is in violation of principles of natural justice because the respondents are required to adopt the procedure which is not prescribed by law as well as contract. Looking to the conditions of labourers it would be unreasonable to require contractor to make payment of wages by account payee cheques. Doctrine of promissory estoppel has also been sought to be invoked. Therefore, it

is prayed that the impugned order marked as Annexure P/3 may be quashed on account of being illegal and unreasonable.

3. Respondents submitted a joint return. Preliminary objection has been raised that clause 12 of the contract provides for settlement of dispute by Engineer-in-charge within 30 days which is an alternative and efficacious remedy and accordingly, the petition is liable to dismissal. It has been further stated that respondents have given contract to the petitioner. Respondent has received number of complaints from the workers that the contractor was not paying wages due to them and the accounts were manipulated. So, a policy decision was taken that payment to workers be given through bank's account payee cheques. It is further averred in the return that the petitioner/contractor was not making proper payment to the workers.

4. Clauses 31.1, 31.2, 31.3 are reproduced below on account of being relevant:

> "31.1 The contractor shall pay to his employees salary and wages as per law of the land applicable to the workmen of the colliery/washery where he is working under this contract.
>
> 31.2 The contractor shall make payment to his employees at the place (s) specified by the General Manager/Project Officer and in the presence of Company's representative authorized by General Manager/Project Officer who shall duly witness all payments by the contractor to his employees. For this purpose the contractor shall notify to the General Manager/Project officer the wage period (s) day/date and time of payment.
>
> 31.3. The contractor shall prepare the wage sheet for his employees in duplicate, a copy of which shall be regularly submitted to the Project Officer."

5. Accordingly, it is stated in the return that payment of wages of employees of Coal Mines are made through the Bank. Under the terms of contract the contractor is also liable to make payment to the employees of their salary as per law applicable to the workmen of the colliery. Accordingly, the contractor has rightly been directed to make payment through account payee cheques and the writ petition is liable to dismissal.

6. Learned counsel for the parties made their submissions in support of their respective pleas which have been duly considered by this court.

7. Clause 12 at page 56 of the writ petition provides a forum for settlement of dispute in following manner:-

> "It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the dispute at company level.
>
> The contractor should make request in writing to the Engineer-in-charge for settlement of such disputes/claims within 30 (thirty) days of arising of the cause of dispute/claim, failing which no

disputes/claims of the contractor shall be entertained by the company."

Effect of this provision would be considered after taking into consideration the objection of the petitioner.

8. Referring to the following condition, it is contended that verification of the disbursement of wages to the labourers/workmen is sufficient and the payment cannot be directed to made compulsorily by account payee cheques.

> "The bills of contractor shall be accompanied by an attested copy of wages sheet with a certificate given on the wages sheet by authorized official witnessing the payment of wages to labourers/workmen engaged by the contractor for the subject work to the effect that the payment indicated in the prescribed column of the wages sheet has been disbursed to the labourers/workmen in their presence."

9. Judicial review in the matter of policy decision came up for consideration before Hon'ble Supreme Court AIR 2002 SC 350 *BALCO Employees Union (Regd) Vs. Union of India and others.*

> "The courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the company is conducting its business, inasmuch as its policy decision may have an impact on the workers' rights, nevertheless, it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law."

10. Object of clause 31.1 to 31.3 quoted hereinabove, is to ensure the payment to the labourers/workmen. It is stated on oath that SECL is making payment to its employees through the bank. If payment is directed to be made to the labourers or workmen by similar mode, there would not occur any illegality or injustice. It is further liable to be noted that labourers/workmen have not approached this court. It is the contractor who submitted the present petition who by stretch of no imagination can be treated as an aggrieved person by virtue of Annexure P/3. Learned counsel for the petitioner has been unable to make out any illegality and/ or breach of any statutory provision. Moreover, clause 12 at page 56 of the writ petition provides for settlement of dispute. It clearly lays down that it is incumbent upon the contractor to avoid litigation and he should make request in writing to the Engineer-in-charge for settlement of disputes/claims within 30 days.

11. Resultantly, I do not find any substance in the writ petition and the same is hereby dismissed summarily with liberty to the petitioner to approach Engineer-in-charge in accordance with clause 12, if, so advised.

No order as to costs.

I.L.R. [2008] M. P., 48
WRIT PETITION
Before Mr. Justice Abhay M. Naik
31 October, 2007

M.P. HOUSING BOARD and another ...Petitioners*
Vs.
SOHANLAL CHOURASIA and another ...Respondents

Arbitration and Conciliation Act (26 of 1996) - Section 11 - Appointment of arbitrator - Contract for construction of commercial building accepted by respondent no. 1 - Some dispute arose between parties, therefore, as per provision of Clause 29 of agreement–Respondent no.1 made request to petitioner to refer the dispute to arbitrator - Authority under agreement failed to act as an Arbitrator within stipulated period therefore, respondent no.1 unilaterally appointed respondent no.2 as arbitrator - Held - If parties agreed upon for procedure for appointment of arbitrator there would be no occasion to appoint arbitrator under Section 11 of the Act, 1996 - Agreement contains arbitration clause for appointment of Dy. Housing Commissioner and further to Add. Housing Commissioner on dispute arrived at between parties - No provision for appointment of respondent no.2 as arbitrator - Appointment of respondent no.2 as arbitrator null and void being contravention of provisions of Act, 1996 - Petition allowed.

From the aforesaid provision, it is clear that in case, if, the parties are agreed upon for a procedure for appointment of an Arbitrator, there would be no occasion to appoint an Arbitrator by making request to the Chief Justice of the Hon'ble Supreme Court of India or this Court as the case may be, or any person or institution designated by him to take the necessary measure under Section 11(6) of the Arbitration and Conciliation Act, 1996.

From the aforesaid discussion, it is clear that although agreement executed between the parties as revealed in Annexure-P/1 does contain an arbitration clause for the appointment of Dy. Housing Commissioner and further Additional Housing Commissioner on a dispute arrived at between the parties, yet it does not provide for appointment of any other person including respondent No.2 as an Arbitrator. Respondent No.2 has, thus, been appointed by the respondent No.1 as an Arbitrator in a unilateral manner. This being in contravention of the provisions of Arbitration and Conciliation Act, 1996 is null and void and, consequently, the arbitral proceedings assumed by him are equally null and void.

Summarising the aforesaid, it may be said that since the agreement marked as Annexure-P/1 did not contain a provision to appoint respondent No.2 as an Arbitrator, his appointment by respondent No.1 as an Arbitrator in a unilateral

*W.P. No. 4507/2007 Jabalpur

manner without the consent of petitioners is null and void in the light of the provisions of the Arbitration and Conciliation Act, 1996. Even the appointment of respondent No.2 as an Arbitrator without the consent of petitioners could not have been upheld under the provisions of the earlier Act of Arbitration of the year 1940 in view of the law laid down by the Apex Court in the case of *Dharma Prathishthanam* (supra). (Paras 6,10 & 11)

Cases Referred :

(1) AIR 1999 SC 950, (2) (2006) 4 SCC 372, (3) (2006) 1 SCC 417, (4) AIR 2006 SC 401, (5) AIR 2005 SC 214,(6) AIR 1962 SC 1810.

Naman Nagrath, Adv. for the petitioners
G.C. Jain, Adv. for the respondents No.1

Cur.adv.vult.

O R D E R

ABHAY M. NAIK, J. :–Petitioner (M.P. Housing Board) issued a notice inviting tender for proposed construction of Commercial complex near Gurudwara, Victoria Hospital Jabalpur. Tender of respondent no. 1 was accepted for civil work amounting to Rs.21,10,352/-. An agreement, as contained in Annexure P/1 was duly executed between the parties on 10.2.2005. Work order dated 13.5.2005 was duly issued in favour of the petitioner requiring him to complete the work within six months. There arose some dispute and consequently, the petitioner intimated the respondent to stop work vide its letter dated 17.8.2005. Respondent no. 1 issued a notice dated 12.9.2005 (Annexure P/2) under clause 29 of the agreement with a request to refer the matter to the Arbitration of Additional Housing Commissioner. Again reminder-cum-notice dated 16.1.2006 (Annexure P/3) was issued by the respondent. Thereafter, another letter dated 1.4.2006 (Annexure P/4) was issued by the respondent that since the authority under the agreement had failed to act as an Arbitrator within the stipulated period, respondent proposed to appoint respondent no. 2 as a sole Arbitrator. Claim was submitted by respondent before the said Arbitrator who initiated the arbitral proceedings. Petitioner on receipt of notice from D.C. Jain, respondent no. 2 submitted preliminary objection regarding maintainability of the proceedings, in view of the provisions of Arbitration and Conciliation Act, 1996. This objection was turned down by the respondent no. 2 vide his order dated 9.10.2006 contained in Annexure P/9. Consequently, this petition has been preferred for the following reliefs:-

> "7.2 To quash the entire arbitral proceedings pending before respondent no. 2, as being *ab-initio* void, contrary to law and without any jurisdiction.
>
> 7.3. To hold that the provisions of Arbitration Act 1940 cannot be invoked after the enactment of Arbitration and Conciliation Act, 1996.
>
> 7.4. To hold that dispute arising out of a works contract with the petitioner has to be referred to Tribunal constituted under M.P. Madhyastam Adhiniyam."

2. Respondent no. 1 submitted his return and refuted the claim of the petitioner.

Relying upon clause 29 of the agreement, it has been contended that the parties are bound by the said clause. A notice was duly issued by respondent no. 1 to the Deputy Housing Commissioner for taking up the matter in arbitration. On having received no response from the Deputy Housing Commissioner, the respondent no. 1 proposed the name of respondent no. 2 as an Arbitrator for adjudication of the dispute. Respondent no. 2 has undertaken job/work of arbitration in a valid manner after duly issuing the notice of the proceedings to the petitioner. It is contended that instead of filing preliminary objection, the appointment of respondent no. 2 as a sole Arbitrator ought to have been challenged on issuing notice dated 1.4.2006. Issues have already been framed by respondent no. 2 and time was granted to the parties to file statement on affidavit. Thus, the petitioner would be deemed to have waived its rights to challenge the appointment of Arbitrator in view of the law laid down by the Apex Court in *M/s M.K. Shah Engineers & Contractors Vs. State of M.P.*(AIR 1999 SC 950).

3. Shri Naman Nagrath, advocate and Shri G.C. Jain, advocate made their submissions at length which have been considered in the light of material on record and provisions of law governing the situation.

4. Agreement between the petitioners and respondent No.1 contained an Arbitration Clause as under :-

> "Clause 29 : Except as otherwise provided in this contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions, herein before mentioned and as to thing whatsoever, in any way arising out of or relating to the contracts, designs, drawings, specifications, estimates, concerning the work or the executing or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the Dy. Housing Commissioner in writing for his decision within a period of thirty days of such occurrence. Thereupon, the Dy. Housing Commissioner shall give his written instructions and/or decision within a period of sixty days of such written request. This period can be extended by mutual consent of the parties.
>
> Upon receipt of written instructions or decision the parties shall promptly proceed without delay to comply such decision or instructions, if the Dy. Housing Commissioner fails to give his instructions or decision in writing within a period of sixty days or mutually agreed time after being requested, if the parties are aggrieved against the decision of the Dy. Housing Commissioner the parties may within thirty days prefer such dispute/disputes for arbitration to the Addl. Addl. Housing Commissioner subject to the jurisdiction and limitations in accordance with the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983. In case the dispute is within the jurisdiction of Addl. Housing Commissioner, he shall then act as sole Arbitrator, and he shall pass an award after hearing both the parties, strictly in accordance

with the provisions of the Arbitration Act, 1940 and the rules made thereunder for the time being in force.

If the contractor does not make any demand for arbitration in respect of claim (s) in writing within ninety days on receiving information from the Executive Engineer that the final bill is ready for payment the claim of the contractor shall be deemed to have been waived and shall be absolutely barred and the Board shall be discharged or released of all the liabilities under the contract in respect of such claim(s).

A reference to the Arbitration, shall be no ground for not continuing the work on the part of the contractor and payment as per terms and conditions of the agreement shall be continued by the Board."

Under the aforesaid clause, a dispute shall be liable to be referred to the Dy. Housing Commissioner in writing for his decision within a period of thirty days of such occurrence. In case of dissatisfaction, against the decision of the Dy. Housing Commissioner or in case of failure on his part, parties had a further right to prefer such dispute for arbitration to the Additional Housing Commissioner subject to the jurisdiction and limitation in accordance with the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983.

5. In the present case, the contractor (respondent No.1) after having received no response from the Dy. Commissioner Housing Board, Commissioner Housing Board and the Chairman Housing Board, proposed the name of respondent No.2, a retired Superintending Engineer from Water Resources Department, Government of Madhya Pradesh, as a sole Arbitrator for adjudication of the dispute. Respondent No.2 assumed the work of arbitration and commenced arbitration proceedings on 5.6.2006. He issued process to the petitioners fixing thereby 12.7.2006 as a date for arbitral proceedings. An objection was raised by the petitioners about jurisdiction of respondent No.2 to proceed with the arbitration. This was turned down vide order dated 9.10.2006 by the respondent No.2 in the light of the decisions of the Apex Court reported as *You One Engineering & Construction Co. Ltd. and another Vs. National Highways Authority of India* [(2006) 4 SCC 372], *Ardy International (P) Ltd and another Vs. Inspiration Clothes & U and another* [(2006) 1 SCC 417] and *Rite Approach Group Ltd. Vs. M/s Rosoboronexport* (AIR 2006 SC 401). This order is marked as Annexure-P/9 which is under challenge before me.

6. Before adverting to various authorities cited in the impugned order, I would like to advert to the provision contained in sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996, which is reproduced below for convenience :-

"11(6). Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed Arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. "

From the aforesaid provision, it is clear that in case, if, the parties are agreed upon for a procedure for appointment of an Arbitrator, there would be no occasion to appoint an Arbitrator by making request to the Chief Justice of the Hon'ble Supreme Court of India or this Court as the case may be, or any person or institution designated by him to take the necessary measure under Section 11(6) of the Arbitration and Conciliation Act, 1996.

7. Agreement (Annx.P/1) between the parties was executed on 10.2.2005, whereas, the Arbitration and Conciliation Act, 1996, had already come into force with effect from 22.8.1996 repealing thereby the Arbitration Act, 1940, by virtue of Section 85. Hon'ble Supreme Court in the case of *Rite Approach Group Ltd.* (supra) has held that if the arbitration agreement contains a specific clause as to who would decide the dispute as an Arbitrator, it alone shall have the jurisdiction to act as an Arbitrator and resolve the dispute. In the present case, the dispute could have been referred under clause 29 to the Dy. Housing Commissioner and further to the Additional Housing Commissioner. Superintending Engineer, i.e. respondent No.2, was not specified as an Arbitrator in Clause 29. Thus, it cannot be said that the parties had agreed on a procedure to appoint respondent No.2 as an Arbitrator.

8. In the case of *Ardy International (P) Ltd* (supra) cited in the impugned order, it has been held that the objection in Civil Suit on the basis of arbitration clause has to be raised at the first instance. In the instant case, the petitioners raised an objection before the alleged Arbitrator himself about his jurisdiction. This being so, they are not precluded from challenging the impugned order before this Court.

9. In the case of You One *Engineering & Construction Co. Ltd.* (supra), it has been held that unless the conditions under Section 11(6) of the Arbitration and Conciliation Act, 1966, are satisfied, there would be no occasion to move the Chief Justice or any person or institution designated by him to take the necessary measure. In the instant case, since no procedure for appointment of respondent No.2 as an Arbitrator was agreed upon between the parties, respondent No.2 could not have assumed the jurisdiction to initiate proceedings for arbitration on a request by respondent No.2.

10. From the aforesaid discussion, it is clear that although agreement executed between the parties as revealed in Annexure-P/1 does contain an arbitration clause for the appointment of Dy. Housing Commissioner and further Additional Housing Commissioner on a dispute arrived at between the parties, yet it does not provide for appointment of any other person including respondent No.2 as an Arbitrator. Respondent No.2 has, thus, been appointed by the respondent No.1 as an Arbitrator in a unilateral manner. This being in contravention of the provisions of Arbitration and Conciliation Act, 1996 is null and void and, consequently, the arbitral proceedings assumed by him are equally null and void. I may profitably refer to the decision of the Hon'ble Supreme Court in the case of *Dharma Prathishthanam Vs. M/s*

Madhok Construction Pvt. Ltd. (AIR 2005 SC 214), wherein, the earlier view of the Constitution Bench in the case of *Khardah Co. Ltd. Vs. Raymond and Co. (India) Pvt. Ltd.* (AIR 1962 SC 1810) has been reiterated in the following manner :-

> "What confers jurisdiction on the Arbitrators to hear and decide a dispute is an arbitration agreement and where there is no such agreement there is an initial want of jurisdiction which cannot be cured even by acquiescence. It is clearly spelled out from the law laid down by the Constitution Bench that the Arbitrators shall derive their jurisdiction from the agreement and consent."
>
> Hon'ble Supreme Court in the case of *Dharma Prathishthanam* (supra) was dealing with the provisions of the Arbitration Act of 1940, which has been referred to in Annexure-P/1. Dealing with various provisions of the Act, Hon'ble Supreme Court has observed :-
>
> "12. On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole Arbitrator Shri Swami Dayal, the reference of disputes to such Arbitrator and the *ex parte* proceedings and award given by the Arbitrator are all void *ab initio* and hence nullity, liable to be ignored. In case of arbitration without the intervention of the Court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an Arbitrator as the one already agreed upon, the appointment of an Arbitrator poses no difficulty. If the arbitration clause does not name an Arbitrator but provides for the manner in which the Arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. A unilateral appointment and a unilateral reference - both will be illegal. "

11. Summarising the aforesaid, it may be said that since the agreement marked as Annexure-P/1 did not contain a provision to appoint respondent No.2 as an Arbitrator, his appointment by respondent No.1 as an Arbitrator in a unilateral manner without the consent of petitioners is null and void in the light of the provisions of the Arbitration and Conciliation Act, 1996. Even the appointment of respondent No.2 as an Arbitrator without the consent of petitioners could not have been upheld under the provisions of the earlier Act of Arbitration of the year 1940 in view of the law laid down by the Apex Court in the case of *Dharma Prathishthanam* (supra).

12. Consequently, the petition succeeds and is, hereby, allowed. Impugned order contained in Annexure-P/9 is, hereby, quashed and the arbitral proceedings

assumed by respondent No.2 are also hereby quashed for want of jurisdiction. No order as to costs.

I.L.R. [2008] M. P., 54
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha
29 November, 2007

AMRIT VIDYA PEETH B.ED. COLLEGE ....Petitioner*
Vs.
STATE OF M.P. and ors. ...Respondents

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

Regard being had to the aforesaid pronouncements of law, if we look at the language employed under section 29 of the Act we have no scintilla of doubt that the Central Government could have issued such a direction as has been issued inasmuch as sub-section (1) of Section 29 make it crystal clear that the Council is bound by such directions on questions of policy as the Central Government may give in writing from time to time and further sub-section (2) of Section 29 lays a postulate that the decisions of the Central Government as to whether the question is one of the policy or not shall be final. Be it noted in the letter dated 20.8.2007 there is mention of the fact that it has come to the notice of School Education and Literacy that there has been uneven and disproportionate growth in the number of recognition granted to various courses of the Institutions in the State falling under the Western Regional Committee of NCTE and while granting recognition the actual demand of teachers in the particular State has been totally ignored. It is

*W.P. No. 14227/2007. Jabalpur

also perceivable from the letter that the Department has felt it appropriate to make comprehensive review of the situation for taking necessary corrective measures. The tenor of the letter and the grounds mentioned therein and keeping in view the language employed in section 29 of the Act there can be no trace of doubt that the Central Government has taken a decision which by no stretch of imagination can not be said to be a policy decision under the scheme of the Act. It is because the purpose of the Act is to provide for establishment of a National Council for Teacher Education with a view to achieve planned and co-ordinated development of the teacher education system throughout the country. That apart, Regulation 4 deals with eligibility and Regulation 8 deals with the conditions for grant of recognition. We have already referred to Section 12 of the Act. In view of the object and reasons and the role assigned to the Council and the power conferred on the Central Government we come to the irresistible conclusion that the direction issued by the Central Government is within the ambit and sweep of its powers and not de hors the statutory exercise of power. (Para 32)

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

Presently to the legitimate expectation and interest. It is submitted by the learned counsel for the petitioners that the institutions have given admission and if eventually the institutions are granted recognition the students should be permitted to appear in the examination. Learned single Judge of this Court while passing the interim order had clearly stated that institutions may admit students provisionally at their own risk without accepting fees from them and if they accept fees from the students they would be ready to face the consequences if the petition is decided against them. In view of the aforesaid order no equity can ever flow in favour of the institutions. We would like to place it on record that an institution which is desirous of imparting B.Ed and M.Ed. education or introducing a course meant for teachers is under obligation to be aware of the provisions contained under the 1993 Act. The said Act has been engrafted with a sacrosanct purpose. Grant of recognition is the condition precedent before any institution proceeds in any other matter like affiliation from the examining body. Whether the affiliation has to be granted automatically or not we have already refrained from dwelling upon the said issue, but, an onerous one, it is inconceivable how an institution without recognition can nurture the idea to admit students. A day-dreamer can build a castle in the air or for that matter castle in Spain, but it is absolutely inapposite on the part of aspirants registered bodies or institutions to admit students and pyramid the foundation relying on the bedrock of legitimate expectation that the students would be treated as students who have been admitted in such institutions in such

courses which are valid in law. An educational institution has to conduct itself in an apple pie order. It has to maintain the sacredness of the concept behind imparting education. They are under obligation to keep in mind that commercialization of course under 1993 Act is impermissible. Quite apart from the above, it is totally imprudent and in a way quite audacious to build a superstructure without an infrastructure. If we allow ourselves to say so, perception has been blinded and in the ultimate eventuate a cataclysm has been unwarrantedly invited. We may say without any fear of contradiction that it is a perceptible deception and fraud on law. Ergo, the stance that they have to be given the benefit of legitimate expectation and their interest should be protected, is devoid of any substance and we unhesitatingly repel the same. (Para 36)

C. National Council for Teacher Education Act, (73 of 1993) - Section 29 - Central Govt. issuing direction to NCTE not to grant affiliation till further orders as it is making comprehensive review of situation for taking necessary corrective measures - Direction was issued on 20-8-07 - Central Govt. directed to take final decision by end of January, 2008.

One of the submission of the learned counsel for the petitioners deserves to be considered. It is submitted that the Central Government cannot take its own time to review the scenario. As is perceptible, the Central Government has issued a letter dated 20.8.07. The grounds for issue of instructions are that there has been uneven and disproportionate growth in the number of recognitions granted to various courses and institutions in the States falling under the Western Regional Committee of the NCTE and while granting recognition, the actual demand of teachers in particular states has been totally ignored and hence, a comprehensive review of the situation for taking necessary corrective measures were necessitous. Because of the said situation directive has been issued to the NCTE not to grant recognition to any teacher training institution intake falling within the jurisdiction of the Western Regional Committee of NCTE till a comprehensive review is made or till further orders whichever is earlier. The institutions which are before us may have filed applications and their applications may have been processed. The NCTE has a statutory role. As has been held by the Apex Court in the case of *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra) the ojbect of the Act is that NCTE is required to deal with applications for establishing new B.Ed. colleges or allowing increase in intake capacity keeping in view 1993 Act and planned and co-ordinated development of teacher-education system in the country. Under Section 12 of the Act the Council is duty bound to take all such steps as it may think fit for ensuring planned and co-ordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under this Act from many a spectrum, undertaking surveys and studies relating to various aspects of teacher education and many a contour As the Central Government is making a comprehensive review of the same we need not to dwell upon the same. However, we direct the Central Government to take final decision by end of January, 2008. (Para 37)

Cases Referred :

(1) 2006 AIR SCW 2048, (2) (2005) 3 SCC 618.

A.P. Singh, for the petitioner

Dharmendra Sharma, A.S.G. for Union of India, *Rakesh Johri,* with *Ashok Chakraworty,* for *N.C.T.E., T.S. Ruprah,* with *Rakesh Jain,* for M.P.B.S.E., *Dipak Awasthy,* G.A. for the State, *K.P. Mishra, P.K. Kaurav, B. Mishra* and *Mr. Tapan Trivedi* for the respondents.

Cur.adv.vult

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–Regard being had to the similitude of the gravamen of challenge in this batch of writ petitions, they are disposed of by a singular order. For the sake of clarity and convenience the facts in Writ Petition No.12104/2007 are adumbrated herein.

2. The petitioner is a college founded and established by Prabhat Shiksha Evam Samaj Kalyan Samiti, Betul, a society registered under the Society Registrikaran Adhiniyam. The college has developed infrastructure as per the norms fixed by the National Council for Teacher Education, New Delhi (for short 'the NCTE') for imparting education in B.Ed. Courses. The first respondent is a body constituted under Section 3 of the National Council for Teacher Education Act, 1993 (for brevity 'the 1993 Act') and the respondent No. 2 is the Western Regional Committee (hereinafter referred to as 'the Committee') situate at Bhopal and the said Committee has been constituted under Section 20 of the Act. The Committee has the power to acknowledge and process the applications submitted for recognitions to impart education in various courses in teacher education including B.Ed. and M.Ed. in the State of Madhya Pradesh. The Committee is also empowered to grant recognition to eligible colleges to conduct B.Ed. courses.

3. It is contended that the Act has been brought into force with a view to achieve planned and coordinated development of teacher education system in the country and for regulation and proper maintenance of norms and standard in the teacher education system and for other matters connected therewith. A reference has been made to Section 14 of the 1993 Act which deals with the recognition of institution offering courses for training of teacher education. There is a postulate in the said provision that the institution offering or intended to offer a course or drawing for teacher education may apply for grant of recognition under the Act to the concerned regional committee in such form and in such manner as may be determined by Regulation. Sub-section (3) of Section 14 prescribes that the regional committee on receipt of the application from any institution under Sub-section (1) and after obtaining from the institution concerned such other particulars as it may consider necessary shall satisfy itself whether the institution had adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfills such other conditions required for proper functioning of the institution for a course in teacher education as may be prescribed by NCTE. It is asserted that recognition is granted under Section 14(4) of the Act and the order granting recognition is published in the official gazette and communicated in writing for appropriate action to such institution and to the concerned examining body, local authority, the State Government and the Central Government. Emphasis has been laid on Section 16(6) which prescribes that every examining body i.e. university on receipt of the

order under sub-section (4) shall grant affiliation to the institution where recognition has been granted by the NCTE. It is contended that the grant of affiliation is merely a ministerial formality required to be done by the examining body and no discretion is left to the university by the Legislature.

4. The respondent No.1 has framed regulations under Section 32(2) of the Act prescribing norms for recognition and procedure for submission of application and processing thereof. The regulations are called as NCTE (Recognition Norms and Procedure) Regulations 2005 (in short '2005 Regulations') .The first respondent has also in exercise of powers conferred under Sub-section (1) and Clause (o) of Sub-section (2) of Section 32 read with Sub-section (7) of Section 20 of the Act framed NCTE (Procedure To Be Followed By the Regional Committees) Regulations 1995 (for short 'the 1995 Regulations). It is put forth that the petitioner college through the society submitted the application in prescribed format complying the requisite norms to the respondent No.2 on 1.6.07 along with the requisite fee of Rs.40,000/-, land title certificate, copy of the approved building plan, FDR, necessary affidavit and undertaking and solvency etc. for grant of recognition for the academic year 2007-08. The respondent No.2, the Committee entertained the application and after primary scrutiny allotted the Code No. APW 06273/223695 and sent the information thereof by letter dated 22.6.07. It is set forth that the petitioner did not receive the said letter but downloaded the details from website of the respondent No.2. The relevant extract of the same has been brought on record as Annexure P-3. The second respondent as per letter dated 22.6.2007 dispatched on 2.7.07 conveyed certain minor deficiencies. The petitioner in order to avoid delay made compliance without protest vide letter dated 18.7.07 as per Annexure P-4. As pleaded, despite the compliance the respondent did not take up any action and no communication was made. The petitioner inquired about the status of his application from the office of the respondent No.2 and he was informed that the decision to issue letter had been taken but formal letter in that regard has not been issued. It is contended that from the aforesaid aspect it would be manifest that the second respondent failed and neglected to process the petitioner's application within the time stipulated under the Regulations and thereby the respondent No.2 had failed to discharge its statutory duties within the reasonable time. It is urged that by not acting within the reasonable time the Committee has shown complete negligence and in fact has conducted itself in a cavalier manner. Various provisions under the Regulations have been referred to how the Committee is required to work under the Regulations.

5. It is set forth in the writ petition that when no definite information was obtained by the petitioner from the office of the second respondent it received an information that the respondent No.3, namely, the Union of India through Secretary, Ministry of Human Resources Development had issued a letter dated 20.8.07 to the first respondent conveying a direction purported to be issued under Section 29 of the Act to withhold the grant of recognition of the institution for courses or additional intake falling under the jurisdiction of the respondent NO.2. It is put forth that by virtue of the issuance of the aforesaid letter the respondent No.3 has stopped functioning of the respondent No.2 in an arbitrary manner as a consequence of which the second respondent has abandoned its statutory duties

and obligation cast on it by the 1993 Act. In pursuance of the letter dated 20.8.07 the NCTE has issued letter dated 22.8.07 as contained in Annexure P-6 directing that the respondent No.2, the committee would not function until further orders.

6. It is averred that the petitioner institution has already applied for affiliation to the respondent No.5 the University the examining body, and 'No Objection Certificate' from the State of Madhya Prdesh in accordance with law. It is also highlighted that as per the law No Ojbection Certificate is not necessary from the State Government but the respondent No.5, University has passed a resolution dated 30.12.06 holding that for affiliation the 'No Objection Certificate' is required from the State Government. To avoid any technical objection the petitioner applied for the No Objection Certificate. The resolution passed has been brought on record as Annexure P-8. The petitioner by way of abandoned caution obtained the No Objection Certificate dated 18.5.06 as Annexure P-9. It is the case of the petitioner that the respondent No.4, the State of Madhya Pradesh has authorised the respondent University to hold the counselling for B.Ed. courses for the entire State for academic session 2007-08 and accordingly the University is holding the counselling for all colleges.

7. It is asseverated that the respondents No.1 and 2 are statutory bodies constituted under the Act and hence, are required to act legally and for furtherance of achieving the object of the Act. It is also set forth that they are under obligation to act within a reasonable period of time and particularly before commencement of the academic session. It is also put forth that 1995 Regulations and the scheme under the provisions clearly stipulate that the respondents are bound to dispose of the applications expeditiously and the respondents are required in law after allotting code number to the petitioner college to process and decide the application in accordance with law within the time prescribed by regulation. It is put forth that the petitioners are entitled to be dealt with statutorily as they have complied with the norms fixed by the NCTE and their legitimate expectations cannot be annihilated by taking arbitrary steps. In this backdrop prayer has been made to issue a writ of certiorari for quashment of the order dated 20.8.2007 and to issue a mandamus commanding the respondent No.1 to immediately hold the meeting with the respondent No.2 and any other committee empowered and authorised to take the final decision on the application of the petitioner relating to academic session 2007-08. There is also a prayer to declare the resolution dated 30.12.2006 passed by the respondent No.5, the university requiring no objection certificate as illegal as such no objection certificate is not required as per the law laid down by the Apex Court.

8. A counter affidavit has been filed in Writ Petition No.12198/2007 by the respondents No.1 & 2. Learned counsel for the parties fairly agreed that the same can be referred to, as basically this Court is required to dwell upon the legal issues. Be it noted, in certain cases it has been asseverated that the notices were issued to remove the deficiency within the statutory period of ninety days but some of the petitioners were not able to remove the same and, therefore, the application was not processed. We would like to record here that the question of deficiency or compliance really does not require to be adverted to in this batch of cases. It is putforth that in the counter affidavit that on 21.8.2007 the Central

Government had issued a direction under Section 29 of the Act that recognition not to be granted to the Teacher Training Institutes falling within the jurisdiction of Western Regional Committee of NCTE, till a comprehensive review is undertaken or till further orders whichever is earlier. The said decision has been brought on record as Annexure-R-1/2. It is the stand in the return that the Central Government is lawfully entitled to issue directions to the NCTE under Section 29 of the Act as the question of grant or refusal to grant recognition is a policy matter under the Act. It is setforth without recognition no institution can admit any student to any course, training or teacher education. Reference has been made to section 14 of the Act and Section 16 of the Act to highlight that the University shall not grant affiliation to the institution conducting a course or training in teacher education unless the institution has obtained recognition under Section 14 of the Act.

9. A return has been filed in this writ petition by the respondent-State stating, *inter alia,* that the relief is claimed against the NCTE and not against the State and further there has to be compliance of the NCTE Act and the Regulations of 2005 before granting recognition to any institution. The State has supported the action of the NCTE.

10. At this juncture it is worthwhile to state that in some cases counter affidavits have been filed by the University and also by the M.P.Board of Secondary Education. It is their stand that affiliation is not a ministerial formality and the institutions are bound to take affiliation as provided under the Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973 wherein there are provisions and those provisions are bound to be followed.

11. In some of the cases, be it noted the recognition was granted for one academic year. Applications were filed for continuation of the recognition or to put it differently, for grant of recognition for subsequent year, namely, 2007-08. It is urged in the said petition that they have complied with the formalities but the State Government has put a embargo. It is worth noting that the application is pending before the NCTE for grant of recognition. In some cases decision as regards recognition had been communicated but no formal order has been passed. It is also worth mentioning that in some cases interim orders were passed by learned single Judge of this Court which is as follows:

> "As an interim measure, it is directed that till further orders petitioner may be permitted to take part in counselling. Petitioner may admit students provisionally at their own risk without accepting fees from them. However, it is made clear that in case the Institutions accept fees from the students they may ready to face the consequences if the petition is decided against them.
>
> Learned counsel for the petitioner is hereby directed to implead concerning University as well as State Government as party to this petition. Let copy of the petition along with all the annexures be supplied to learned Govt. Advocate as well as to Shri P.K. Kaurav, Advocate on or before 31st August, 2007.
>
> Learned counsel for the University shall intimate about the passing of this order to the University."

12. At this juncture it is worthwhile to state that the matters relating to grant of recognition have been transferred from the Benches at Indore and Gwalior and an order was passed by Hon'ble the Chief Justice that the matter should be heard by a Division Bench. Accordingly, the matters have been placed before us.

13. We have heard the learned counsel for the petitioners. Mr. Dharmendra Sharma, learned Assistant Solicitor General for Union of India, Mr. Rakesh Johri along with Mr. Ashok Chakravorty, learned counsel for the NCTE, Mr. T.S. Ruprah and Mr. Rakesh Jain, learned Senior Counsel for the Board of Secondary Education, Madhya Pradesh, Bhopal, Mr. Deepak Awasthi, learned Government Advocate for the State, Mr. K.P. Mishra, learned Senior Counsel, Mr. P.K. Kaurav and Mr. Tapan Trivedi, advocates for Barkatullah University, Bhopal/Rani Durgavati Vishwavidyalaya, Jabalpur/Jiwaji University, Gwalior/Hari Singh Gour University, Sagar/Awadhesh Pratap Singh University, Rewa.

14. Learned counsel appearing for the petitioners in the cases have raised the following contentions:

(i) The Union of India has no jurisdiction to issue such a direction as has been issued by letter dated 20-8-2007 under Section 29 of the Act.

(ii) The instruction issued amounts to interference in the statutory functioning of the NCTE which is a central apex body and has to have independence in its functioning.

(iii) the directions given are contrary to the norms of regulations framed by the NCTE and other statutory provisions inasmuch as the Act and the Regulations have the inherent prescription or uninterrupted and continuous functioning of the NCTE as well as the committees and they cannot be denuded of their powers.

(iv) The interference made by the Central Government is contrary to Section 21 of the Act as the power vests with the NCTE only to terminate the regional committee.

(v) The language used in Section 30 of the Act confers the power on the Central Government to supersede the Council under certain contingencies and hence, the order passed in the case at hand is not in consonance with the aforesaid provision.

(vi) If Section 17 of the 1993 Act is scrutinised in proper perspective it will clearly show that the regional committee has the power to grant recognition to an institution and is also empowered to withdraw recognition but no power can be bestowed on the Central Government to interfere in such a manner as that would tantamount to scuttle the statutory functioning of the committee which is impermissible. Assuming the Central Government has issued such a direction it should have made an alternative arrangement but that having not been done the direction is unsustainable.

(vii) Section 29(1) of the Act deals with issue of general policy-decision but the direction at hand cannot, by any stretch of imagination, be construed as a policy-decision.

(viii) Any direction in contravention of the provisions of the statute cannot withstand scrutiny and has to pave the path of extinction.

(ix) The direction issued by the Central Government is contrary to the report of the Central Government on "Department of Secondary and Higher Education" published by the Government of India on 25-01-2006 which has been referred in paragraph 70 of the decision rendered in *State of Maharashtra vs. Sant Dhyaneshwar Shiskhan Shastra Mahavidyalaya,* 2006 AIR SCW 2048.

(x) The institutions would suffer immensely due to long pendency of the matter before the Committee and keeping in view the interim order passed by this Court to the effect that students be admitted without fees and no claim of equity should be protected in the legitimate interest the respondents should be directed to accept admission of the students in the institutions.

15. Mr. Dharmendra Sharma, learned Assistant Solicitor General for Union of India submitted that though the Union of India has not filed a counter affidavit but the letters are self explanatory and relate to exercise of power and, therefore, it is fundamentally a pure question of law which arises for consideration in this batch of cases. It is his submission that the Central Government has power under Section 29(1) of the Act to issue directions in relation to policy matters and if the scheme of the Act and the regulations framed thereunder are properly scrutinised there can be no trace of doubt that review of grant of recognition to various institutions can be a matter of scrutiny by the Government of India because recognition cannot be granted to an institution unless it fulfills the conditions as provided under the Act and the Regulations. It is also put forth by him that the object of the Act is to achieve planned and co-ordinated development of the teacher education system through out the country and hence, a decision for grant of recognition has to be taken keeping the object of the Act in view. The learned counsel further submitted that it is the duty of the Council to determine and maintain the standards in the teacher education system and to conduct surveys and studies relating to various aspects of teacher education to co-ordinate and monitor teacher education and its development in the country and, therefore, the power of reviewing the grant of recognition has to be treated as a policy decision and, therefore, the power has been rightly exercised. It is propounded by him that the direction issued as ad interim in measure and cannot be claimed as a part of legitimate expectation. It is also proponed by him that there has been no abolition of the Committee and scrutiny by the Union of India cannot be regarded as an antithesis to the powers conferred under the statute.

16. Mr. Deepak Awasthi, learned Government Advocate for the State submitted that obtainment of 'no objection certificate' is mandatory requirement and it cannot be said that the State has no say in the matter.

17. Mr. T.S. Ruprah and Mr. Rakesh Jain, learned senior counsel appearing for the Board of Secondary Education,M.P., Mr. K.P.Mishra, learned Senior Counsel, Mr. P.K. Kourav, Mr. Tapan Trivedi, learned counsel appearing for various Universities submitted that before granting affiliation they are required to follow the provision of the M.P. Vishwa Vidyalaya Adhiniyam,1973 and submission of the petitioners that they have only a ministerial job to do is *sans substratum.*

18. Before we advert to the statutory provisions it is apposite to refer to the letter issued by the Central government to NCTE. The said letter reads as under:

New Delhi
20th August, 2007

Government of India,
Ministry of Human Resources Development
Department of School Education & Literacy

To

The Chairperson,
National Council for Teacher Education,
1, Bahadur Shah Zafar Marg,
New Delhi – 110 002

Subject : 'Directions under Section 29 of the NCTE Act, 1993 to withhold the grant of recognition in institutions/Courses/additional intake falling under jurisdiction of Western Regional Committee of National Council for Teacher Education (NCTE)

Sir,

It has come to notice of the Department of School Education & Literacy that there has been uneven and disproportionate growth in the number of recognitions granted to various courses and institutions in the states falling under the Western Regional Committee of NCTE and that while granting recognition, the actual demand of teachers in particular states has been totally ignored.

2. In these circumstances, it is felt appropriate to undertake a comprehensive review of the situation for taking necessary corrective measures. Therefore, as directed by the competent authority, NCTE is hereby directed under Section 29 of the NCTE Act, 1993 that recognition may henceforth not be granted to any teacher training institutions/courses/additional intake falling within the jurisdiction of the Western Regional Committee of NCTE, till a comprehensive review is made or till further orders, whichever is earlier.

3. Necessary instructions to this order may accordingly be conveyed to the Western Regional Committee of NCTE. A compliance report may be sent to this Department at the earliest.

Yours sincerely,
(Simmi Choudhary)
Deputy Secretary to Government
Govt. of India
Tel : 2307327

19. It is also necessary to reproduce the communication made by the NCTE to the committee:

National Council of Teacher Education
A Statutory Body of the Government of India
Most immediate

File No.49-19/2007/N&S/NCTE
August 22, 2007

To

Dr. OVS Sikarwar,
Regional Director
Western Regional Committees
Manas Bhawan (Near AIR)
Shyamla Hills,
Bhopal : 162 002

Sub : Directions under Section 29 of the NCTE Act 1993 to withheld the grant of recognition to institutions / courses / additional intake, falling under the jurisdiction of Western Regional Committee of NCTE.

Sir,

I am directed to say that directions have been received from the competent authority under Section 29 of the NCTE Act, 1993 on August 21, 2007 that recognition may henceforth not be granted to any teacher training institutions/ courses/additional intake falling within the jurisdiction of the Western Regional Committee of NCTE till a comprehensive service to be undertaken or till further orders, whichever is earlier.

2. In view of the above, you are directed to ensure that the above directions are complied with and immediate steps are taken to ensure that no action taken for grant of recognition and also no meeting of the Western Regional Committee is held. The Chairperson and members of the Western Regional Committee may immediately be suitably informed in this regard.

Yours faithfully,
Sd/-
(V.C. Tewari)
Member Secretary"

20. Presently to the statutory provisions of the Act and the provisions of regulations governing the field.

21. Section 12 of the Act occurring in Chapter III deals with functions of the Council. The said provision enunciates that it is the duty of the Council to take all such steps as it may think fit for ensuring planned and co-ordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under the Act. The Council is required to undertake surveys and studies relating to various aspects of teacher education and publish the result thereof. It is the duty of the Council to recommend to the Central Government and State Government, Universities, University Grants Commission and recognised institutions in the matter of preparation of suitable plans and programmes in the field of teacher education. It

is the statutory duty of the Council to co-ordinate and monitor teacher education and its development in the country. In addition thereto, it is also within the domain of the council to lay down guidelines in respect of minimum qualifications for a person to be employed as a teacher in schools or in recognised institutions; to lay down norms for any specified category or courses or trainings in teacher education including the minimum eligibility criteria for admission thereof, and the method of selection of candidates, duration of the course, course contents and mode of curriculum; to lay down guidelines for compliance by recognised institutions, for starting new courses or training and such other guidelines including to take necessary steps to prevent commercialization of teacher education.

22. Section 14 of the Act deals with recognition of institutions offering course or training in teacher education. The said provision is reproduced below:

> "14. Recognition of institutions offering course or training in teacher education."
>
> (1) Every institutions offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:
>
> Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee
>
> (2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.
>
> (3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institutions concerned such other particulars as it may consider necessary, it shall,- (a) if it is satisfied that such institutions has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institutions for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institutions, subject to such conditions as may be determined by regulations; or
>
> (b) if it is of the opinion that such institutions does not fulfil the requirements laid down in sub-clause (a), pass an order refusing recognition to such institutions for reasons to be recorded in writing.
>
> Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institutions for making a written representation."
>
> (4) Every order granting or refusing recognition to an institutions

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

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

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

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

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

23. Section 15 of the Act provides for permission for a new course or training by recognised institution. To appreciate the scenario in proper perspective it is apt to quote the said provision:

"15. Permission for a new course or training by recognised institution."

(1) Where any recognised institution intends to start any new course or training in teacher education, it may make an application to seek permission therefor to the Regional Committee concerned in such form and in such manner as may be determined by regulations.

(2) The fees to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application from an institution under sub-section (1), and after obtaining from the recognised institution such other particulars as may be considered necessary, the Regional Committee shall,-

(a) if it is satisfied that such recognised institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper conduct of the new course or training in teacher education, as may be determined by regulations, pass an order granting permission, subject to such conditions as may be determined by regulation; or

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

Provided that before passing an order refusing permission

under sub-clause (b) the Regional Committee shall provide a reasonable opportunity to the institution concerned for making a written representation.

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

24. Section 16 deals with the affiliating body to grant affiliation after recognition or permission by the Council. The said provision is as under:

"16. Affiliating body to grant affiliation after recognition or permission by the Council."

Notwithstanding anything contained in any other law for the time being in force, no examining body shall, on or after the appointed day,-

(a) grant affiliation, whether provisional or otherwise, to any institution; or

(b) hold examination, whether provisional or otherwise, for a course or training conducted by a recognised institution, unless the institution concerned has obtained recognition from the Regional Committee concerned, under section 14 or permission for a course or training under section 15."

25. Section 20 deals with the power of the Council to establish regional committees. Section 21 confers the power on the Council to terminate the Regional Committee. Section 29 provides for directions by the Central Government. The said provision being relevant for the present purpose is quoted below:

"29. Directions by the Central Government."

(1) The Council shall, in the discharge of its functions and duties under this Act be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time.

(2) The decision of the Central Government as to whether a question is one of policy or not shall be final."

26. Section 30 confers power on the Central government to supersede the Council. As lot of emphasis has been laid on the said provision by the learned counsel appearing for the petitioners, we think it apposite to quote the same:

"30. Power to supersede the Council."

(1) If the Central Government is of the opinion that the Council is unable to perform, or has persistently made default in the performance of the duties imposed on it by or under this Act or has exceeded or abused its powers, or has wilfully or without

sufficient cause, failed to comply with any direction issued by the Central government under section 29, the Central Government may, by notification in the Official Gazette, supersede the Council for such period as may be specified in the notification.

Provided that before issuing a notification under sub-section the Central Government shall give a reasonable opportunity to the Council to show cause why it should not be superseded and shall consider the explanation and objections, if any, of the Council.

(2) Upon the publication of a notification under sub-section (1) superseding the Council-

(a) all the Members of the Council shall, notwithstanding that their term of office had not expired, as from the date of supersession, vacate their offices as such Members;

(b) all the powers and duties which may, by or under the provisions of this Act be exercised or performed by or on behalf of the Council shall, during the period of supersession be exercised and performed by such person or persons as the Central Government may direct;

(c) all property vested in the Council shall, during the period of supersession, vest in the Central Government.

(3) On the expiry of the period of supersession for such further period as it may consider necessary; or

(a) extend the period of supersession for such further period as it may consider necessary; or

(b) re-constitute the Council in the manner provided in section 3.

27. Section 32 deals with the power of the Council to make regulations. The said provision is reproduced hereunder:

"32. Power to make regulations."

(1) The Council may, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder, generally to carry out the provisions of this Act."

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the time and the place of the meetings of the Council and the procedure for conducting business thereat under sub-section (1) of section 7;

(b) the manner in which and the purposes for which persons may be co-opted by the Council under sub-section (1) of section 9;

(c) the appointment and terms and conditions of service of officers and other employees of the Council under sub-sections (1) and

(2) respectively of section 19;

(d) The norms, guidelines and standards in respect of-

(i) the minimum qualifications for a person to be employed as a teacher under clause (d) of section 12;

(ii) the specified category of courses or training in teacher education under clause (e) of section 12 ;

(iii) starting of new courses or training in recognised institutions under clause (f) of section 12;

(iv) standards in respect of examinations leading to teacher education qualifications referred to in clause (g) of section 12;

(v) the tuition fees and other fees chargeable by institutions under clause (h) of section 12;

(vi) the schemes for various levels of teacher education, and identification of institutions for offering teacher development programmes under clause (l) of section 12;

(e) the form and the manner in which an application for recognition is to be submitted under sub-section (l) of section 14;

(f) conditions required for the proper functioning of the institution and conditions for granting recognition under clause (a) of sub-section (3) of section 14;

(g) the form and the manner in which an application for permission is to be made under sub-section (1) of section 15;

(h) conditions required for the proper conduct of a new course or training and conditions for granting permission under clause (a) of sub-section (3) of section 15;

(i) the functions which may be assigned by the Council to the Executive Committee under sub-section (1) of section 19;

(j) the procedure and the quorum necessary for transaction of business at the meetings of the Executive Committee under sub-section (5) of section 19;

(k) the manner in which and the purposes for which the Executive Committee may co-opt persons under sub-section (6) of section 19;

(l) the number of persons under clause © of sub-section (3) of section 20;

(m) the term of office and allowances payable to members under sub-section (5) of section 20;

(n) additional functions to be performed by the Regional Committee under sub-section (6) of section 20;

(o) the functions of, the procedure to be followed by, the territorial jurisdiction of, and the manner of filling casual vacancies among members of, a Regional Committee under sub-section (7) of section 20;

(p) any other matter in respect of which provision is to be or may be, made by regulations."

28. It seemly to state here that the NCTE vide Annexure-R/2, 22-8-2005 has framed regulations laying down procedure for grant of recognition for norms, standards, guidelines and teacher training programmes. The said regulation has been framed under Section 32(2) of the Act. Regulation 4 deals with eligibility criteria of the institutions which are eligible for consideration of their applications under these regulations. Regulation 5 deals with manner of making application. Regulation 7 deals with processing of the application. Regulation 8 deals with the conditions for grant of recognition and the Regulation 9 deals with the financial management.

29. The seminal question that emanates for consideration is whether the letter that has been issued by the Central Government, which have been reproduced herein above could have been issued under Section 29 of the Act.

30. In this context we may refer with profit to the decision rendered in *Food Corporation of India and Others Vs. Bhanu Loadh and Others,* (2005) 3 SCC 618 wherein their Lordships were dealing with the power conferred on the Central Government under Section 6 (2)of the Food Corporation Act, 1964. The said provision deals with the management of Food Corporation. Section 12 of the said Act deals with the power of the Central Government to employ officers and other employees of the Corporation. Section 12-A of the Act empowers the Central Government to transfer certain types of government employees, serving in the Department of the Central Government dealing with food or any of its subordinate to FCI. Section 45 of the Act invests power in FCI to make regulations. In the aforesaid case the FCI had issued an advertisement for direct recruitment to the posts of Joint Managers/Deputy Managers in the Corporation. The process of recruitment for the post of Joint Manager was completed and the select list of the candidates was finalised with the approval of the Executive Committee of the Board of Management of FCI. At that juncture, the Government of India, Ministry of Food, issued a directive, purportedly in exercise of power under Section 6(2) of the Act imposing a complete ban on the recruitment process. The said directive was challenged before the High Court of Andhra Pradesh and a learned single Judge came to hold that the said directive was within the ambit and scope of Section 6 of the Act. A Letters Patent Appeal was preferred against the order of the learned single Judge which was also summarily dismissed. However, the Gauhati High Court posing a question to the effect whether the Government of India has any lawful authority to interfere with the internal administration of FCI, particularly relating to the matter regarding internal management viz. Appointment and service of its staff came to the conclusion that internal management was not within the scope of sub-sections (1) and (2) of Section 6 of the Food Corporation Act,1964. In the writ appeal the Division Bench concurred with the view expressed by the learned single Judge. Being dissatisfied with the aforesaid order the FCI preferred a Special Leave Petition. Their Lordships of the Apex Court addressed to the issue whether the Central Government could have issued a directive under Sub-section (2) of Section 6 of the Act which has the effect of putting an embargo

on the direct recruitment of employees. Their Lordships answered the issue in the following terms:

> "12. In our view, the words of sub-section (2) of Section 6 of the Act are very material and direct that the Board of Directors in discharging its functions "shall act on business principles" having regard to the "interests of the producer and consumer" and shall be guided by "such instructions on questions of policy" as may be given to it by the Central Government. First, the expression "business principles" is one of widest import. We see no reason as to why the policy of recruitment of officers/staff, which would obviously have serious financial impact on the Corporation, is not subsumed under this expression. Secondly, the Board of Management is required to have regard to the interest of the "producers and the consumers", and not merely of the officers and employees of FCI. Finally, the Board is required to discharge all its functions and be guided by the instructions on questions of policy, which may be given to it by the Central Government. Questions of policy could be, not only with regard to the organisation of FCI, its management and function, but also with regard to its employment policy, recruitment and many other details which would, in the long run, affect the interests of the consumers/producers for whom alone FCI is established under the Act. Testing it on this anvil, we find no difficulty in holding that the directive dated 21-8-1995 followed by the directive dated 6-11-1995 are well within the ambit of sub-section (2) of Section 6 of the Act. The directive dated 21-8-1995 indicates that the policy was not to have any creation/ upgradation of posts of any level except where completely unavoidable. The policy was that "the existing vacancies shall not be filled up by fresh recruitment", and that there shall be no further revision in the conditions of service without the prior approval of the Central Government. The policy directive issued on 6-11-1995 was a sequel and highlighted something being done contrary to the Regulations. While the maximum age prescribed under the Recruitment Rules is 35/40 years for the posts concerned, departmental candidates in the age of 52-53 years were proposed to be appointed. Even assuming that there is a power of relaxation under the Regulations, we think that the power of relaxation cannot be exercised in such a manner that it completely distorts the Regulations. The power of relaxation is intended to be used in marginal cases where exceptionally qualified candidates are available. We do not think that they are intended as an "open sesame" for all and sundry. The wholesale go-by given to the Regulations, and the manner in which the recruitment process was being done, was very much reviewable as a policy directive, in exercise of the power of the Central Government under Section 6(2) of the Act."

31. In this context we may usefully refer to the observations of the Apex Court in *Sant Dnyaneshwar Shikshan ShastraMahavidyalaya* (supra):

> "It is thus clear that the Central Government has considered the subject of Secondary Education and Higher Education at the national level. The Act of 1993 also requires Parliament to consider Teacher Education System 'throughout the country'. NCTE, therefore, in our opinion, is expected to deal with applications for establishing new B.Ed. colleges or allowing increase in intake capacity, keeping in view 1993 Act and planned and co-ordinated development of teacher-education system in the country.

32. Regard being had to the aforesaid pronouncements of law, if we look at the language employed under section 29 of the Act we have no scintilla of doubt that the Central Government could have issued such a direction as has been issued inasmuch as sub-section (1) of Section 29 make it crystal clear that the Council is bound by such directions on questions of policy as the Central Government may give in writing from time to time and further sub-section (2) of Section 29 lays a postulate that the decisions of the Central Government as to whether the question is one of the policy or not shall be final. Be it noted in the letter dated 20.8.2007 there is mention of the fact that it has come to the notice of School Education and Literacy that there has been uneven and disproportionate growth in the number of recognition granted to various courses of the Institutions in the State falling under the Western Regional Committee of NCTE and while granting recognition the actual demand of teachers in the particular State has been totally ignored. It is also perceivable from the letter that the Department has felt it appropriate to make comprehensive review of the situation for taking necessary corrective measures. The tenor of the letter and the grounds mentioned therein and keeping in view the language employed in section 29 of the Act there can be no trace of doubt that the Central Government has taken a decision which by no stretch of imagination can not be said to be a policy decision under the scheme of the Act. It is because the purpose of the Act is to provide for establishment of a National Council for Teacher Education with a view to achieve planned and co-ordinated development of the teacher education system throughout the country. That apart, Regulation 4 deals with eligibility and Regulation 8 deals with the conditions for grant of recognition. We have already referred to Section 12 of the Act. In view of the object and reasons and the role assigned to the Council and the power conferred on the Central Government we come to the irresistible conclusion that the direction issued by the Central Government is within the ambit and sweep of its powers and not de hors the statutory exercise of power.

33. Once we have come to hold that the Central Government has the power to issue such a direction as the policy decision, the other submissions viz. that the Committee has become non-functional; that there is an abandonment of statutory functioning; that there is ostracization of authority by a statutory body to perform its duties; and that there is an abdication of exercise of powers; and that there is a creation of vacuum in the absence of alternative mode, pale into insignificance. Further, the contention that the Regional Committee could have been terminated by the Council is of no substance

34. At this stage we think it apposite to refer to the stand and stance of the learned counsel for the petitioners that 'No Objection Certificate' from the State demanded by the University to grant affiliation is contrary to the decision rendered in the case of *Sant Dnyaneshwar Shikshan ShastraMahavidyalaya* (supra). In the aforesaid case a three-Judge Bench in paragraph 78 has held as under:-

> "78. In our opinion, the observations that the provisions of Section 82 and 83 of the Maharashtra University Act are "null and void" could not be said to be correct. To us, it appears that what the High Court wanted to convey was that the provisions of Sections 82 and 83 would not apply to an institution covered by 1993 Act. As per the Scheme of the Act, once recognition has been granted by NCTE under section 14(6) of the Act, every university ('examining body') is obliged to grant affiliation to such institution and sections 82 and 83 of the University Act do not apply7 to such cases."

35. Mr.Deepak Awasthy, learned Government Advocate and learned counsel appearing for various Universities have submitted that the obtaining of 'No Objection Certificate' is a condition precedent for grant of affiliation. In the case at hand, as is manifest, not a singular institution has been granted recognition under Section 14 of the Act. Sub-section (4) of Section 14 provides that every order granting or refusing permission to a recongized institution for a new course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for proper action to such institution and the concerning examining body, local authority or the State Government or the Central Government. It is not in dispute that the applications for grant of recognition to the institution or for other courses are pending before the Committee of the NCTE. In view of the aforesaid the issues relating to requirement of obtainment of grant of 'No Objection Certificate' or grant of automatic affiliation need not be addressed by us as they are premature at this stage and accordingly, we refrain from doing so.

36. Presently to the legitimate expectation and interest. It is submitted by the learned counsel for the petitioners that the institutions have given admission and if eventually the institutions are granted recognition the students should be permitted to appear in the examination. Learned single Judge of this Court while passing the interim order had clearly stated that institutions may admit students provisionally at their own risk without accepting fees from them and if they accept fees from the students they would be ready to face the consequences if the petition is decided against them. In view of the aforesaid order no equity can ever flow in favour of the institutions. We would like to place it on record that an institution which is desirous of imparting B.Ed and M.Ed. education or introducing a course meant for teachers is under obligation to be aware of the provisions contained under the 1993 Act. The said Act has been engrafted with a sacrosanct purpose. Grant of recognition is the condition precedent before any institution proceeds in any other matter like affiliation from the examining body. Whether the affiliation has to be granted automatically or not we have already refrained from dwelling upon the said issue, but, an onerous one, it is inconceivable how an institution without recognition can nurture the idea to admit students. A day-dreamer can build a castle in the air or for that matter castle in Spain, but it is absolutely inapposite on

the part of aspirants registered bodies or institutions to admit students and pyramid the foundation relying on the bedrock of legitimate expectation that the students would be treated as students who have been admitted in such institutions in such courses which are valid in law. An educational institution has to conduct itself in an apple pie order. It has to maintain the sacredness of the concept behind imparting education. They are under obligation to keep in mind that commercialization of course under 1993 Act is impermissible. Quite apart from the above, it is totally imprudent and in a way quite audacious to build a superstructure without an infrastructure. If we allow ourselves to say so, perception has been blinded and in the ultimate eventuate a cataclysm has been unwarrantedly invited. We may say without any fear of contradiction that it is a perceptible deception and fraud on law. Ergo, the stance that they have to be given the benefit of legitimate expectation and their interest should be protected, is devoid of any substance and we unhesitatingly repel the same.

37. One of the submission of the learned counsel for the petitioners deserves to be considered. It is submitted that the Central Government cannot take its own time to review the scenario. As is perceptible, the Central Government has issued a letter dated 20.8.07. The grounds for issue of instructions are that there has been uneven and disproportionate growth in the number of recognitions granted to various courses and institutions in the States falling under the Western Regional Committee of the NCTE and while granting recognition, the actual demand of teachers in particular states has been totally ignored and hence, a comprehensive review of the situation for taking necessary corrective measures were necessitous. Because of the said situation directive has been issued to the NCTE not to grant recognition to any teacher training institution intake falling within the jurisdiction of the Western Regional Committee of NCTE till a comprehensive review is made or till further orders whichever is earlier. The institutions which are before us may have filed applications and their applications may have been processed. The NCTE has a statutory role. As has been held by the Apex Court in the case of Sant Dnyaneshwar Shikshan ShastraMahavidyalaya (supra) the ojbect of the Act is that NCTE is required to deal with applications for establishing new B.Ed. colleges or allowing increase in intake capacity keeping in view 1993 Act and planned and co-ordinated development of teacher-education system in the country. Under Section 12 of the Act the Council is duty bound to take all such steps as it may think fit for ensuring planned and co-ordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under this Act from many a spectrum, undertaking surveys and studies relating to various aspects of teacher education and many a contour As the Central Government is making a comprehensive review of the same we need not to dwell upon the same. However, we direct the Central Government to take final decision by end of January, 2008.

38. Consequently, the writ petitions are dismissed without any order as to costs.

I.L.R. [2008] M. P., 75
WRIT PETITION

Before Mr. Justice R.S. Jha

3 December, 2007

SHIV BABU .....Petitioner*

Vs.

STATE OF M.P. ....Respondent

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

In the present case the disciplinary authority has exercised powers under Rule 19 and has dispensed with the services of the petitioner on account of his conviction in the present case without a departmental inquiry and rightly so, as in such a case the rule empowers the disciplinary authority to pass orders as it deems fit without following the procedure prescribed in Rules 14 to 18 of the M.P. CS (CCA) Rule, 1966.

The next submission of the learned counsel for the petitioner is that in view of pending appeal of the petitioner, the disciplinary authority could not have passed the impugned order of removal. Regulation 238 cannot be read in isolation as is being read by the petitioner. It has to be read subservient to Rule 19 of the M.P. CS (CCA) Rule, 1966 and along with Regulation 240 which clearly authorize and empower the disciplinary authority to pass appropriate orders on conviction of a government servant by a competent criminal Court without awaiting for decision of the pending criminal appeal.

In the circumstances in view of the provisions of Rule 19 of the M.P. CS (CCA) Rule, 1966 which in any case have precedence over the police regulation which are only by way of executive instructions and in view of Regulation 240, I am unable to agree with the contention of the learned counsel for the petitioner.

In the circumstances, I do not find any manifest illegality or patent illegality in the impugned orders of the disciplinary authority or the appellate authority. However, it needs no specific emphasis to state that in case the petitioner is successful in his appeal, he may approach the authorities for reconsidering his case in accordance with Police Regulation 240. (Paras 4,5,6 and 7)

*W.P No. 16086/2007 Jabalpur

Cases Referred :

(1) 1996 MPLJ 507, (2) 2003(1) MPLJ 296.

Sanjay Patel, for the petitioner
None, for the respondent

Cur.adv.vult

ORDER

R.S. JHA, J. :–The petitioner has filed this petition being aggrieved by orders dated 03-02-2007 and 29-10-2007 passed by the competent authority and the appellate authority respectively removing the petitioner from service on account of his conviction for offences under Sections 498-A and 304-B read with Section 34 of the Indian Penal Code and Section 3/4 of the Dowry Prohibition Act for a period of ten years rigorous imprisonment with fine of Rs. 500/-.

2. It is contended by the learned counsel for the petitioner that in view of Regulation 238, the impugned order of removal of the petitioner dated 3-2-2007 could not have been passed as the appeal filed by the petitioner against his conviction is pending before this Court and vide order dated 25-4-2007 the appellant has been granted bail. It is also submitted that the petitioner could only have been removed from service by holding a full fledged departmental inquiry and in the absence of the same, the impugned order of removal deserves to be quashed.

3. From a perusal of the averments and documents filed by the petitioner, it is evident that the petitioner has been convicted for offences punishable under Sections 498-A, 304-B read with Section 34 of the Indian Penal Code and Section 3/4 of the Dowry Prohibition Act and has been sentenced to 10 years of rigorous imprisonment with fine of Rs. 500/-. It is also clear that the petitioner has filed an appeal against his conviction which has been registered as Criminal Appeal No. 528/2007 and the petitioner has been granted bail in the said appeal vide order dated 25-4-2007.

4. It is an admitted fact that the petitioner's service is governed by the provisions of Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (for short, 'M.P. CS (CCA) Rule, 1966'). Rule 19 of the M.P. CS (CCA) Rule, 1966 provides that notwithstanding anything contained in Rule 14 to Rule 18 (which provide and prescribe the procedure for conducting a Departmental Inquiry) where any penalty is imposed on a Government servant on account of his conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit. Apparently, in view of the non-obstante Clause in Rule 19, the detailed procedure prescribed for conducting a Departmental Inquiry under Rule 14 to 18 of the M.P. CS (CCA) Rule, 1966 is excluded where orders are passed under Rule 19 on the basis of conviction of a Government servant on criminal charges. In the present case the disciplinary authority has exercised powers under Rule 19 and has dispensed with the services of the petitioner on account of his conviction in the present case without a departmental inquiry and rightly so, as in such a case the rule empowers the disciplinary authority to pass orders as it deems fit without following the procedure prescribed in Rules 14 to 18 of the M.P. CS (CCA) Rule, 1966.

5. The next submission of the learned counsel for the petitioner is that in view of pending appeal of the petitioner, the disciplinary authority could not have passed the impugned order of removal. Regulation 238 cannot be read in isolation as is being read by the petitioner. It has to be read subservient to Rule 19 of the M.P. CS (CCA) Rule, 1966 and along with Regulation 240 which clearly authorize and empower the disciplinary authority to pass appropriate orders on conviction of a government servant by a competent criminal Court without awaiting for decision of the pending criminal appeal. The said powers conferred on the disciplinary authority are apparently in consonance with settled principle of service Jurisprudence that the continuance of a convicted employee in service is not conducive for good administration.

6. In the circumstances in view of the provisions of Rule 19 of the M.P. CS (CCA) Rule, 1966 which in any case have precedence over the police regulation which are only by way of executive instructions and in view of Regulation 240, I am unable to agree with the contention of the learned counsel for the petitioner. Similar view has also been taken by this Court in the Case of *R.N.Gupta Vs. J.N.K.V. Jabalpur,* 1996 MPLJ 507 and *Jamna Prasad Vs. State of M.P.,* 2003 (1) MPLJ 296.

7. In the circumstances, I do not find any manifest illegality or patent illegality in the impugned orders of the disciplinary authority or the appellate authority. However, it needs no specific emphasis to state that in case the petitioner is successful in his appeal, he may approach the authorities for reconsidering his case in accordance with Police Regulation 240.

8. The petition is merit less and is accordingly dismissed at admission stage.

I.L.R. [2008] M. P., 77
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
4 December, 2007

MANAKCHAND RUTHIA ...Petitioner*
Vs.
RAJENDRA KUMAR AGRAWAL ...Respondent

Civil Procedure Code (5 of 1908) - Section 151 - Consolidation of two suits - Petitioner filed suit seeking relief of declaration and permanent injunction to the effect that agreement to sell executed by him has lost its efficacy due to non compliance of conditions of said agreement - Respondent filed a suit for specific performance of Contract on the basis of same agreement - Held - Both suits are based on same agreement between same parties and in respect of same land - Merely because different issues have been framed it cannot be said that both the suits are so distinct that they cannot be tried together - Consolidation of suits can be ordered to save parties from multiplicity of proceedings, delay and expenses - Order passed by the Trial Court proper - Petition dismissed.

In the Civil Suit No. 3 A/2006 filed by the respondent No. 1, he is seeking

*W P. No. 16253/2007 Jabalpur

specific performance of the agreement of sale. His claim is based on the same agreement dated 29.9.1998 which according to the petitioner in his Civil Suit No. 20 A/2005 has lost its efficacy due to non compliance of the conditions of the said sale agreement. Thus, both the suits are based upon the same agreement of sale between the same parties and in respect of the same Survey number of the land. Merely because different issues have been framed in the said suits it cannot be said that the suits are so distinct that they cannot be tried together and the issues cannot be tried jointly.

The Trial Court has correctly exercised the inherent powers vested in it under Section 151 of the C.P.C. by ordering consolidation of both the suits in order to meet the ends of justice and to prevent the abuse of the process of the Court. The consolidation of the suit can be ordered to save the parties from multiplicity of the proceedings, delay and expenses. On going through the pleadings of both the suits, I find that there is substantial and sufficient similarity of the issues arising for decision in both the suits. In my view by consolidation the parties will be relieved of the need of adducing the same or similar documentary and oral evidence twice into two different suits at two different trials. The court would be able to pass a common judgment and it will be open for the court either to draw two different decrees or one common decree which can be placed on records of the two suits. (Paras 8 and 9)

Alok Aradhe, Sr. Adv. with Siddharth Gulati for petitioner.

Cur. adv. vult

ORDER

SHANTANU KEMKAR, J. :–Heard learned Senior Counsel on the question of admission.

This order shall also govern the disposal of the Writ Petition No. 16255/2003 – Manakchand Ruthia vs. Rajendra Kumar Agrawal and another.

2. Feeling aggrieved by the order dated 23.10.2007 passed by the I Additional District Judge, Sehore in Civil Suit No. 3 A/2006 by which the application filed under Section 151 of the Code of Civil Procedure (for short C.P.C.) by the first respondent seeking consolidation of Civil Suit No. 3 A/2006 and Civil Suit No. 20 A/2005 has been allowed, the petitioner has filed this petition under Article 227 of the Constitution of India.

3. The petitioner/plaintiff filed a Civil Suit No. 20 A/2005 seeking relief of declaration and permanent injunction against the first respondent. As per the plaint averments first respondent (defendant No. 1) entered into an agreement of sale on 29.9.1998 with the petitioner (plaintiff) to purchase the land out of Survey No. 480 Chawni, Sehore. It is stated that since the defendant No. 1 failed to abide by the conditions of the said sale agreement the sale agreement lost its efficacy. In the circumstances, the defendant No. 1 has no right to claim any right over the said land and is not entitled to interfere into the peaceful possession of the petitioner/plaintiff over the said land.

4. The respondent No. 1/defendant No. 1 submitted his written statement on 3.5.2006 in the said Civil Suit No. 20 A/2005. Along with the written statement

the defendant No. 1 also filed an application under Section 151 of the C.P.C. stating therein that he has also filed a Civil Suit No. 3 A/2006 against the plaintiff which is also pending in the same Court and, therefore, both the suits be consolidated and be tried together.

5. The Trial Court before deciding the said application framed issues in both the civil suits on 21.2.2007. Thereafter the respondent No. 1/ defendant No. 1 submitted yet another application on 14.9.2007 under Section 151 of the C.P.C. reiterating his prayer for consolidation of both the suits. The Trial Court vide impugned order dated 23.10.2007 allowed the application dated 14.9.2007 filed by the first respondent/defendant No. 1 and directed for consolidation of the both the suits. Similar order was passed by the trial court in Civil Suit No. 20 A/2005 which is subject matter of challenge in W.P. No. 16255/2007.

6. The contention of the learned senior counsel for the petitioner is that the issues involved in both the suits are different and since the petitioner's/plaintiff's evidence in Civil Suit No. 20 A/2005 has already been recorded the order directing consolidation would cause delay and injustice to the petitioner.

7. Having heard the learned Senior Counsel for the petitioner and on perusal of the documents filed along with the petition, I find no merit in this petition.

8. In the Civil Suit No. 3 A/2006 filed by the respondent No. 1, he is seeking specific performance of the agreement of sale. His claim is based on the same agreement dated 29.9.1998 which according to the petitioner in his Civil Suit No. 20 A/2005 has lost its efficacy due to non compliance of the conditions of the said sale agreement. Thus, both the suits are based upon the same agreement of sale between the same parties and in respect of the same Survey number of the land. Merely because different issues have been framed in the said suits it cannot be said that the suits are so distinct that they cannot be tried together and the issues cannot be tried jointly.

9. The Trial Court has correctly exercised the inherent powers vested in it under Section 151 of the C.P.C. by ordering consolidation of both the suits in order to meet the ends of justice and to prevent the abuse of the process of the Court. The consolidation of the suit can be ordered to save the parties from multiplicity of the proceedings, delay and expenses. On going through the pleadings of both the suits, I find that there is substantial and sufficient similarity of the issues arising for decision in both the suits. In my view by consolidation the parties will be relieved of the need of adducing the same or similar documentary and oral evidence twice into two different suits at two different trials. The court would be able to pass a common judgment and it will be open for the court either to draw two different decrees or one common decree which can be placed on records of the two suits.

10. Merely because the plaintiff has adduced his evidence in one of the suit will not be a ground to restrict the Trial Court's power to consolidate the two suits which for the reasons stated above needs to be consolidated and more particularly when the defendant No. 1 had filed the first application under Section 151 of the C.P.C. in the petitioner's suit seeking consolidation, at the initial stage itself.

11. In this view of the matter, I find no illegality or jurisdictional error in the impugned order.

12. Accordingly, the petition deserves to be and is hereby dismissed *in limine*.

I.L.R. [2008] M. P., 80
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
5 December, 2007

ANIL KUMAR JAIN ...Petitioner*
Vs.
STATE OF M.P. and ors ...Respondents

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

Rohit Arya, with *Anubhav Jain*, for the petitioner
T.S. Ruprah, Addl.A.G. for the respondents no. 1 & 2

Cur.adv.vult

ORDER

SHANTANU KEMKAR, J.:–Heard learned Senior counsel for the petitioner on the question of admission.

1. The petitioner contested and succeeded in the election held in the year 2005 for the post of President Municipal Council Deori District Sagar. On 6.8.2007 out of total 15 councillors 13 councillors of the said Municipal Council submitted a proposal before the Collector Sagar for recalling of the petitioner from his office as President of the Municipal Council. The Collector after satisfying himself and verifying that the three fourth of the councillors of the Municipal Council have signed the proposal of recall of the petitioner sent the said proposal on 8/9.8.2007 to the State Govt. for further action.

2. Thereafter, before the third respondent State Election Commission could declare the election, two councillors out of the said 13 councillors submitted another affidavits before the Collector on 30/8/2007 and 31/8/2007 respectively stating therein that the earlier affidavits seeking recall of the petitioner were submitted under political pressure and compulsion and as such the same be treated incorrect and be treated as cancelled. Thereafter, again on 1/9/2007 the said two councillors submitted third affidavits contradicting the affidavits sworn by them on 30/8/2007

*W.P. No. 16355/2007, Jabalpur

and 31/8/2007. In view of the submission of the three different affidavits taking different stand show cause notices were issued to them by the Collector, and it is stated by the petitioner that the Collector has passed orders removing the said two councillors from their post.

3. The case of the petitioner is that after submitting the proposal of recall out of 13 councillors 2 councillors having sworn affidavit stating therein that no action be taken on their earlier proposal and affidavit in regard to recalling of the petitioner, the impugned proposal dated 8/9.8.2007 (Anneuxure P-1) sent by the Collector to the State Govt. became totally inconsequential and could not have been acted upon either by the Collector, or by the State Govt. for making reference to the State Election Commission to arrange for voting on the said proposal. The petitioner accordingly, prayed that the proposal Annexure P-1 sent by the Collector Sagar, to the State Govt. be quashed and the election programme (Anneuxure P-11) issued by the State Election Commission be also quashed.

4. Shri T.S. Ruprah, learned Additional Advocate General for respondents no. 1 & 2 argued that in view of Section 47 of the Madhya Pradesh Municipalities Act, 1961 (For short the Act) the action of the Collector, State Govt. and the State Election Commission cannot be said to be illegal. He pointed out from the proposal (Annexure P-1) sent by the Collector that on 6.8.2007, 13 councillors appeared before the Collector and they all presented the proposal of recalling of the petitioner. The Collector after satisfying himself and verifying that the three fourth of the councillors have submitted the proposal of recall referred the proposal to the State Govt. for further action. He also submitted that after sending of the said proposal by the Collector vide communication datd 8/9-8-2007 (Anneuxre P-1) to the State Govt., filing of the affidavits by two councillors to withdraw the earlier affidavits and proposal to recall the petitioner being inconsequential has rightly been ignored by the Collector, the State Govt. and also by the State Election Commission. According to him in view of Section 47 of the Act after sending the proposal to the State Govt. the Collector became *functus officio* and under the scheme of Section 47 neither the State Govt. nor the State Election Commission have powers to reconsider the matter on the basis of filing of affidavits by some councillors seeking withdrawal of their proposal.

5. Having heard learned counsel and on a close scrutiny of Section 47 of the Act, I find no merit in this Writ Petition.

6. On going through the proposal dated 8/9-8-2007 (Annexure P-1) sent by the Collector to the State Govt., I find that all the 13 councillors who had submitted the proposal of recalling of the petitioner appeared personally before the Collector. The Collector after satisfying and verifying that three fourth of the total number of the councillors have signed the proposal of recall, sent the same to the State Govt. for further action.

7. After sending of the proposal by the Collector on 8/9-8-2007 in due compliance of Section 47(2) of the Act; the alleged affidavits were submitted by the two councillors on 30.8.2007 and 31.8.2007 seeking withdrawal of their earlier affidavits for recalling of the petitioner. Thereafter, again on 1.9.2007 affidavits were submitted by the said two councillors changing their stance.

8. Having regard to the aforesaid, it is clear that the proposal for recalling of the petitioner was submitted and presented by three fourth of the total number of the elected councillors of the Municipal Council and on due satisfaction and verification as provided under Section 47(2) of the Act it was sent by the Collector to the State Govt. It is not the case of the petitioner that there is any breach or non compliance of the first proviso of Section 47 or of Section 47 (2) of the Act. The submission of affidavits on 30.8.2007 and 31.8.2007 by the said two councillors after the proposal being sent on 8/9-8-2007 by the Collector to the state Govt., is of no consequence. Once the proposal is sent by the Collector there is no provision in Section 47 and in the Act empowering the Collector, the State Govt. or to the State Election Commission to reconsider the matter and to cancel or ignore the duly sent proposal of recall on the basis of such subsequently filed affidavits. If such course is allowed it would amount to reading something which is not provided in Section 47 and in the Act.

9. Thus, I find no illegality in the impugned proposal sent by the Collector, the reference made by the State Govt. and the action of the State Election Commission to arrange for voting on the proposal of recall.

10. The petition being devoid of merits is dismissed *in limine.*

I.L.R. [2008] M. P., 82
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
9 October, 2007

KHAIRUNISHA & ors. ...Appellants*
Vs.
SUBHASH @ PUNJABI & ors. ...Respondents

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

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. 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 *simplicitor,* while if the cause of murder or act of murder was originally not intended and the same was caused

*M A. 3372/05. Jabalpur

in furtherance of any other felonious act then such murder is an accidental murder.

Coming to the facts of instant case : it is clear that there was causal connection between the initial accident that took place between of Mini truck and that of offending vehicle, there was also connection of the subsequent events with the accident and the clearly the Motor Vehicle driven by Subhash Nagle caused death of Mohd. Arif. Thus, it was a clearly a case of accidental murder. It was having causal connection with the motor accident, altercation also took place due to accident as the compensation was demanded that was also having causal connection, thereafter Mohd. Arif was run over by the offending truck. Thus, case squarely falls within the category of accidental murder as per principles laid down by the Apex Court in *Rita Devi* (supra). Thus, the claimants would be entitled for compensation, being a case of accidental murder involving use of motor vehicles. (Paras 8 & 12)

Cases Referred :

(1) AIR 2000 SC 193-=2000 ACJ 801, (2) 2001 ACJ 1176; (3) 1998 ACJ 1351 (SC); (4) 1991 ACJ 777 (SC); (5) (1964) 2 All ER 742; (6) 2007 ACJ 1126; (7) 2001 ACJ 801; (8) 2007 ACJ 43; (9) 2003 ACJ 512.

Pramod Thakre, for the appellants,
Danendra Sukhdeo, for the respondents No.2
Rakesh Jain, for respondents No.3

Cur.Adv.vult

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :-The appeal has been preferred by the claimants aggrieved by dismissal of their claim petition by the Addl. Motor Accidents Claims Tribunal, Multai, District Betul as per award dt.10.10.2005 passed in M.A.C.C. No.33/04. The Tribunal has dismissed the claim petition on the basis that it was a murder committed by use of motor-vehicles. There was no causal connection of murder committed with the accident, in the opinion of the Tribunal it was not a case of an accidental murder.

2. The Claimants preferred claim petition claiming compensation on account of death of Mohd. Arif aged 23 years, driver of Tata Mini Truck (MP28-B/0144). The Mini Truck met with an accident with another truck (MP-05-A/8131) driven by Subhash @ Punjabi Nagle owned by Dayalu and insured with the New India Assurance Co.Ltd. When accident was caused Mohd. Arif driver of the Mini Truck asked Subhash Nagle to make the payment of compensation, as several persons had assembled Subhash Nagle asked Mohd. Arif to accompany him in his Truck, he went ahead 1/2 k.m. along with Mohd. Arif in the Truck and committed MARPEET of Mohd. Arif, ultimately Mohd. Arif was crushed by the Truck driven by Subhash Nagle, he fell down on the road and rear wheel of the truck ran over his head. He died on the spot. Subhash Nagle ran away from the spot along with the truck. Subhash Nagle was tried for commission of offence u/s 302, 427 of the I.P.C. and punished with life imprisonment. Deceased was earning Rs.4200/- per month. His salary was Rs.2100/-, allowance was also Rs.2100/-. Compensation of Rs.6,99,800/-was claimed along with interest.

3. The driver was proceeded *exparte*. The owner in his reply contended that it was not a case of motor-accident, murder of Mohd. Arif was committed by Subhash Nagle. Thus, the claimants were not entitled to claim compensation.

4. Insurer; the New India Assurance Co.Ltd. in its reply denied the liability to make the compensation on the ground that it was not a case arising out of motor-accident, it was a case of murder. As rate of interest was reduced, liability, if any, be saddled with the reduced rate of interest.

5. The Tribunal on assessment of evidence has found that it was a case of murder of Mohd. Arif, it could not be said to be a case of motor-accident. Consequently, the claim petition has been dismissed. Aggrieved by the same the appeal has been preferred by the claimants.

6. Shri Pramod Thakre, learned counsel appearing on behalf of the claimants has submitted that it was an accidental murder of Mohd. Arif, there was causal connection of murder with use of the motor-vehicles, there was collision of two vehicles one driven by the deceased and another by Subhash Nagle respondent No.1, that has ultimately led to the injuries being caused, altercation between the two drivers took place due to accident of two vehicles as deceased Mohd. Arif demanded compensation, Subhash Nagle ran over the truck over him. Thus, the dismissal of the claim petition by the Tribunal was not proper, he has also relied upon various decisions to be referred later.

7. Shri Rakesh Jain, learned counsel appearing on behalf of the insurer has submitted that the accident was over, thereafter altercation took place between two drivers and as found by the Tribunal, intentionally truck was taken over the deceased Mohd. Arif by driver Subhash Nagle, thus, the Tribunal has rightly found it to be a case of out and out murder, it cannot be said to be a case of accidental murder or having causal connection with the accident. Shri Danendra Sukhdeo, learned counsel appearing on behalf of the owner has also supported the submissions made by Shri Rakesh Jain.

8. It is not in dispute that there was accident between Mini Truck driven by the deceased Mohd. Arif and the truck driven by Subhash Nagle a convict in the murder case relating to death of Mohd. Arif. Subhash Nagle had taken Mohd. Arif in his truck in order to satisfy his demand to make payment of compensation due to damage caused to the Mini Truck which Mohd. Arif was driving. It appears that after Mohd. Arif was taken by Subhash Nagle in his truck an altercation took place between them, thereafter Mohd. Arif was dashed with the truck. It appears that the truck dashed the deceased rear wheel came over the head resulting into death of Mohd. Arif on the spot. Before giving finding of the causal connection in the instant case, we deem it appropriate to refer to decisions of the Apex Court in *Rita Devi v. New India Assurance Co.Ltd.*, AIR 2000 SC 1930 = 2000 ACJ 801 wherein the Court has laid down that though Motor Vehicles Act has not defined the word 'death' the legal interpretations with reference to word 'death' in Workmen's Compensation Act will be applicable. The relevant object of both the Acts is to provide compensation to the victims of accidents. Workmen's Compensation Act is confined to workmen whereas the Motor Vehicles Act is available to the victims involving a motor vehicle. While examining the actual

legal import of the words 'death due to accident arising out of the use of motor vehicle' the Apex Court considered the question can a murder be an accident in any given case ? The Apex Court has laid down that there is no doubt that the '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 of 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. 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 simplicitor,* 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. In the backdrop of the fact that deceased in the said case was driver of Auto-Rickshaw for carrying passengers on hire 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, 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. Thus, it was held by their Lordships that the death of autorickshaw driver is an accident in the process of theft of autorickshaw.

9. A Division Bench of this Court in *Kaushalya Bai and others v. Ramkishan Kirar and others,* 2001 ACJ 1176, in the backdrop of the fact that death was caused when stolen goods were taken away in the tractor trolley, when effort was made by the deceased to stop the tractor trolley he was hit, it was a case of accidental murder arising out of use of motor vehicle. In *Sameer Chanda v. M.D. Assam State Trans. Corpn.,* 1998 ACJ 1351 (SC) where the injuries were suffered by the claimant due to bomb blast inside the passenger bus when it reached the last stoppage and passengers were alighting from it, abnormal situation was prevailing during that period requiring owner or driver to take extra care by carrying a police escort,but there was no police help in the city bus on the day of accident,plea of negligence was allowed by the Tribunal. their Lordships of the Apex Court considered the decision in *Shivaji Dayanu Patil v. Vatschala Uttam More,* 1991 ACJ 777(SC) in which there was a collision between a petrol tanker and a truck on a national high-way, as a result of which the tanker went off the road and fell on its left side at a distance of about 20 feet from the high-way. As a result of the collision, the petrol contained in the tanker leaked out and collected nearby, about four hours later, an explosion took place in the tanker causing burn injuries to those assembled near it. The Apex Court held that the word 'use' has a wider connotation to cover the period when the vehicle is not moving and is stationary and the use of a vehicle does not cease on account of the vehicle having been rendered immobile on account of a breakdown or mechanical defect or accident. The Apex Court has laid down that the expression 'arising out of' has a wider connotation as compared to the 'accident caused'. The expression 'arising out of' has been used in sections 165, 163-A and 140 of the 1988 Act. There is departure from the previous Act of 1939 in which under section 95(1)(b)(ii) the

expression used was 'caused by'. Their Lordship laid down that use of expression 'arising out of' indicates that for the purpose of awarding compensation under section 92-A of the 1939 Act was causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate under the Act of 1988. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression 'arising out of the use of motor vehicle' enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment.

The right of third party to claim compensation in such situation has been considered by Lord Denning in the case of *Hardy v. Motor Insurer's Bureau*, (1964) 2 All ER 742 it was held that :

> "The policy of insurance, which a motorist is required by statute to take out, must cover any liability which may be incurred by him arising out of the use of the vehicle by him. It must, I think, be wide enough to cover, in general terms, any use by him of the vehicle, be it an innocent use or a criminal use, or be it a murderous use or a playful use. A policy so taken out by him is good altogether according to its terms. Of course, if the motorist intended from the beginning to make a criminal use of the vehicle intended to run down people with it or to drive it recklessly and dangerously and the insures knew that that was his intention, the policy would be bad in its inception. NO one can stipulate for inequity. But that is never the intention with which such a policy is taken out. At any rate, no insurer is ever party to it. So the policy is good in its inception. The question arises only when the motorist afterwards makes a criminal use of the vehicle, the consequences are then these: if the motorist is guilty of a crime involving a wicked and deliberate intent and he is made to pay damages to an injured person, he is not himself entitled to recover on the policy. But if he does not pay the damages, then the injured third party can recover against the insurers under section 207 of the Road Traffic Act, 1960 for it is a liability which the motorist, under the statute, was required to cover. The injured third party is not affected by the disability which was attached to the motorist himself. So here, the liability of Phillips to the plaintiff was a liability which Phillips was required to cover by a policy of insurance, even though it arose out of his willful and culpable criminal act. If Phillips had been insured, he himself would be disabled from recovering from the insurers. But the injured third party would not be disabled from recovering from them."

10. In *Oriental Insurance Co.Ltd. v. Sheela Bai Jain and another*, 2007 ACJ 1126 a Division Bench of this Court has considered the question of murder arising out of and in the course of employment, truck loaded with goods turned

turtle and cleaner of truck was guarding the truck and its goods when he was murdered by unknown persons, it was held by this Court that it was a case of 'death' in the course of employment. Decision of *Rita Devi* (surpa) had been relied upon, the Court has found the causal connection as observed in *Shivaji Dayanu Patil* (supra).

11. Shri Pramod Thakre, learned counsel appearing on behalf of the claimants has referred the decision in *Oriental Insurance Co.Ltd. v. Archana Rajan and others,* 2001 ACJ 801 wherein a Division Bench of Patna High Court in the case of murder with intent of causing violence inside a motor vehicle was held to be an accident and insurance company was held liable. In *National Insurance Co.Ltd. v. Kasheni and others,* 2007 ACJ 43 the High court of Gauhati has also awarded compensation to the victim, owing to firing travelling in the Auto-Rickshaw. Counsel has also referred to *Sushila and another v. State of Karnataka and ors,* 2003 ACJ 512) where murder of forest watchman was committed by wood smugglers when he tried to catch them while protecting forest produce of the State, it was held to be a fatal accident. It appears to us that facts of each case are required to be considered so as to find out causal connection.

12. Coming to the facts of instant case : it is clear that there was causal connection between the initial accident that took place between of Mini truck and that of offending vehicle, there was also connection of the subsequent events with the accident and the clearly the Motor Vehicle driven by Subhash Nagle caused death of Mohd. Arif. Thus, it was clearly a case of accidental murder. It was having causal connection with the motor accident, altercation also took place due to accident as the compensation was demanded that was also having causal connection, thereafter Mohd. Arif was run over by the offending truck. Thus, case squarely falls within the category of accidental murder as per principles laid down by the Apex Court in *Rita Devi* (supra). Thus, the claimants would be entitled for compensation, being a case of accidental murder involving use of motor vehicles.

13. Coming to question of quantum of compensation to be awarded : we find that the Tribunal has assessed the income at Rs.3,000/- per month that is found to be proper assessment of income of Mohd. Arif, annual income, thus, comes to Rs.36,000/-, making customary 1/3rd deduction towards self expenditure of the deceased which amount the deceased would have spent on himself, had he been alive, the annual loss of dependency comes to Rs.24,000/-. The age of mother was 42 years, consequently instead of multiplier of 17 we apply the multiplier of 15 considering the age of mother, thus, the compensation comes to Rs.3,60,000/-. Apart from that we award a sum of Rs.30,000 to the claimants under the customary heads such as loss of estate, loss of expectancy of life and funeral expenses. Thus, total compensation comes to Rs. 3,90,000 (Rs. Three Lakh, Ninety Thousand Only). The compensation to carry interest @ 6% per annum from the date of claim petition till realization.

14. Resultantly, the appeal is allowed in part to the aforesaid extent. Compensation of Rs. 3,90,000 (Rs. Three Lakh, Ninety Thousand Only) is awarded along with interest @ 6% per annum from the date of claim petition till realization.

Liability of the respondents is held to be joint and several to make payment of compensation. We award 50% of the amount to the mother and remaining amount to be disbursed equally to the brother and sister. No costs.

I.L.R. [2008] M. P., 88
APPELLATE CIVIL
Before Mr. Justice Arun Mishra and Mr. Justice S.A. Naqvi
9 October, 2007

MANOJ KUMAR JAIN & anr. ...Appellants*
Vs.
CORPORATION BANK & anr. ...Respondents

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

On the steps being taken under sub-section 4 of section 13 of Act of 2002 any person aggrieved by any of the measures referred in section 13(4) taken by the secured creditor, may make application to the DRT having jurisdiction of the matter within 45 days from the date, on which such measure had been taken. It is open to the secured creditor to take steps with respect to the borrower and borrower as defined in section 2(f) and the debt as defined in section 2(ha) of the Act of 2002 is not regulated by any financial constraint. In other words section 13(4) is not applicable only to the cases where amount of debt due is more than Rs. Ten Lakhs. There is no room to confine the application of the Act of 2002 to the debt of more than Rs. Ten Lakhs, that interpretation would defeat the very object of the Act for which Act of 2002 has been enacted.

Aforesaid Section 17 also cause no fetter on the power of Debts Recovery Tribunal to entertain the application in those cases only where debt is above Rs. Ten Lakhs. Section 18 of the Act of 2002 provides appeal to the Appellate Tribunal.

*F.A. 657 2007. Jabalpur.

Section 34 of the Act of 2002 provides that no Civil Court shall have the jurisdiction to entertain any suit or proceedings in respect of any matter which Debt Recovery Tribunal or Appellate Tribunal is empowered to deal with by or under the Act.

The aforesaid provision of the Section 1(4) of the Act of 1993 is with respect to the applicability of the Act of 1993 and cannot govern the applicability of the Act of 2002 within the pecuniary limits as provided in subsection 4 of section 1 of the Act of 1993. Section 17 of the Act of 1993 deals with the jurisdiction, power and authority of the Tribunal, no doubt about it that under the Act of 1993 the jurisdiction, power and authority of the Tribunal has to be governed by the provision of the Act of 1993 inclusive of section 1(4) of the Act of 1993. Section 17 of the Act of 1993 cannot be made applicable to the provision of section 17 of Act of 2002 which provide independent remedy under the said Act nor section 34 of Act of 2002 can be interpreted in the manner as suggested by Shri A.K.Jain, learned counsel appearing for appellant that bar is created under section 34 of Act of 2002 only with respect to the debt of Rs. 10 lakhs or above.

In view of the aforesaid provisions, it is clear that operation of section 17 of the Act of 2002 is unfettered by the amount of loan, that has been taken and there is remedy of appeal/application provided under section 17 of the Act of 2002. Consequently the action initiated by the Bank under the provisions of the Act of 2002 cannot be the subject matter of the Civil Court with respect to the matters to be dealt with under the Act of 2002. Section 34 bars the jurisdiction of the civil court as such court below has rightly held the civil suit to be not maintainable before it. (Paras 6 & 7)

Cases Referred :

(1) AIR 2004 SC 2371, (2) AIR 2007 Sc 712.

A.K. Jain, for the appellants

R.S. Chauhan, for the respondents

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred by the plaintiffs aggrieved by order passed by District Judge, Jabalpur in C.S. No. 8-A/06 rejecting the plaint under Order 7 Rule 11 of CPC on the ground that civil suit is barred under section 34 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as Act of 2002).

2. The plaintiffs are the purchaser from borrower Jitendra Kumar Jasnani, they have purchased the house by registered sale deed dated 8.12.2003 for a sum of Rs. 8,27,000/-. Before filing of the suit the appellants came to know that the first floor portion purchased by them was under mortgage with the Corporation Bank. Paper publication revealed that the Bank had taken the action under the Act of 2002, therefore, the plaintiffs filed the suit for declaration that they are the absolute owners in possession of house numbers 1267 to 1270 comprised of first floor having an area of 1287 sq.ft. of land situated at Gol Bazar, Wright Town, Jabalpur. The Bank filed an application under Order 7 Rule 11 of CPC contending

that suit is not maintainable because the Act of 2002 bars the jurisdiction of the Civil Court to entertain any suit or proceeding in respect of any matter or proceeding under the Act of 2002, steps have been taken by the Bank under the aforesaid Act. Remedy of the plaintiff lies before Debt Recovery Tribunal under section 17 of the Act of 2002.

3. The learned District Judge, Jabalpur has held that in view of provisions of the Act of 2002 the Civil Suit is not maintainable. Objection raised by the Bank has been upheld. Aggrieved by the dismissal of the suit on the ground of maintainability, the plaintiffs have preferred the instant appeal in this Court.

4. Shri A.K.Jain, learned counsel appearing on behalf of appellants has submitted that Section 34 of the Act of 2002 has to be read with Section 17 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter to be referred to as the Act of 1993). He has also submitted that the application is not barred by virtue of section 37 of the Act of 2002. Provisions of the Act of 2002 are in addition to and not in derogation of the Act of 1993. The borrower had taken the loan below Rs. Ten Lakhs as per section 1(4), the Act of 1993 is not applicable where debt is less than Rs. Ten Lakhs. He has also submitted that the debt has the same meaning under the Act of 2002 as defined in section 2(g) of the Act of 1993, thus the debt has to be the one which is above Rs. Ten Lakhs, thus the civil suit is maintainable. In case any steps are not taken by the Bank under section 13 of the Act of 2002 appeal/application does not lie before the Debt Recovery Tribunal, consequently the decision rendered by the Court below be set aside.

5. Shri Rajesh Singh Chauhan, learned counsel appearing for respondent Bank has submitted that the Act of 2002 is an independent Act and the pecuniary jurisdiction provided in the Act of 1993 does not govern the steps to be taken by the Bank under the Act of 2002. Section 34 is clearly attracted to bar the civil suit, suit has been rightly dismissed as not maintainable by the Court below. He has relied upon the decision of Apex Court in *Mardia Chemicals Ltd. Vs. Union of India and others* - AIR 2004 SC 2371 and *M/s Transcore Vs. Union of India and another* - AIR 2007 SC 712.

6. The question arise for consideration whether provisions of the Act of 2002 are regulated by the Act of 1993, in the matter of pecuniary limits of jurisdiction with regard to steps taken against the borrower etc. by the creditor.

7. It is necessary to consider the provisions of the Act of 2002. The aim and object of the Act of 2002 reflects that there was absence of legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further the banks and financial institutions in India did not have power to take possession of securities and sell them. There was failure to keep pace with the changing commercial practices and financial sector reforms, that resulted in slow pace of recovery of defaulting loans and mounting levels of non performing assets of banks and financial institutions. Narasimham Committee and Andhyarujina Committee were constituted by the Central Government for the purpose of examining banking sector reforms, suggestion was made to enact a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on

these suggestions, an ordinance was enacted, thereafter, bill was introduced, ultimately that has taken the shape of Act No. 54 of 2002, enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest or for matter connected therewith or incidental thereto. Section 2 contains the definition of borrower to mean any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created by mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any right or interest of any bank or financial institution in relation to such financial assistance there is no fetter of pecuniary limit contained in the definition. Section 2(f) defining the borrower is quoted below :-

> 2(f) "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created by mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any right or interest of any bank or financial institution in relation to such financial assistance;

Debt has been defined in section 2(ha) of the Act of 2002 which shall have the meaning assigned to it in clause (g) of section 2 of the Act of 1993. Section 2(ha) is quoted below :-

> 2(ha) "debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

Section 2(g) of the Act of 1993 is quoted below :-

> 2(g) "debt" means any liability (inclusive of interest) which is alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or whether payable under a decree or order of any civil court or otherwise and subsisting on, and legally recoverable on, the date of the application;

Thus, meaning of debt is clear. The debt as defined in the Act of 1993 has no co-relation with financial limit, but that is otherwise provided for the Debt Recovery Tribunal under the Act of 1993 under section 1(4) of the said Act. The Debt Recovery Tribunal under the Act of 2002 means the Tribunal established under sub-section (1) of section 3 of the Act of 1993. Default has been dealt with in section 2(j) of the Act of 2002 to mean non-payment of 'any' principal debt or interest thereon or "any other" amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor. Word 'any'

debt or amount payable makes the intendment of the Act of 2002 clear that it's operation is not confined to amount of more than Rs. Ten Lakhs as in the case of Act of 1993.

Non-performing asset has been defined in section 2(o) thus:-

> 2(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,-
>
> (a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guideline relating to assets classifications issued by such authority or body;
>
> (b) in any other case, in accordance with the direction or guidelines relating to assets classifications issued by the Reserve Bank.

Secured creditor has been defined in section 2(zd) thus :-

> 2(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes -
>
> (i) debenture trustee appointed by any bank or financial institution; or
>
> (ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or
>
> (iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;

Secured debt has been defined in section 2(ze) to mean a debt which is secured by any security interest. Security interest has been defined in section 2(zf) it also has no corelation with amount of Rs. Ten Lakhs or more, provision provides thus :-

> 2(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;

Section 5 of the Act of 2002 deals with acquisition of rights or interest in financial assets. Section 9 provides for measures for assets reconstruction. Section 10 deals with the other functions of securitisation company or reconstruction company. Section 11 of the Act of 2002 deals with the resolution of disputes, it covers in ambit 'any dispute' not dispute of valuation of Rs. 10 Lakhs or above. Section 11 is quoted below :-

> **11. Resolution of disputes.-** Where any dispute relating to

securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the bank, or financial institution, or securitisation company or reconstruction company or qualified institutional buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 (26 of 1996), as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.

Enforcement of security interest is provided in section 13 of the Act of 2002, in case any borrower makes any default in repayment of secured debt or any instalment thereof, it is open after taking the steps prescribed in sub section 2 of section 13 and after consideration of the representation made, to take the steps, as provided in sub-section 4 of section 13 of the Act of 2002 to take possession of the secured assets of the borrower; to take over the management of the business of the borrower; appoint any person to manage the secured assets, the possession of which has been taken over by the secured creditor and require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money. Section 13(4) of the Act of 2002 is quoted below :-

13(4): In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to

pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

On the steps being taken under sub-section 4 of section 13 of Act of 2002 any person aggrieved by any of the measures referred in section 13(4) taken by the secured creditor, may make application to the DRT having jurisdiction of the matter within 45 days from the date, on which such measure had been taken. It is open to the secured creditor to take steps with respect to the borrower and borrower as defined in section 2(f) and the debt as defined in section 2(ha) of the Act of 2002 is not regulated by any financial constraint. In other words section 13(4) is not applicable only to the cases where amount of debt due is more than Rs. Ten Lakhs. There is no room to confine the application of the Act of 2002 to the debt of more than Rs. Ten Lakhs, that interpretation would defeat the very object of the Act for which Act of 2002 has been enacted.

Section 17 of the Act of 2002 provides the remedy in such a case, Section 17 is quoted below :-

> **17 : Right to appeal.-** (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken;
>
> Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.
>
> (2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.
>
> (3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in-sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of ection 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously a possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6)- If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

Aforesaid Section 17 also cause no fetter on the power of Debts Recovery Tribunal to entertain the application in those cases only where debt is above Rs. Ten Lakhs. Section 18 of the Act of 2002 provides appeal to the Appellate Tribunal. Section 34 of the Act of 2002 provides that no Civil Court shall have the jurisdiction to entertain any suit or proceedings in respect of any matter which Debt Recovery Tribunal or Appellate Tribunal is empowered to deal with by or under the Act. Section 34 of the Act of 2002 is quoted below :-

34: Civil court not to have jurisdiction.- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

The Debt Recovery Tribunal is empowered to deal with the matter under section 17 and as per scheme of the Act the secured creditor is empowered to take the steps provided in the Act against borrower and even against the person who has acquired any of the secured assets from the borrower. Bank has the right to realize the amount from borrower or such purchaser under the provision of the Act of 2002 for which the Bank had initiated the steps in instant case by taking steps under the said Act and Bank has claimed that it has taken symbolical possession of the property also under the provisions of the Act. The provision of section 35 of Act of 2002 contains non obstante clause to the effect that the provision of the Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

Section 37 of the Act of 2002 specifically provides that provision of the Act shall be in addition to, and not in derogation of the acts mentioned therein, including Act of 1993 or any other law for the time being in force. Section 37 of the Act of 2002 is quoted below :-

> 37. Application of other laws not barred.- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contract (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (51 of 1993) or any other law for the time being in force.

Merely by the provision made in section 37 of the Act of 2002 that provisions of Act are in addition to, cannot be meant to interpret that the provisions of the Act of 2002 to be regulated by Section 1 of the Act of 1993 relating to recovery of debt of over 10 Lakhs. Section 1(4) of the Act of 1993 is quoted below :-

> 1(4): The provisions of this Act shall not apply where the amount of debt due to any bank or financial institution or to a consortium of banks or financial institutions is less than ten lakh rupees or such other amount, being not less than one lakh rupees, as the Central Government may, by notification, specify.

The aforesaid provision of the Section 1(4) of the Act of 1993 is with respect to the applicability of the Act of 1993 and cannot govern the applicability of the Act of 2002 within the pecuniary limits as provided in subsection 4 of section 1 of the Act of 1993. Section 17 of the Act of 1993 deals with the jurisdiction, power and authority of the Tribunal, no doubt about it that under the Act of 1993 the jurisdiction, power and authority of the Tribunal has to be governed by the provision of the Act of 1993 inclusive of section 1(4) of the Act of 1993. Section 17 of the Act of 1993 cannot be made applicable to the provision of section 17 of Act of 2002 which provide independent remedy under the said Act nor section 34 of Act of 2002 can be interpreted in the manner as suggested by Shri A.K.Jain, learned counsel appearing for appellant that bar is created under section 34 of Act of 2002 only with respect to the debt of Rs. 10 lakhs or above. We find no room to entertain the aforesaid submission based on section 1(4) of the Act of 1993. It

cannot be attracted to section 34 or to section 17 of the 2002 Act. The Act of 1993 cannot control provision of Section 17 of the Act of 2002. Accepting the submission of Shri Jain would mean that Tribunal would have jurisdiction only to deal with the matter as prescribed under the Act of 1993.

In view of the aforesaid provisions, it is clear that operation of section 17 of the Act of 2002 is unfettered by the amount of loan, that has been taken and there is remedy of appeal/application provided under section 17 of the Act of 2002. Consequently the action initiated by the Bank under the provisions of the Act of 2002 cannot be the subject matter of the Civil Court with respect to the matters to be dealt with under the Act of 2002. Section 34 bars the jurisdiction of the civil court as such court below has rightly held the civil suit to be not maintainable before it.

8. The Apex Court in *Mardia Chemicals Ltd. Vs. Union of India and others* (supra) has laid down thus :-

> 50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr. Salve, one of the counsel for respondents that there would be no bar to approach the Civil Court. Therefore, it cannot be said no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the Civil Court is barred in respect of matters which a Debt Recovery Tribunal or Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the Civil Court shall have no jurisdiction to entertain any proceeding thereof. The bar of Civil Court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

The Apex Court has clearly laid down that prohibition under section 34 covers even the matter which can be taken cognizance by the Debt Recovery Tribunal, though no measures in that direction has so far been taken under sub-section (4) of Section 13. Therefore, any matter in respect of which an action may be taken even later on under Act of 2002, the Civil Court shall have no jurisdiction to entertain any proceeding thereof. Essence was the liability of plaintiff,

the matter is to be dealt with by the DRT under the provisions of the Act of 2002 as provided in section 13(4). The Apex Court in *M/s Transcore Vs. Union of India and another* (supra) has also considered the provisions of State Financial Corporation Act and has held that remedy under the Act of 2002 is an additional remedy and is different from the integrated scheme of the Act of 2002.

9. Resultantly, we find appeal has no merit, it is liable to be dismissed, same is hereby dismissed. However, we leave the parties to bear their own costs as incurred of this appeal.

I.L.R. [2008] M. P., 98
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
30 October, 2007

GULKHAN .....Appellant*
Vs.
OM PRAKASH KHATRI ....Respondent

A. Accommodation Control Act, M.P. (41 of 1961) - Sections 12(1)(a), 13(1)(2)–Arrears of Rent–Respondent/Plaintiff claimed rent at the rate of Rs. 1,200 per month–Appellant/tenant claimed the rent to be Rs. 200 per month–In view of dispute provision of Section 13(1) of Act could not be invoked as same was arrested till deciding such dispute by Court–Trial Court fixed provisional rate of rent @ Rs. 200 per month–Entire arrears of rent deposited by Defendant/tenant within one month of order–No further default in paying rent committed by tenant–Tenant cannot be held the defaulter–Decree under Section 12(1)(a) set aside.

Accordingly the appellant disputed the rate of the rent and the quantum of arrears. In view of such dispute the provision of Section 13 (1) of the Act could not be invoked as the same were arrested till deciding such dispute by the Court. Such dispute was decided by the trial court on 23.4.2004 under Section 13 (2) of the Act by fixing the provisional rate of rent @ Rs.200/- p.m. from the date of 1.11.1997.

As per findings of the trial court in paragraph 34 of the impugned judgment in compliance of such order the entire arrears of rent was deposited by the appellant in C. C. D. vide dated 6.5.2004 within one month from the date of such order. I have not been apprised by the respondent counsel that subsequent to aforesaid order any default in paying the rent has been committed by the appellant. While as per submission of appellant counsel he is depositing the rent regularly as directed by the trial court. It is noted that even on passing the impugned judgment the rent of such accommodation was held @ Rs.200/- p.m. In such circumstance it could not be inferred that appellant committed any default in depositing the rent.

Considering the circumstance that after fixing the provisional rent and quantum of arrears by the trial court the appellant deposited the entire arrears in compliance of the interim order of the trial court and thereafter he paid the rent regularly. Hence, he could not be held the defaulter in view of the dictum announced by the Apex Court in the matter of *Jamnalal Vs. Radheshyam* reported in 2000 (4) S.C. C. 380. (Paras 9 & 11)

*F. A. No. 756/04, Jabalpur

B. Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(c) - Nuisance - Appellant/tenant taking new electricity connection - Held - Landlord bound to provide all necessary amenities for proper use to keep accommodation in tenanted condition - If landlord fails to provide the same then tenant has right to obtain such amenities in accordance with law - Electricity connection was given by MPSEB after considering application - Appellant/tenant had acted in accordance with procedure - Such act would not be termed as part of nuisance for passing decree under Section 12(1)(c) of Act.

So for installation of new connection is concerned, as per procedure the landlord is bound to provide all necessary amenities for its proper use to keep the accommodation in tenanted condition. If the landlord is failed to provide the same then tenant has a right to obtain such amenities in accordance with law. It appears that connection was provided by the Electricity Board after considering the application of the appellant. Under such premises it could not be inferred that the appellant has committed any illegal act against the title of the respondent. If such electricity connection was taken by the appellant in accordance with the procedure then such act could not be termed as part of the nuisance for passing the decree under Section 12 (1) (c) of the Act. (Para 15)

C. Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(e) - *Bonafide* requirement - Respondent/Plaintiff pleaded that his family comprises of 13 members - Any account of available accommodation not disclosed - Held - In matter of *bonafide* requirement landlord is duty bound to put forth account of available accommodations in possession of him - In the lack of such pleadings alleged need could not be considered as *bonafide* and genuine - Plaintiff having 6 vacant rooms in tenanted premises and is residing in another house - If his need was genuine and *bonafide* he could have started use of vacant rooms - His need could not be termed as *bonafide* or genuine - Decree under Section 12(1)(e) set aside - Appeal allowed.

In paragraph 4 of the plaint it is pleaded that except the disputed accommodation he is in possession of the remaining house and the same is used for keeping the domestic articles and remain locked, while in the written statement the appellant pleaded that respondent has a double storied house comprising ten rooms in which he is residing with his family is more than sufficient and convenient for the residence of his family. Besides this he has also an accommodation of six rooms at Pariyat. Inspite the aforesaid pleadings of the appellant regarding availability of sufficient alternate accommodation with the respondent for his alleged need, the same is never explained by the respondent in the plaint in any manner. In the matter of *bonafide* genuine requirement the landlord like respondent is duty bound to put forth the account of the available accommodations in possession of him and in the lack of such pleadings his alleged need could not be considered as bonafide and genuine. In such premises he does not deserve for decree of eviction.

When the landlord like respondent is having six vacant rooms with him in the tenanted house and also having a house no.124, main road, Ranjhi, in which he is residing with his family, if his need was *bonafide* and genuine then he could have

started the use of those vacant room in the alleged tenanted house but the same are kept in locked position. In such circumstance his alleged need could not be termed as *bonafide* or genuine. Mere wish of the landlord is not sufficient unless such need is not proved *bonafidely* and genuine with probabilities. In such premises, it is held that trial court has committed grave error, perversity and illegality in passing the decree under Section 12(1)(e) of the Act, the same is not sustainable, it deserves to be and is hereby set aside. (Paras17 & 18)

Cases Referred :

(1) (2000) 4 SCC 380, (2) AIR 1981 SC 1711.

Sujata Das, for the appellant
Rajendra Gupta, for the respondent

Cur.adv.vult

JUDGMENT

U. C. Maheshwari J.:–This appeal is directed by the appellant/defendant being aggrieved by the judgment and decree dated 30.9.2004 passed by 9th Additional District Judge, Jabalpur in Civil Original Suit No.44/04 whereby the suit for eviction filed by the respondent has been decreed against him under Section 12 (1) (a), (c) and (e) of Madhya Pradesh Accommodation Control Act, 1961 (In short "the Act").

2. The brief facts of the case are that respondent filed a suit for eviction against the appellant in respect of accommodation comprising two rooms on the ground floor of House No.1582 situated at Purani Basti Ranjhi, Jabalpur. As per averments of the plaint the defendant /respondent was inducted in such accommodation for residential purpose in the month of April 1997 on monthly tenancy @ Rs.1,000/- p.m. The same was enhanced in the year 1999 @ Rs.1,200/- p.m. The appellant committed default in payment of rent and did not pay the same since 1999. On making it's demand the son of the respondent Rajendra Khatri was subjected to misbehave and beating by the appellant. The other part of the house is in possession of the respondent. The same is used for keeping the domestic goods. The appellant tried to take forcefully possession of the first floor by breaking the lock on 22.3.2002. The same was reported to the police by said Rajendra Khatri for which the appellant is facing the criminal prosecution for the offence under Section 448, 294 and 506 of IPC. Besides this the appellant has polluted the well situated in such house by throwing the garbage in it. The electricity connection of such accommodation was disconnected on account of non-payment of its bill by the appellant. Subsequent to it without consent of the respondent the appellant took the new electricity connection in such accommodation. The aforesaid acts of the appellant are not only contrary to the terms and conditions of the tenancy but also contrary to the interest of the respondent. Thereby the appellant has become nuisance in such accommodation. Besides this the appellant filed a suit for perpetual injunction in the Court of Third Civil Judge Class-II, Jabalpur against Rajendra Khatri the son of the respondent stating him the landlord and denied the title of the respondent, such act of the appellant comes under the purview of nuisance. In the family of the respondent there are 13 members including three dependant sons, daughter in-laws, grand sons and grand daughters. He did

not have the sufficient accommodation of his own at Jabalpur for their comfortable residence. Thus, he is in bonafide need of the disputed accommodation for the residence of his family members. On the aforesaid ground the respondent gave a notice to the appellant on 20.5.2003 for vacating the premises but inspite it's service the same was not complied with on which the present suit was filed by the respondent.

3. In the written statement of the appellant by admitting the tenancy the same was said to be @ Rs.200/- p.m. while the other averments of the plaint are denied. The grounds of eviction mentioned by the respondent are denied. In addition it was pleaded that on making demand by the son of respondent Rajendra Prasad Khatri on 1.11.97 the appellant gave him Rs.20,000/- on assurance that same will be adjusted towards the future rent. In view of such advance payment he did not commit any default. In the year 1997 such house was damaged due to calamity of earthquake, on which the respondent demanded sum from him for it's repairing. As the appellant was awarded some compensation as sufferer of earthquake. On denying the same being aggrieved the respondent filed the suit. The respondent's son wanted to evict the appellant forcefully through some unsocial elements, therefore to protect the possession of accommodation he filed the suit for perpetual injunction against the son of respondent. It is further pleaded that respondent is also having two-storied house comprising ten rooms in which he is residing conveniently with his family. Besides this he is also having an accommodation comprising six rooms situated near Money dairy at Pariyat. In such circumstance the need of the respondent is neither bonafide nor genuine and prayed for dismissal of the suit.

4. In view of the aforesaid pleadings the issues were framed and evidence was record. On appreciation of the evidence the respondent suit was decreed by the trial court against the appellant on the ground enumerated under Section 12 (1) (a) (c) and (e) of the Act. Being aggrieved by such decree the appellant filed this appeal. The respondent also filed his cross-objection under Order 41 Rule 22 of CPC for setting aside the findings of issue No.1 holding the tenancy of the appellant @ Rs.200/- p.m. contrary to the case of the respondent @ Rs.1,200/- p.m.

5. Ms. Sujata Das, learned counsel for the appellant assailed the impugned judgment that there was a disputed regarding rate of monthly rent and in pursuance of it entire quantum of arrears of rent was also disputed. The same was decided by the trial court by interim order dated 23.4.2004 directing the appellant to deposit the entire arrears of rent@ Rs.200/- p. m. and the same was deposited on 6.5.2004, within one month from the date of the order and subsequent to it the regular rent was deposited by the appellant. In such circumstance the appellant could not be held the defaulter in respect of payment of rent. She further said that the respondent has failed to prove that appellant has committed any act amounting to be a nuisance. He also failed to prove that the appellant has violated any rules or regulations in taking new electricity connection in such accommodation. Mere taking such new electricity connection could not be treated as nuisance. So for bonafide and genuine requirement are concerned, she said that in view of the deposition of respondent himself and his son Rajendra Khatri they have sufficient

alternate accommodation in House No.124; situated at Ranjhi Bazar, main road and also the other accommodation of the dispute house for the alleged need. The respondent did not give any account or explanation in his pleading regarding such available accommodation. In the lack of it the need of respondent could not be turned either bonafide or genuine. But the trial court while appreciating the evidence has not considered these aspects. So far cross objection of the respondent is concerned she said that in view of available evidence and the circumstance that tenancy as held by the trial court @ Rs.200/- p.m. does not required any interference. With these submission she prayed for dismissing the suit and cross-objection of the respondent by allowing the appeal.

6. Shri Rajendra Gupta, learned appearing counsel for the respondent while justifying the impugned judgment said that the same is passed after taking into consideration the available evidence and in conformity with law but the trial court has committed grave error in holding the alleged tenancy @ Rs.200/- p.m. contrary to the record. As per his submission the alleged tenancy took place in the year 1997 @ Rs.1,000/- p.m. the same was enhanced in the year 1999 by Rs.200/- p.m. and since then the tenancy was @ Rs.1,200/- p.m. In respect of this contention sufficient evidence was available on the record but contrary to it the tenancy was held @ Rs.200/- p.m. under the wrong premises. Such findings of the trial court requires modification for holding the tenancy @ Rs.1,200/- p.m.

7. He further said that in any case if the tenancy is upheld @ Rs.200/- pm. even then the decree passed by the trial court does not require any interference as the appellant polluted the alleged well by throwing the garbage in it. Besides this, on account of the non-payment of electricity bill by the appellant the electric connection was disconnected and without consent of the landlord-respondent new connection was taken by the appellant thereby he acted against the interest of the respondent. Such acts are covered by the definition of nuisance defined under Section 12 (1) (c) of the Act. So far bonafide genuine requirement is concerned, he said that considering the number of members in the respondent family such question was rightly decided by the trial court in favour of the respondent. It was not necessary for the respondent to plead the account of available accommodation and its use. Thus, the findings of the trial court in this regard do not require any interference. Under these premises he prayed for dismissal of the appeal by allowing his cross-objection.

8. Having heard the counsel, I have carefully gone through the pleadings of the parties, evidence available on record by the trial court and also perused the impugned judgment. I am of the considered view that trial court has committed grave error in decreeing the suit because of the following reasons.

9. So far the arrears of rent is concerned, as per averments of the plaint the tenancy of the appellant was initially @ Rs.1,000/- p.m. and since 1999 the same is @ Rs.1,200/- p.m. while in the written statement it was stated that such accommodation was taken long back @ Rs.200/- p.m. Besides this it is also pleaded that on making demand by the respondent he paid Rs.20,000/- a advance rent to the son of the respondent on 1.11.1997. Accordingly the appellant disputed the rate of the rent and the quantum of arrears. In view of such dispute the provision

of Section 13 (1) of the Act could not be invoked as the same were arrested till deciding such dispute by, the Court. Such dispute was decided by the trial court on 23.4.2004 under Section 13 (2) of the Act by fixing the provisional rate of rent @ Rs.200/- p.m. from the date of 1.11.1997. The contention of appellant regarding payment of Rs.20,000/- in advance to the respondent's son was not found to be correct and the appellant was directed to deposit the arrears of rent @ Rs.200/- p.m. As per findings of the trial court in paragraph 34 of the impugned judgment in compliance of such order the entire arrears of rent was deposited by the appellant in C. C. D. vide dated 6.5.2004 within one month from the date of such order. I have not been apprised by the respondent counsel that subsequent to aforesaid order any default in paying the rent has been committed by the appellant. While as per submission of appellant counsel he is depositing the rent regularly as directed by the trial court. It is noted that even on passing the impugned judgment the rent of such accommodation was held @ Rs.200/- p.m. In such circumstance it could not be inferred that appellant committed any default in depositing the rent.

10. So far cross-objection of the respondent for enhancing the rate of rent is concerned, the findings of the trial court in paragraph 10 to 14 of the impugned judgment appear to be based on available evidence and the copy of assessment register of local authority Ex.D.3 to Ex. D.5. According to such record that in the year 1992-93 such accommodation was in possession of the appellant @ Rs.150/- p.m. and subsequent to it in any circumstance it could not be enhanced up to Rs.1,000/- p.m. in the year 1997 and Rs.1,200/- in the year 1999. Besides this, looking to the locality and size of the accommodation i. e. only two rooms the rate stated by the respondent appears to be very higher side. Therefore, I have not found any substance in the cross-objection of the respondent. Hence, the same deserves to be and is hereby dismissed.

11. Considering the circumstance that after fixing the provisional rent and quantum of arrears by the trial court the appellant deposited the entire arrears in compliance of the interim order of the trial court and thereafter he paid the rent regularly. Hence, he could not be held the defaulter in view of the dictum announced by the Apex Court in the matter of *Jamnalal Vs. Radheshyam* reported in 2000 (4) S.C. C. 380, in which it was held as under:

> "15. . . . . Where the dispute as to the amount of rent payable by the tenant has no nexus with the rate of rent, the determination of such dispute in a summary inquiry is not contemplated under sub-section (2) of Section 13. Such a dispute has to be resolved after trial of the case. Consequently, it is only when the obligations imposed in Section 13 (1) cannot be complied with without resolving the dispute under sub-section (2) of that section, that Section 13(1) will become inoperative till such time the dispute is resolved by the court by fixing a reasonable provisional rent in relation to the accommodation. It follows that where the rate of rent and the quantum of arrears of rent are disputed the whole of the Section 13(1) becomes inoperative till provisional fixation of monthly rent by the court under sub-section (2) of Section 13, which will govern compliance of Section 13 (1) of the Act. . . . ."

16. Sub-section (3) of Section 13 of the Act deals with a case where the dispute is as to the person or persons to whom the rent is payable. If the court is satisfied that the dispute raised by the tenant in regard to the person or persons to whom the rent is payable is false or frivolous, Sub-section (4) says, the court in its discretion may order striking out the defence against the eviction instead and proceed with the hearing of the case. So also Sub-section (6), in the case of noncompliance in depositing or payment of rent of any amount as required by Section 13(1) of the Act, enables the court to order striking out the defence against the tenant instead and proceed with the hearing of the suit. Sub-section (5) directs that if the tenant makes deposit or payment as required under Sub-section (1) or Sub-section (2) of Section 13 of the Act, the Court is barred from making a decree or order for the recovery of the possession of the accommodation on the ground of default in payment of rent by the tenant but the court may allow such cost as it may deem fit to the landlord."

12. Thus in view of aforesaid discussion and dictum of the Apex Court, it is held that the trial court has committed grave error in passing the decree under Section 12 (1) (a) of the Act. The same deserves to be and is hereby set aside.

13. Coming to the question whether the alleged well was polluted by the appellant is concerned, the same has not been proved specifically by cogent and admissible evidence. Mere on vague statement of the respondent in the lack of any specific pleading with particulars regarding date and time for committing such act, it could not be inferred that such act was committed by the appellant. While recording the deposition respondent Om Prakash stated that well was polluted by the appellant by throwing the garbage. He could not disclose any date or time regarding such Act even in his chief. The other witnesses namely Rajendra Khatri (P.W.2) and Jitendra Naidu (P.W.3) also did not state such particulars either in their chief or in cross-examination. Therefore, in the absence of any specific pleading and the positive evidence no inference could be drawn against the appellant for committing such act. Besides this pollution has not been proved by examining any expert witness in that regard. Hence, the findings of the trial court holding that appellant affected the title of the respondent by such act is not sustainable and in pursuance of it the decree passed under 12 (1) (c) on the ground of nuisance is also not sustainable.

14. So for disconnection of the electricity and taking fresh connection without consent of the respondent is concerned, I have not found any pleading or evidence saying that the appellant was bound to pay the bill of electricity apart the rent. For the sake of argument if it is deemed that the appellant had to pay the electricity bill and it was not paid by him even then only on the ground of non-payment of electricity bill and taking new connection in the premises could not be held to be a circumstance to draw any inference against the appellant.

15. So for installation of new connection is concerned, as per procedure the landlord is bound to provide all necessary amenities for its proper use to keep the

accommodation in tenanted condition. If the landlord is failed to provide the same then tenant has a right to obtain such amenities in accordance with law. It appears that connection was provided by the Electricity Board after considering the application of the appellant. Under such premises it could not be inferred that the appellant has committed any illegal act against the title of the respondent. If such electricity connection was taken by the appellant in accordance with the procedure then such act could not be termed as part of the nuisance for passing the decree under Section 12 (1) (c) of the Act.

16. In such premises it is held that the trial court has committed grave error in passing the decree against the appellant under Section 12 (1) (c) of the Act. Hence, it deserves to be and is hereby set aside.

17. Coming to the question regarding alleged *bonafide* and genuine requirement of the accommodation to the respondent is concerned, as per averments in paragraph 7 of the plaint the respondent pleaded that his family is comprising by 13 members including three sons, daughters in-law, grand sons and grand daughters for whose residential requirement he is in need of disputed accommodation as he does not have any other sufficient suitable accommodation of his own at Jabalpur. In such pleading he did not disclose any account of available accommodation. Even it has not been stated that at present in which premises respondent and his family members are residing. In paragraph 4 of the plaint it is pleaded that except the disputed accommodation he is in possession of the remaining house and the same is used for keeping the domestic articles and remain locked, while in the written statement the appellant pleaded that respondent has a double storied house comprising ten rooms in which he is residing with his family is more than sufficient and convenient for the residence of his family. Besides this he has also an accommodation of six rooms at Pariyat. Inspite the aforesaid pleadings of the appellant regarding availability of sufficient alternate accommodation with the respondent for his alleged need, the same is never explained by the respondent in the plaint in any manner. In the matter of *bonafide* genuine requirement the landlord like respondent is duty bound to put forth the account of the available accommodations in possession of him and in the lack of such pleadings his alleged need could not be considered as *bonafide* and genuine. In such premises he does not deserve for decree of eviction. Such question was considered and answered by the Apex Court in the matter of *Hasmat Rai and another v. Raghunath Prasad* reported in AIR 1981 S.C. 1711, in which it was held as under:

> 16. There is an error apparent on the face of the record in as much as when the H. C. was faced with a dilemma whether the landlord required the whole of the building including demised premises now in possession of the appellant tenant for starting his business of Chemists and Druggists and when the High Court had before it an indisputable fact that the respondent landlord has obtained vacant possession of a major portion of the building which was in possession of firm M/s. Goraldas Parmanand, was it necessary for him to have any additional accommodation? The High Court got over this dilemma by observing and by affirming the finding of the subordinate Courts that the remaining portion of

the premises would be used by the landlord for his residence and even though the portion utilised for the purpose of running the business would be smaller compared to the one to be utilized for the residence it would still not be violative of sub-section (7) of Section 12 because such a composite user would not radically change the purpose for which the accommodation was let. This finding is contrary to record and pleadings. Minutely scanning the plaint presented by the landlord there is not the slightest suggestion that he needs any accommodation for his residence. He has not even stated whether at present he is residing in some place of his own though he claimed to be residing in the same town. He does not say whether he is under any obligation to surrender that premises. Section 12 (1)(e) specifically provides for a landlord obtaining possession of a building let for residential purposes if he bona fide requires the same for his own use and occupation. But there is an additional condition he must fulfil namely he must further show that he has no other reasonably suitable residential accommodation of his own in his occupation in the city or town concerned. Utter silence of the landlord on this point would be a compelling circumstance for the Court not to go in search for some imaginary requirement of the landlord of accommodation for his residence. In the context of these facts the Trial Court and the first Appellate Court committed a manifest error apparent on the record by upholding the plaintiff's case by awarding possession also on the ground neither pleaded nor suggested the landlord must have been quite aware that he cannot obtain possession of any accommodation for his residence. Therefore, the finding of the High Court and the Courts subordinate to it that the respondent-landlord requires possession of the whole of the building including the one occupied by the tenant for starting his business as Chemists and Druggists as also for his residence is vitiated beyond repair. Once impermissible approach to the facts of the case on hand is avoided although facts found by the Courts are accepted as sacrosant yet in view of the incontrovertible position that emerges from the evidence itself that the landlord has acquired major portion of the building in which he can start his business as Chemists and Druggists he is not entitled to an inch of an extra space under Section 12 (1)(f) of the Act.

18. In view of aforesaid dictum if the present case is examined then from the deposition of respondent Om Prakash (P.W.1) he stated that he is residing since last 12-13 years in the house No.124, the same was constructed by his father comprising three rooms and three shops. He further admitted that he is in possession of some part of disputed house. His son Rajendra Khatri deposed that he is residing in the house No.124, Ranjhi Bazar, main road. In paragraph 5 he further stated that six rooms of disputed house are in their possession since 1997 and in first floor of such house some articles are kept by them. These admissions

are apparently showing that they are in possession of sufficient alternate accommodation for the alleged need, if any, but such alternate accommodations or its availability has neither been pleaded nor explained in any manner at the time of filing the suit or subsequent to it by way of amendment. When the landlord like respondent is having six vacant rooms with him in the tenanted house and also having a house no.124, main road, Ranjhi, in which he is residing with his family, if his need was bonafide and genuine then he could have started the use of those vacant room in the alleged tenanted house but the same are kept in locked position. In such circumstance his alleged need could not be termed as *bonafide* or genuine. Mere wish of the landlord is not sufficient unless such need is not proved bonafidely and genuine with probabilities. In such premises, it is held that trial court has committed grave error, perversity and illegality in passing the decree under Section 12(1)(e) of the Act, the same is not sustainable, it deserves to be and is hereby set aside.

19. In the aforesaid premises by allowing this appeal and dismissing the cross objection the impugned judgment and decree is hereby set aside and the suit of the respondent is hereby dismissed. The respondent shall bear their own cost of this litigation and also pay the cost of both the courts to the appellant. The advocate fees Rs.2,500/- is quantified.

20. Decree be drawn up accordingly.

21. Appeal is allowed as indicated above.

I.L.R. [2008] M. P., 107
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
30 October, 2007

PRAHLAD SINGH ....Appellant*
Vs.
JAMMNA BAI & ors. ...Respondents

Civil Procedure Code (5 of 1908)–Section 151, Order 1 Rule 10, Order 22 Rule 10, Transfer of Property Act, 1882, Section 52 - Impleadment–Proposed respondents filed application under O.1 rule 10 for their substitution as they have purchased disputed property from deceased respondent - Proposed respondents had also filed separate civil suits against appellant seeking declaration and perpetual injunction which was decreed and appeal by appellant is pending - Legal representatives of deceased respondent also not taking any interest to defend appeal - Held - Although in view of provision of Section 52 of Transfer of Property Act proposed respondents are not necessary party - However legal representatives of deceased respondent are not taking interest to defend appeal - After acquiring rights by assignment they have right to join the appeal for protecting their rights till the extent of the deceased respondent - As application for joining them as respondents has been filed at very belated stage cost of Rs. 5000 imposed on each of proposed respondent to be payable to appellant - Application allowed.

*F.A. No. 142/1991. Jabalpur

In pendency of such second appeals the proposed respondents want to join this appeal to save their acquired rights and interest. As per provision of Section 52 of Transfer of Property Act the decision of this appeal shall be binding against them. Although in view of the aforesaid provision of the Transfer of Property Act the presence of the proposed respondents in this appeal is not necessary to pass the effective decree. But simultaneously it can not be brushed aside that after transferring the property to proposed respondents perhaps Jamnabai and after her demise her legal representatives are not taking interest to defend this appeal. Besides this in view of the provision of Order 22 Rule 10 r/w Order 1 Rule 10 of the CPC after acquiring the rights by assignment they have a right to join this appeal for protecting their rights till the extent of the right of Jamnabai. In such premises, I am of the view that they should be permitted to join this appeal. (Para 10)

Case referred :

(1) AIR 2005 SC 2209.

Prabha Vishwakarma, for the appellant
Sunil Vishwakarma, for the respondents no. 1(a) to 1 (f)
A.L. Patel, G.A. for the respondents no.2

Cur.adv.vult.

ORDER

U. C. MAHESHWARI J.:–This order shall decide the I. A. No.3039/07, an application under Order 1 rule 10 r/w Section 151 of CPC filed on behalf of the proposed respondents namely Bahadur Singh Lodhi and Ammir Singh Lodhi to implead them as party in this appeal.

2. This appeal is preferred at the instance of the plaintiffs being aggrieved by the judgment and decree dated 4.5.1991 passed in C.O.S.2-A/78 (Old No.41-A/91) by the third Additional District Judge, Sagar dismissing the suit seeking declaration and permanent injunction in respect of some agricultural land.

3. During pendency of this appeal above mentioned I. A. is filed by the counsel for the respondent No.1 (a) to 1(f) on behalf of the Bahadur Singh Lodhi and Ammir Singh Lodhi who acquired the right, title and the interest in the disputed property during pendecy of this appeal from the deceased respondent No. 1 Jammna Bai in the year 1992.

4. As per averment of it, each proposed respondents purchased the separate part of the aforesaid land from the deceased defendant/ respondent No.1 Smt. Jamna Bai through two different sale deeds vide dated 2.5.1992. It is also pleaded that regarding present litigation the specific averments were made in the aforesaid sale deed. On earlier occasion an application in this regard was filed by the appellant but the same was dismissed as withdrawn and subsequent to it no step was taken by the appellant, hence, this I. A. is preferred, their presence to adjudicate this appeal are necessary and on impleading them as party there will be no change in the nature of the case. The same is supported by an affidavit of Bahadur Singh; photocopy of sale deeds are also annexed with it.

5. In reply of the appellant by disputing the averments of this I. A. it is contended

that deceased respondent Jamnabai transferred the disputed property unauthorisedly to the proposed respondents during pendency of this appeal. Thus in view of Section 52 of the Transfer of Property Act they will get the right only subject to decision of this appeal.

6. In addition it is pleaded that on the strength of aforesaid sale deeds Bahadur Singh and Ameersingh filed their separate suits bearing C.O.S. No.67-A/93 and 68-A/93 respectively in the Court of Civil Judge, Class-I, Deori seeking declaration and perpetual injunction against the present appellant. On dismissing the same by the trial court vide judgment-dated 14.3.2005, they filed their appeals bearing No. C. A. No.15/06 and 16-A/06 respectively. The same were allowed by 6th Additional District Judge, Sagar vide judgment dated 4.11.2006 on which present appellants have filed S. A. No.330/07 and 331/07, the same are pending for adjudication in this court. In view of such other litigation, it is apparent that some independent proceedings are going on between the proposed respondent and the appellants. Hence, their presences in this appeal are not necessary. With these submissions he prayed for dismissal of the application.

7. Shri Sunil Vishwakarma learned counsel for the proposed respondents said that in view of the provision of Order 1 Rule 10 and Order 22 Rule 10 of CPC along with the provision of Section 52 of Transfer of Property Act they have a right to join the proceeding just to protect their acquired rights in respect of the dispute property; as after transferring the property the deceased respondent Jamna Bai and after her death her legal representatives had not any interest to contest this appeal. He also said that in order to avoid the further complication and multiplicity of litigations they should be permitted to join the proceeding under the right and limitation of deceased Jamna Bai. He also placed his reliance on a case of Apex Court in the matter of *Amit Kumar Shaw v. Farida Khatoon* reported in AIR 2005 S.C. 2209.

8. On the other hand by responding the aforesaid argument Smt. Prabha Vishwakarma, learned counsel for the appellant said that in view of the provision of Section 52 of Transfer of property Act the presence of proposed persons are not necessary to adjudicate this appeal as the decree which would be passed in this appeal shall be binding against them and they will get the right in the property only subject to decision of this appeal.

9. Having heard and perused the record along with the averments of I. A., reply and also the record of S. A. No.330/07 and 331/07 in view of the following reasons I am of the considered view that this application deserves to be allowed.

10. It is apparent on record that initially the suit was filed against the deceased respondent Jamnabai and other on dismissing the same this appeal is preferred by the appellant. In pendency of this appeal the proposed respondents purchased the disputed property from Jamnabai vide registered sale deeds dated 2.5.1992 and on their strength each of them filed their separate suits seeking declaration and perpetual injunction against the appellants. The same were dismissed by the trial court but the decreed by the appellate court against which at the instance of the appellants the Second Appeals bearing No.330/07 and 331/07 are pending in this court against the proposed respondents. In pendency of such second appeals the

proposed respondents want to join this appeal to save their acquired rights and interest. As per provision of Section 52 of Transfer of Property Act the decision of this appeal shall be binding against them. Although in view of the aforesaid provision of the Transfer of Property Act the presence of the proposed respondents in this appeal is not necessary to pass the effective decree. But simultaneously it can not be brushed aside that after transferring the property to proposed respondents perhaps Jamnabai and after her demise her legal representatives are not taking interest to defend this appeal. Besides this in view of the provision of Order 22 Rule 10 r/w Order 1 Rule 10 of the CPC after acquiring the rights by assignment they have a right to join this appeal for protecting their rights till the extent of the right of Jamnabai. In such premises, I am of the view that they should be permitted to join this appeal.

11. My aforesaid view is fully fortified by the decision of the Apex Court in the matter of *Amit Kumar Shaw* (Supra) in which it was held as under:

> 16. The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant, the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

12. In the aforesaid cited case the application was moved at very belated stage with an explanation regarding delay. Considering the sufficient cause for such delay the application was allowed and the person acquired right during pending lis was permitted to join the proceedings. But in the case at hand as per averments of the sale deeds the pendency of this litigation was known to the aforesaid proposed respondents from the date of execution of the same inspite it they did not take any step to join this appeal for years together. Hence, by treating the application at very belated stage in order to compensate the appellant this application is allowed by imposing the cost Rs.5,000/- against each of the proposed respondent. Subject to payment of such cost to the appellant within 30 days, the counsel for the proposed

respondents are directed to incorporate their names as respondent No.6 and 7 on the record.

13. Accordingly the aforesaid I. A. is allowed. Subject to such correction this appeal be listed for consideration of other pending I.As. along with the record of S. A. No.330/07 and 331/07.

I.L.R. [2008] M. P., 111
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
27 November, 2007

MEHARBAN SINGH ...Appellant*
Vs.
SMT. PUSHPABAI and ors. ...Respondents

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

From perusal of the record it is evident that in the present case appellant was having no permit. Appellant himself appeared before learned tribunal and contested the claim cases but could not prove that he was having valid permit. In memo of appeal also it is not the case of appellant that appellant was having valid permit. Since the offending vehicle was without permit, therefore, it is a case where the appellant/petitioner was having no permit. (Para 10)

Cases Referred :

(1) 1997(2) MPLJ 179, (2) AIR 2007 (NOC) 1924,(3) 2004 ACJ 2094.

V.P. Saraf, for the appellant
S.V. Dandwate, for the respondent no.2

Cur.adv.vult

O R D E R

N.K. Mody, J. :–Being aggrieved by the award dated 23/12/06 passed by MACT, Dewas, the present appeal/revision has been filed by the appellant/ petitioner who is owner.

2. Short facts of the case are that claim petitions were filed by the injured who are respondent no. 1 in all the matters alleging that on 23/08/05 respondent no.1 were going in a bus bearing registration No. MP 04 H-7291, it was alleged that because of rash and negligent driving of respondent no. 3 the offending bus

* M.A. No. 3060/07. Indore

turtle down, with the result respondent no. 1 sustained injuries. It was alleged that the offending bus was owned by appellant and insured with respondent no. 2. On the basis of aforesaid facts it was prayed that the claims petition be allowed and respondent no. 2 and 3 and appellant be held liable for payment of compensation. The claim petition was contested by the appellant as well by respondent no. 2. The defense taken by respondent no. 2 was that the respondent no. 3 was not possessing valid driving license and the offending vehicle was not possessing the valid permit. It was alleged that in the facts and circumstances of the case respondent no. 2 is entitled for exoneration.

3. After framing of issue and recording of evidence learned tribunal found that because of rash and negligent driving of respondent no. 3, the accident took place in which respondent no. 1 in all the cases sustained injuries. It was also found prove that offending bus was not possessing the valid permit. However, it was found proved that respondent no. 3 was possessing the valid driving license. Therefore, the claim petitions filed by the appellant were allowed. In each of the case the amount of compensation awarded by the learned tribunal is as under:

Sr. No.	Case No.	Claim Case No.	Name of Injured	Awarded Amount
1.	M.A.3029/07	06/06	Shanta Bai	10,400/-
2.	C.R. 296/07	12/06	Prem Bai	3,150/-
3.	C.R. 317/07	13/06	Meethu Bai	3,100/-
4.	CR. 316/07	14/06	Bansi Lal	3,100/-
5.	C.R. 306/07	16/06	Shanta Bai	3,100/-
6.	C.R. 310/07.	17/06	Badri Lal	5,100/-
7.	C.R. 311/07	18/06	Devaji	3,100/-
8.	C.R. 301/07	19/06	Yashoda Bai	3,625/-
9.	C.R. 308/07	20/06	Nathi Bai	3,100/-
10.	C.R.No.315/07	31/06	Vikram	3,100/-
11.	C.R. 307/07	33/06	Rajesh	3,100/-
12.	C.R. 304/07	36/06	Ramkala Bai	3,100/-
13.	C.R. 312/04	37/06	Gori Bai	3,100/-
14.	C.R.305/07	54/06	Vikram	3,800/-
15.	C.R. 313/07	62/06	Ganga Bai	3,100/-
16.	C.R. 314/07	63/06	Lalit	3,100/-
17.	C.R. 303/07	65/06	Rekha Bai	3,100/-
18.	C.R. 302/07	64/06	Sonu	3,100/-
19.	M.A.3060/07	67/05	Pushpa Bai	31,800/-

4. It was also held by the learned tribunal that since there is a violation of terms and conditions of policy, therefore, respondent no. 2 shall have a right of

recovery from the appellant. It is this part of the award which is under challenged in all the cases.

5. Learned counsel for the appellant submits that even if the appellant was not possessing the valid permit then too, it could not be directed that respondent no. 2 can recover the amount from the appellant. For this contention reliance was placed on a decision of Divisional Bench of this Court in the matter of *Radheshyam Vs. Gayatri Devi,* Reported in 1997(2), MPLJ 179, wherein this court has observed that the question arising for determination in appeal was whether insurer could disown its liability under section 149 of the Act because the policy contained a clause that the vehicle would not be allowed to be used for the purpose not allowed by the permit and whether the overloading would constitute violation of the purpose of the permit. In this case it was held that vehicle was being used for sanctioned purpose and if any conditions are violated either by over speeding or overloading, that will be a breach of conditions of permit but it cannot be said that vehicle was not used for the purpose not authorised by the permit. It was not a case of without permit. It was further observed that tribunal was therefore, in error in holding that because of the violation of the condition of permit of carrying passengers in excess of seating capacity, insurance company would not be liable to pay compensation is illegal as such a defense is not available in sub-section (2) of section 149 of the Act against the third party risk as the vehicle was not used for a purpose not allowed by the permit of transport vehicle.

6. Further reliance was placed on a decision of Rajasthan High Court in the matter of *RK. College Vs. Ramesh Chand,* Reported in AIR 2007 (NOC) 1924, wherein the Rajasthan High Court has observed that offending vehicle was found on nationalised route not covered under permit. It was observed that it might be a case of violation of conditions of permit but it can not be said that by such fact alone there occurred a breach of insurance policy condition, moreso when it was not case of insurer that vehicle was not being used as contract carriage or was used for any other purpose, insurer cannot be therefore exonerated of its liability.

7. Learned counsel further submits that in the facts and circumstances of the case learned tribunal committed error in giving a option to respondent no. 2 to recover the amount from the appellant/petitioner.

8. Mr. SV. Dandwate, learned counsel for respondent no. 2, submits that none of the cases mentioned above is applicable in the present case. Learned counsel submits that in a decision of Division Bench of this court in the matter of *Radheshyam* (supra), the vehicle was not without permit but was a case of violation of terms of permit as there was over loading. Learned counsel submits that in the similar condition Hon'ble Apex Corut in the matter of *National Insurance Co. Ltd. Vs. Challa Bharathamma and Ors,* Reported in 2004 ACJ 2094, where insured had not obtained permit to ply the vehicle and the defense was in terms of the policy of insurance the insurer had no liability. Tribunal accepted the plea. High Court held that insurer was liable to indemnify the award. It was of the view that since there was no permit, the question of violation of any condition thereof does not arise. It was held by the Hon'ble Apex Court that the view is clearly fallacious. A person without permit to ply a vehicle cannot be placed at a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof.

9. In the aforesaid case the Hon'ble Apex Court has further observed that-

> "The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned executing court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the execution court shall take assistance of the concerned Regional Transport Authority. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, i.e., the insured. In the instant case considering the quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

Learned counsel submits that keeping in view law laid down by the Hon'ble Apex Court learned tribunal committed no error.

10. From perusal of the record it is evident that in the present case appellant was having no permit. Appellant himself appeared before learned tribunal and contested the claim cases but could not prove that he was having valid permit. In memo of appeal also it is not the case of appellant that appellant was having valid permit. Since the offending vehicle was without permit, therefore, it is a case where the appellant/petitioner was having no permit. In view of this the law laid down by the Divisional Bench of this court in the matter of Radheshyam (supra) has no application as in that case there was violation of terms of conditions of permit. Keeping in view the law laid down by the apex court appeal/revision has no force and is hereby dismissed. No order as to costs.

11. A copy of this order be placed in the record of C.R. Nos. 296/07, 301/07, 302/07, 303/07, 304/07, 305/07 306/07, 307/07, 308/07, 310/07, 311/07, 312/07, 313/07, 314/04, 315/07, 316/07, 317/07 and MA. No.3029/07.

I.L.R. [2008] M. P., 115
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
28 November, 2007

SMT. DURGA KORI and ors. ..Appellants*
Vs.
RAM GOPAL and ors. ...Respondents

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

Sharad Gupta, for the appellants
Virendra Verma, for the respondent no.2
Rakesh Jain with *Napur Jain,* for the respondent no.5

Cur.adv.vult

ORDER

The Order of the Court was delivered by **S.A. Naqvi, J.:**–The appellants have preferred the miscellaneous appeal under Section 173 of the Motor Vehicles Act for enhancement of compensation amount being aggrieved by impugned award dated 21.07.2004 passed by the XIth Additional Motor Accident Claims Tribunal, Jabalpur in MVC No.09/04 whereby the compensation amount of Rs.2,63,000/- has been awarded alongwith interest at the rate of 6% per annum.

2. The admitted facts are that the respondent No.2 Smt. Raj Rani Tripathi was owner of the truck No. MP 19/1981, the respondent No.1 Ramgopal was driver of the truck and the respondent No.3 the New India Assurance Company Limited was insurer of the truck. The accident occurred due to rash and negligent driving of the truck by respondent No.1 Ramgopal and Rewaram Kori died in the accident. The respondent No.5 the Oriental Insurance Company Limited was insurer of the jeep No. MP 20-FA/0122. The appellant No.1 Smt. Durga Kori is widow, appellant No.2 to 4 are children and appellant Nos.5 and 6 are parents of the deceased. The deceased was driver of the jeep.

3. The facts of the case in a nutshell are that on 28.11.2002 at about 9:30 p.m. deceased Rewa Ram was driving jeep No. MP 20-FA/0122 he was going to Sihora for the work of Bank and other persons were also sitting in the jeep. The respondent No.1 by driving the truck rashly and negligently dashed the jeep No. MP 20-FA/0122, the jeep turned turtle and Rewa Ram sustained injuries and died on the spot.

*M.A. No. 2382/2005. Jabalpur

The FIR was lodged. The respondent No.1 was charge-sheeted. The deceased was getting handsome salary. The appellants claimed compensation amount of Rs.13,92,000/-.

4. The respondents No. 1 and 2 denied the claim petition and contended that the accident occurred due to the negligence of the deceased Rewa Ram. There was no negligence of the respondent No1, Rewa Ram was drunk. The respondent No.3 pleaded that the respondent No.1 was not holding valid and effective driving licence on the date of accident. The truck was driven in breach of the terms and conditions of the insurance policy. The insurer is not liable to indemnify the owner.

5. The tribunal framed four issues. After hearing learned counsel for both the parties, perusing the evidence and material on record, the tribunal partly allowed the claim petition and awarded compensation of Rs.2,63,000/- alongwith interest at the rate of 6% per annum. Being aggrieved by the impugned award the appellants have preferred the appeal for enhancement of compensation amount on various grounds.

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

7. The learned counsel for the appellants contended that the compensation amount awarded by the tribunal is on the lower side. The tribunal erred in calculating monthly income of the deceased, annual loss of dependency of the appellants and awarding compensation amount towards loss of future dependency of the appellants. Contrary to that, learned counsel for the respondent Nos. 2 and 5 supported the impugned award and contended that the compensation amount awarded by the tribunal is just and proper. The learned counsel for the respondent No.5 also contended that the respondent Nos.4 and 5 are not liable to indemnify the appellants.

8. The only question for consideration in the appeal is adequacy of compensation amount. It is not disputed that Rewa Ram died in the vehicular accident due to rash and negligent driving of truck by the respondent No.1 Ram Gopal. At the time of accident deceased Rewa Ram working as a driver on jeep owned by respondent No.4. The tribunal has assessed the monthly income of the deceased at Rs.2000/- per month admittedly Rewa Ram was driver on the jeep of respondent No.4. Durga Bai (AW-1) deposed that the deceased was used to earn Rs.2200/- per month as pay and Rs.1500/- per day as allowance. The statement could not be impeached in the cross-examination. No evidence has been lead by the respondent No.1, 2 and 3 to controvert the statement of the witness. It is a matter of common knowledge that the minimum pay of the driver vehicle in these days is Rs.3,000/- per month. On the basis of evidence of Durga Bai (AW-1) it can be safely held that the monthly income of the deceases was Rs.3,000/-. Consequently, we set aside the findings of the tribunal in this respect. We hold that the monthly income of the deceased was Rs.3,000/- per month i.e. Rs.36,000/- per annum by deducting 1/3rd amount from the annual income towards the expenses of the deceased had he been alive annual dependency of the appellants of deceased comes Rs.24,000/-. The age of the deceased was 40 years. Looking to the age of the deceased and age of the claimants the multiplier of 16 can be safely used.

Consequently, the loss of future dependency of the appellants comes to Rs.24,000 X 16=Rs.3,84,000/- besides that the appellants are entitled to get 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. Hence, the appellants are entitled to get compensation amount of Rs.4,24,000/- (Rs. Four lacs twenty four thousand only).

9. Consequently, the appeal is partly allowed. The impugned award passed by the tribunal is modified and is enhanced from Rs.2,63,000/- to Rs.4,24,000/- (Rs. Four lacs twenty four thousand only). The enhanced compensation amount shall carry interest at the rate of 7% per annum from the date of filing of the claim petition before the tribunal till realization. No order as to costs.

I.L.R. [2008] M. P., 117
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
29 November, 2007

THE NEW INDIA ASSURANCE CO. LTD., INDORE ...Appellant*
Vs.
BALU and ors. ...Respondents

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

S. 2 (28) of the Motor Vehicles Act defines motor vehicle. According to which only those vehicles are not covered under the definition of motor vehicle, which are running upon the fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or vehicle having less than 4 wheels fitted with engine capacity of not exceeding 25 cubic centimeters. In the present case the appellant has examined Ramesh Gagrani, A.O. of the Company, who has categorically admitted that the JCB machine is having 4 wheels. It has also been admitted that it is being driven by the driver and it is being used for the purpose of construction of roads. It is also admitted by him that it moves on the roads. So far as the law laid down by Hon. the Jharkhand High Court is concerned, it is of no help to the appellant because in this case the Hon. Jharkhand High Court has held that the machineries such shovels, traxcavators, cranes, rappridozers, excavators, which are not adapted for use upon roads and are plied exclusively within enclosed premises of mines are not motor vehicles. In the present case the JCB machine is running on the roads and is being used for construction of the roads. Only because it is not being registered by the Regional Transport Authority as motor vehicle and no registration number is being given, it can not be said that the JCB was not a motor under the provisions of the Motor

*M.A. No. 1323/2005. Indore

Vehicles Act. In the facts and circumstances of the case, this court is of the view that the learned tribunal has rightly held that the JCB machine is motor for the purpose of Motor Vehicles Act. (Para 8)

Cases Referred :

(1) (2007) ACJ 117,(2) AIR 1992 SC 1371.

C.P. Singh, for the appellant
M.L. Pathak, for the respondent no.1
M.K. Jain, For the respondent no.3

Cur.adv.vult

ORDER

N.K. Mody, J. :–This order shall also govern the disposal of Misc.Appeal No.1337/05 *(New India Assurance Co.Ltd. Vs Gopal s/o Kachru & Ors).* In both the appeals the award is one which is dated 2.2.2005 passed by the 7th M.A.C.Tribunal, Fast Track, Ujjain, whereby Claim Case No.63/04 as also 62/04 were decided.

2. The short facts of the case are that respondent no.1 claimants Gopal and Balu filed a claim petition alleging that on 13.7.2002 at about 2 p.m. They were going on a motor bike. At that time, JCB machine, which was owned by respondent no.2, driven by respondent no.3 and insured with the appellant was driven by respondent no.3 negligently and rashly with the result the claimants sustained grievous injuries. It was alleged that since the JCB machine was insured with the appellant, therefore, respondent no.1 is entitled for compensation from respondents no. 2 and 3 and also from the appellant. The claim petition was contested by the appellant on various grounds including the ground that the JCB machine is not a motor and was not insured by the appellant as motor under the provisions of the Motor Vehicles Act and it is not maintainable before the claims tribunal.

3. After framing of issues and recording evidence, the learned claims tribunal awarded Rs.46,500/- in the claim case filed by Balu and Rs.34532/- in the claim case filed by Gopal and also held that since the offending JCB machine was insured with the appellant, therefore, the appellant is liable to pay the compensation, against which the present appeals have been filed. Cross objections have been filed by the respondents for enhancement of the compensation.

4. Shri ML Pathak, learned counsel for respondent no.1 submits that in the matter of Balu, the learned tribunal has awarded only Rs.46,500/-. The break-up is Rs.32,000 for permanent disability, Rs.8,000/- for medical expenses, Rs.6,500/- for pain and suffering, special diet. Learned counsel submits that the claimant Balu sustained fracture of tibia in his leg, he was hospitalised from 13.7.2002 to 31.7.2002 and again from 17.10.2002 to 21.10.2002. He was operated upon twice and the disability was assessed as 26%. The compensation awarded on the disability is on the lower side and on number of heads no amount has been awarded.

5. Learned counsel further submits that in the matter of claimant Gopal, the learned tribunal awarded only a sum of Rs.34532/-. The break-up is Rs.25,000/- for permanent disability, Rs.5732/- for medical expenses, Rs.5,000/- for special

diet. Learned counsel submits that the claimant Gopal was driver by profession. He was hospitalised from 13.7.2002 to 20.7.2002 and the disability was assessed to the extent of 19%. Looking to the injuries sustained by him, the amount of compensation awarded is on the lower side.

6. Shri CP Singh, learned counsel for the appellant submits that Ex.D-1 is the policy whereby the offending JCB machine was insured. It is submitted that as per the policy the risk, which was covered by the appellant was " Own Damage Risk" only. It is submitted that since the third party risk was not covered, therefore, the Insurance Company is not liable to pay any compensation. Learned counsel submits that the offending JCB machine was not a motor, as it was not registered by the R.T.O. and was not insured by the appellant as motor, therefore, the learned tribunal committed error in HOLDING the appellant liable for compensation. For this contention, reliance is placed by Shri CP Singh, learned counsel for the appellant on a decision in the matter of *Central Coalfields Ltd. Vs State of Bihar (now Jharkhand) and others* (2007 ACJ, 117) where the question involved was whether machinery such as shovels, trascavators, craned, rappridozers, excavators, which are not adapted for use upon roads and are plied exclusively within enclosed premises of mines are motor vehicles. In the aforesaid case the Jharkhand High Court after placing reliance on a decision of Hon'ble the Apex Court in the matter of *Central Coalfields Ltd. v. State of Orrisa* (AIR 1992 SC, 1371) held that the machineries are not adapted for use upon the roads were/are used within the enclosed premises of the mines and thus can not be held to be motor vehicles. Learned counsel submits that since the offending JCB machine was not a motor vehicle and, therefore, the finding by the learned tribunal whereby the liability to pay the compensation deserves to be set aside.

7. Learned counsel for the respondent Shri ML Pathak and Shri MK Jain submit that after due appreciation of the evidence and the policy filed by the appellant, the learned tribunal has come to the conclusion that the offending vehicle was a motor, as defined under the Motor Vehicles Act and held the appellant liable for payment of the compensation. It is submitted that the finding of the learned tribunal requires no interference.

8. S. 2 (28) of the Motor Vehicles Act defines motor vehicle. According to which only those vehicles are not covered under the definition of motor vehicle, which are running upon the fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or vehicle having less than 4 wheels fitted with engine capacity of not exceeding 25 cubic centimeters. In the present case the appellant has examined Ramesh Gagrani, A.O. of the Company, who has categorically admitted that the JCB machine is having 4 wheels. It has also been admitted that it is being driven by the driver and it is being used for the purpose of construction of roads. It is also admitted by him that it moves on the roads. So far as the law laid down by Hon. the Jharkhand High Court is concerned, it is of no help to the appellant because in this case the Hon. Jharkhand High Court has held that the machineries such shovels, traxcavators, cranes, rappridozers, excavators, which are not adapted for use upon roads and are plied exclusively within enclosed premises of mines are not motor vehicles. In the present case the JCB machine is running on the roads and is being used for

construction of the roads. Only because it is not being registered by the Regional Transport Authority as motor vehicle and no registration number is being given, it can not be said that the JCB was not a motor under the provisions of the Motor Vehicles Act. In the facts and circumstances of the case, this court is of the view that the learned tribunal has rightly held that the JCB machine is motor for the purpose of Motor Vehicles Act.

9. So far as Policy Ex.D-1 and D-2 is concerned, the Policy itself is defective. Since JCB is a motor, therefore, it was the duty of the appellant to issue the Policy at after covering all the risks.

10. So far as amount of compensation is concerned, it appears that looking to the injuries sustained by both the respondents Gopal and Balu, the amount of compensation awarded in both the appeals is on lower side as no amount has been awarded on number of heads. In M.A.No.1323/05 the claimant Balu shall be entitled for the following amount:-

> Medical expenses Rs.5,000/-, special diet Rs.5,000/-, permanent disability Rs.50,000/-, transsportation expenses Rs.5,000/-, pain and suffering Rs.5,000/-, and loss of income Rs.5,000/-, totaling Rs.75,000/- instead of Rs.46,500/-. Thus the amount enhanced is Rs.28500/-.

In M.A.No.1337/05 the claimant shall be entitled for compensation as under :-

> Permanent disability Rs.25,000/-, medical expenses Rs.5,000/-, pain and suffering Rs.5,000/-, expenses incurred on attendant Rs.5,000/-, loss of income Rs.5,000/- transportation expenses Rs.5000/- and special diet Rs.5,000/-, totaling Rs.55000/- instead of Rs.34, 532/-. Thus the amount enhanced is Rs.34,532/-.

11. The enhanced amount shall carry interest @ 7.5% from the date of application. With the aforesaid, the appeals filed by the appellant are dismissed, the cross-objections filed by respondent no.1 stand allowed. No order as to costs.

I.L.R. [2008] M. P., 120
APPELLATE CIVIL
Before Mr. Justice Dipak Misra & Mr. Justice S.A. Naqvi
6 December, 2007

MAHESH MATRE and ors. ....Appellants*
Vs.
AKHLESH THAKUR and ors. ...Respondents

Motor Vehicles Act (59 of 1988) - Section 166 - Joint feasors - Deceased travelling in jeep which was dashed by truck as a result of which jeep skidded to certain distance and its three tyres came out due to accident - Some persons received grievous injuries and some died - Claims Tribunal held that both drivers were negligent and their contribution was determined at 50% each - Respondents were held liable to pay 50% of the award as driver, owner and

*M.A. No. 2818/2004. Jabalpur

insurance company of jeep were not made party - Held - Deceased was not driving jeep therefore, it cannot be held that he had contributed to accident - Accident has been caused by composite negligence of feasors - It is the choice of claimant to claim from owner, driver and insurer of both vehicles or any one of them - Conclusion of tribunal that as owner, driver and insurer of jeep have not been made party, therefore, 50% is to be deducted is absolutely unsustainable - Appeal allowed.

From the aforesaid enunciation of law it is quite clear that where the liability is joint and several it is the choice of the claimant to claim from the owner, driver and the insurer of both the vehicles or any one of them. The entire of amount of compensation on account of the injuries or death can be imposed on the owner, driver and insurer of that vehicle. In view of the aforesaid, the conclusion arrived at by the tribunal that as the owner, driver and insurer of the jeep have not been made parties, therefore, 50% is to be deducted, is absolutely unsustainable. The liability in entirety can be imposed on the insurer of the truck. Therefore, the amount of compensation determined by the Tribunal in favour of the claimants has to be made good by the insurer of the truck. (Para 13)

Cases Referred :

(1) 1991 ACJ 651,(2) AIR 2002 SC 2864, (3) 2004 ACJ 53,(4)2005 (1) MPLJ 372,

Umesh Trivedi, for the appellants
V.K. Trivedi, 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') the legal propriety of the award dated 29.6.2004 passed in Motor Accident Claim Case No. 72/2003 by the Motor Accidents Claims Tribunal, Waraseoni (for short 'the Tribunal') is called in question by the claimants-appellants (hereinafter referred to as 'the claimants').

2. The claimants initiated an action under Section 166 of the Act for grant of compensation of Rs.7,09,000/- for the death of the deceased, Sitaram, as his legal representatives on the foundation that on 19.9.2003 at about 3 O' clock in the morning the deceased was travelling in a Marshall Jeep bearing registration No. MH-26-C/4930 and when it reached near Dabrapara, Bhilai at G.E. Road a truck bearing registration No.KCG-04/ZC.1395 being rashly and negligently driven by the first respondent dashed against it as a result of which the jeep skidded to certain distance and its three tyres came out due to the aforesaid accident. Some of the persons travelling in the jeep sustained grievous injuries and some other died at the spot. Because of the accident the deceased, Sitaram, breathed his last at the sport. A crime No.645/2003 for the offences punishable under Sections 279, 337, 338, 304-A of the Indian Penal Code at the concerned Police Station.

3. It was pleaded by the claimants that at the time of death of deceased, Sitaram, he was 21 years of age, able bodied and was serving in a grossary shop

from which he was earning Rs.2,000/- as salary. In addition to the same, he was also getting Rs.1,500/- from working in the agriculture field. It was contended that he was maintaining the family and his death has caused immense loss to the legal representatives. On various heads the claimants putforth a claim of Rs.7,09,000/-.

4. The non-applicant driver filed his written statement resisting the factum of negligence by stating, inter alia, that the jeep was moving at a great speed and it was patent that the jeep driver was sleeping and at the time of collision the speed of the jeep was quite high and the driver was unable to control. In essence, the driver of the truck put the full blame on the jeep driver. The owner of the truck chose to remain ex parte before the Tribunal. The insurer resisted the claim of the claimants on the ground that the truck in question was not involved in the accident and it was not insured with it. It was also putforth that the driver of the truck did not have the valid licence to drive a heavy vehicle. It was the stand of the Insurance Company that the claimants had not impleaded the owner, driver and insurer of the jeep, though the driver of the jeep was responsible for causing the accident. The income aspect putforth by the claimants was seriously controverted by the insurer.

5. The Tribunal framed as many as seven issues and came to hold that the accident had occurred due to the negligence of both the drivers and their contribution was determinable at 50% each; that at the time of accident the driver of the truck possessed valid and effective driving licence; that the truck in question was insured with the insurance company and the insurance was valid at the time of accident; that the claimants were entitled to receive compensation of Rs.3,17,712/- but as the liability had to be apportioned, and, therefore, the insurer alongwith the owner and driver would be jointly and severally liable to pay a sum of Rs.1,58,856/-; that the claimants should be entitled to 8% per annum interest with effect from 20.10.2003 i.e. from the date of presentation of the application of the claim petition till realization of the full amount within a period of two months; and that after expiration of two months the claimants would be entitled to get interest at the rate of 10% per annum on the awarded sum. Apart from the above, the Tribunal also issued directions in which manner the amount would be kept in the fixed deposit and how it shall be disbursed.

6. We have heard Mr.Umesh Trivedi, learned counsel for the petitioner and Mr.V.K.Trivedi, learned counsel for the respondent No.3-Insurer.

7. Questioning the defensibility of the award it is submitted by Mr. Umesh Trivedi, learned counsel for the appellant that the Tribunal has grossly erred by reducing the amount of compensation by 50% treating it to be a contributory negligence though the analysis made by the Tribunal would clearly establish that it is a case of composite negligence. It is his further submission that the owner, driver and the insurer of both the vehicles, namely, truck or the jeep, are to be kept in a singular compartment of joint tort feasors and hence, the legal representatives are entitled to sue any one of the tort feasors and hence, the reasons ascribed by the tribunal that the owner, driver and insurer of the jeep have not been made as parties and, therefore, the compensation required to be

slashed down by 50%. It is canvassed by Mr.Trivedi that though the tribunal has relied on the decision rendered in *Bhajan Lal Bisnoi Vs. Rajasthan State Transport Corporation,* 1991 ACJ 651 and expressed the opinion that it is a case of composite negligence, but has reduced the amount by 50% because of non-impleadment of owner, driver and the insurer on the ground that they stay in the nearby village and, therefore, it was imperative on the part of the claimants to array them as respondents which is unacceptable in law.

8. Mr.V.K.Trivedi, learned counsel for the respondents submitted that the award passed by the Tribunal cannot be faulted as the claimants have deliberately not made the jeep owner, driver and the insurer as the parties. It is contended by him that the present case would fit into the compartment of contributory negligence and hence, the award passed by the Tribunal cannot be found fault with. Learned counsel further submitted that there can be apportionment of compensation even in the case of composite negligence and the same having been done by the tribunal the award is absolutely flawless.

9. Before we proceed to deal with the concept of composite negligence and contributory negligence and the effect of non-impleadment of the owner, driver and insurer of the jeep in which the deceased was travelling, we would like to put in on record that Mr.Umesh Trivedi, learned counsel for the appellant submitted that he does not intend to assail the amount determined by the tribunal for the purpose of compensation but his only challenge is with regard to the apportionment inasmuch as the grant of compensation of Rs.3,17,712/- is just and fair in the case at hand.

10. Because of the aforesaid statement made by the learned counsel for the appellant we would like to refrain from dwelling upon the same and advert to other issues. From the material brought on record and the findings recorded by the tribunal it is discernible that the deceased died the accidental death while travelling in the jeep. He was not driving the jeep. He had not contributed to the causation of the accident. In the absence of any contribution for causing the accident, the question of contributory negligence does not arise. In the case of *Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and others,* AIR 2002 SC 2864 the Apex Court dealt with the concept of contributory negligence in the following terms:-

> "The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an 'author of his own wrong'".

11. In *Municipal Corporation of Greater Bombay Vs. Laxman Iyer and another,* 2004 ACJ 53 the Apex Court has explained the concept of contributory negligence thus:-

> "Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of other's negligence. Whichever party could have avoided the consequence of other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning."

12. Tested on the touchstone of the aforesaid parameters, there cannot be any shadow of doubt that in the absence of any role remotely played by the deceased in the causation of accident, it cannot be held that he had contributed to the accident. In fact, as is evincible, he was travelling in the jeep and the accident had occurred because of the collision between the truck and the jeep. Thus, he was a third party in respect of both the vehicles. As far as he is concerned the accident has been caused by the composite negligence by the feasors. This Court in *Sushila Bhadoriya and others Vs. M.P.State Road Transport Corporation,* 2005 (1) MPLJ 372 (FB) has held as under:-

> "26. On the same principle, in the case of tort-feasors, where the liability is joint and several, it is the choice of the claimant to claim damages from the owner and driver and insurer of both the vehicles or any one of them. If claim is made against one of them, entire amount of compensation on account of injury or death can be imposed against the owner, driver and insurer of that vehicle as their liability is joint and several and the claimant can recover the amount from any one of them. There cannot be apportionment of claim of each tort-feasors in the absence of proper and cogent evidence on record and it is not necessary to apportion the claim."

13. From the aforesaid enunciation of law it is quite clear that where the liability is joint and several it is the choice of the claimant to claim from the owner, driver and the insurer of both the vehicles or any one of them. The entire of amount of compensation on account of the injuries or death can be imposed on the owner, driver and insurer of that vehicle. In view of the aforesaid, the conclusion arrived at by the tribunal that as the owner, driver and insurer of the jeep have not been made parties, therefore, 50% is to be deducted, is absolutely unsustainable. The liability in entirety can be imposed on the insurer of the truck. Therefore, the amount of compensation determined by the Tribunal in favour of the claimants has to be made good by the insurer of the truck.

14. Consequently, the appeal is allowed. The award passed by the Tribunal is modified and it is directed that the amount of compensation determined by the tribunal be paid to the claimants by the respondent No.3, Insurer alongwith interest at the 6% per annum from the date of presentation of the application till the date of realization. The amount already paid shall be deducted. In the peculiar facts and circumstances of the case there shall be no order as to costs.

I.L.R. [2008] M. P., 125
APPELLATE CIVIL

Before Mr. Justice Rajendra Menon & Mr. Justice S.A. Naqvi

13 December, 2007

SMT. AMNA BI and anr. ...Appellants*

Vs.

M/S ROYAL TRANSPORT SERVICE and ors. ...Respondents

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

It is therefore, clear from the aforesaid enunciation of law that if the bread winner of the family dies on account of motor accident other person in the family who are dependent upon him entitled to claim compensation. Facts of the present case if evaluated in the back drop of the aforesaid principles indicates that appellant no. 2 Rasid Khan is a handicapped person dependent upon the earning of the deceased. According to PW/1 Amna Bi she had two sons Sajid Khan aged 25 years and Rasid Khan aged 16 years. It is stated by her that her younger son Rasid Khan is physical handicapped, he is unable to perform any work and both Rashid Khan and claimant no. 1 herself were being maintained by Sajid Khan. Even though Rasid Khan appellant no. 2 is not examined but the statement of PW /1 Amna Bi in this regard is not at all challenged by Insurance Company and there is no reason for accepting the statement of PW/1 Amna Khan for holding that her younger son is physical handicapped and was dependent upon her elder son.

*M.A. No. 912/2003. Gwalior

Accordingly, it has to be held that appellant no. 2 Rasid was dependent upon his elder brother, it was Sajid Khan who was maintaining appellant no. 2 and because of the accident Rasid Khan has suffered adversely on account of death of his brother and therefore, is entitled to seek compensation. (Para 8)

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

As far as enhancement of compensation is concerned the only question to be determined is with regard to assessment of the earning of Sajid Khan. Even though no documentary evidence is adduced, PW/1 Amna Bi mother of deceased and PW/2 Hari Singh owner of truck bearing CII 7814 have been examined and both these witnesses have categorically stated that Sajid Khan was earning Rs. 3,000/- per month as driver, in the absence of any evidence in rebuttal, this evidence cannot be ignored merely because documentary evidence is not produced, PW/2 Hari Singh owner of truck in his evidence, admits that he does not have any document in this regard was not sending any pay slip or record to the Labour Department nor maintaining any register or ledger, even otherwise as the accident had taken place in the year 2002 it can be easily assumed that a truck driver would be earning about Rs. 3000/- at that point of time. That being so we are of the considered view that in assessing the earing of Sajid at Rs. 1500/- per month, learned tribunal has committed grave error when from the statement of PW/1 Amna Bi and PW/2 Hari Singh it is seen that Sajid Khan was earning Rs. 3000/- per month. (Para 10)

Cases Referred :

(1) AIR 2007 SC 1474, (2) AIR 1987 SC 1690, (3) AIR 1989 SC 1589.

K.M. Mishra, for the appellants
None, for the respondents No. 1 & 2
S.S. Bansal, for the respondents no.3

JUDGMENT

The Judgment of the Court was delivered by **Rajendra Menon, J.** :– This is claimants appeal under Section 173 of the Motor Vehicles Act seeking enhancement of the compensation granted by the Motor Accident Claims Tribunal, Vidisha in claim case No. 138/2002.

2. Claimants are the widowed mother and invalid brother of deceased Sajid Khan who was working as driver in truck bearing CII-7814. It is stated that on 28-08-02 when Sajid Khan was working as driver and was checking nut bolts of the wheels after parking the truck by the road side, a bus bearing no. M.P. 04-F-0526 belonging to respondent no. 1, driven by the respondent no. 2 and insured with respondent no. 3 came from the opposite direction, it was driven in rash and negligent manner and dashed against the truck, as a result injuries were sustained by Sajid Khan and he died on the spot. Inter alia contending that Sajid Khan was

earning Rs. 3000/- as salary per month, was paid daily allowance of Rs. 75/-, appellant no. 1 widowed mother and appellant no.2 handicapped brother are totally dependent upon the deceased claimed compensation of Rs. 13,60,000/-. On the basis of material and evidence that came on record learned tribunal assessed the income of Sajid Khan at Rs. 1500/- per month and after deducting Rs. 1000/- for self expenses dependency has been assessed at Rs. 500/- per month, considering the age of appellant no. 1 to be about 70 years and taking not of the fact that appellant no. 2 is invalid brother aged 17 years multiplier of 13 is applied and the compensation determined at Rs.1,56,000/- thereafter adding a sum of Rs. 2,000/- towards funeral expenses, Rs. 5000/- for loss of love and affection a total compensation of Rs. 1,63,000/- is awarded. Inter alia contending that the compensation is very much on the lower side assessment of income of Rs.1500/- per month is on the lower side, dependency is not properly assessed, this appeal is filed seeking enhancement of the compensation.

3. Shri K.M. Mishra, learned counsel for appellants invites our attention to the driving licence of the deceased Ex. P/7 statement of PW/1 Amna Bi and pointed out that Sajid Khan was working as driver and according to claimant her son was earning Rs. 3000/- per month along with Rs. 75/- daily allowance. PW/2 Hari Singh who is owner of the truck in which Sajid Khan was working as driver has also stated the he was paying Rs. 3000/- per month and Rs. 75/- as daily allowance to the deceased. It is stated by Shri K.M. Mishra, that in rebuttal as no evidence is lead, learned tribunal has committed grave error in ignoring the statement of PW/1 Amna Bi and PW/2 Hari Singh in the matter of determining salary of deceased Sajid Khan and by assessing salary on the basis of improper assessment of evidence it is argues that tribunal has committed grave error which warrants interference now in this appeal.

4. Shri S.S. Bansal, learned counsel for Insurance Company supported the award and by filing a cross objection submitted that as appellant no. 2 Rasid Khan, brother of deceased Sajid Khan is not his legal representative, no compensation can be granted to him. Placing reliance on a judgment of the Supreme Court in the Case of *Smt. Manjuri Bera Vs. Oriental Insurance Co. Ltd,* AIR 2007 SC 1474 and inviting our attention to the provisions of Section 166(1)(c) of the Motor Vehicles Act and the definition of legal representatives as appearing in Section 2(11) of the Code of Civil Procedure, Shri Bansal tried to emphasis that appellant no. 2 is not a legal representative of deceased Sajid Khan and therefore, he is not entitled to compensation and in assessing the compensation on the basis of age and disability of the appellant no. 2 it is argued by the learned counsel for Insurance Company that learned tribunal has committed grave error and prays for interference and allowing of the cross objection.

5. Refuting the aforesaid contention and challenging the cross objection raised by the Insurance Company Shri K.M. Mishra, learned counsel for appellants invites our attention to the observation made in the case of Smt. Manjuri Bera (supra) in para 13 and 16 so also on a judgment of the Supreme Court in the case of *Gujarat State Road Transport Corporation Ahmedabad Vs. Ramanbhai Prabhatbhai and another* AIR 1987 SC 1690 and argued that a dependent brother is also legal representative for the purpose of claiming compensation under the Motor Vehicles

Act and in awarding compensation to appellant no. 2 and assessing the quantum of compensation by considering his disability etc. learned tribunal has not committed any error which warrants interference in this proceeding. Accordingly, he prays for dismissal of the cross objection.

6. We have heard learned counsel for parties at length and perused the records.

7. Before considering the claim of the appellants for enhancement of the compensation we deem it proper to consider the cross objection raised by the Insurance Company with regard to entitlement of appellant no. 2 in claiming the compensation.The term legal representative is not defined in the Motor Vehicles Act, however, it is contemplated under Section 166(1)(c) of the Motor Vehicles Act that all or any of the legal representative of the deceased are entitled to compensation. Section 166 of the Motor Vehicles Act, deals with filing of a application for compensation and it is stipulated therein that a application for compensation arising out of an accident of the nature specified in sub Section 1 of Section 165 can be made by a person who has sustained injuries or by the owner of the property or in cases where the death has resulted from the accident by all or any of the legal representatives of the deceased. Even though the term legal representative appearing in clause (c) of Section 166 (1) is not defined in the Motor Vehicle Act but the same is defined under Section 2(11) of CPC to mean 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 capacity, the person on whom the estate devolves on the death of the party so suing or sued.

8. In the case of *Manjuri Bera* (supra) reliance is placed on a judgment earlier rendered in the case of *Gujarat State Road Transport Corporation Ahmedabad* (supra) and it is held that for the purpose of the Motor Vehicles Act a legal representative is one who suffers on account of death of a person due to a motor vehicle accident. It is emphasized that the said person need not necessarily be a wife, husband, parent or child. It is held by the Supreme Court that the right to file a claim application has to be considered in the back ground of the right to entitlement. After taking note of the observation made in the case of *Gujarat State Road Transport Corporation Ahmedabad*(supra) and another judgment in the case of *Custodian of Branches of BANCO National ultramarino, Vs. Nalini Bai Naique* AIR 1989 SC 1589 it is observed that a legal representative is one who suffers on account of the accident. In the case of *Gujarat State Road Transport Corporation Ahmedabad* (supra) the question is considered in the light of right to file application for compensation under Section 110(A) of the Motor Vehicles Act as was existing at the relevant time and after considering various provisions it is held by the Supreme Court that a legal representative, entitled to claim compensation under the Motor Vehicles Act need not necessarily be the wife, husband, parent or child of the deceased person. It is held by the Supreme Court in the said case that any other person who suffers because of the accident is a legal representative, it is held in the aforesaid case that the brother of a person who dies in motor accident is entitled to maintain a claim for compensation under Section 110(A) if he is legal representative of the deceased. In para 11 of the aforesaid judgment it is so observed by the Supreme Court:

"Every legal representative who suffers on account of the death of a person due to a motor vehicle accident should have a remedy for realisation of compensation and that is provided by Ss. 110-A to 110-F. These provisions are in consonance with the principles of law of torts that every injury must have a remedy. It is for the Motor Vehicles Accidents Tribunal to determine the compensation which appears to it to be just as provided in S. 110-B and to specify the person or persons to whom compensation shall be paid. The determination of the compensation payable and its apportionment as required by S. 110-B amongst the legal application may be filed under S. 110-A have to be done in accordance with well-known principles of law. It is to be remembered that in an Indian family brothers' sisters and brother's children and sometimes foster children live together and they are dependent upon the bread-winner of the family and if bread-winner of the family 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 has been substantially modified by the provision contained in the Motor Vehicles Act in relation to cases arising out of motor vehicles accidents."

(Emphasis Supplied)

It is therefore, clear from the aforesaid enunciation of law that if the bread winner of the family dies on account of motor accident other person in the family who are dependent upon him entitled to claim compensation. Facts of the present case if evaluated in the back drop of the aforesaid principles indicates that appellant no. 2 Rasid Khan is a handicapped person dependent upon the earning of the deceased. According to PW/1 Amna Bi she had two sons Sajid Khan aged 25 years and Rasid Khan aged 16 years. It is stated by her that her younger son Rasid Khan is physical handicapped, he is unable to perform any work and both Rashid Khan and claimant no. 1 herself were being maintained by Sajid Khan. Even though Rasid Khan appellant no. 2 is not examined but the statement of PW /1 Amna Bi in this regard is not at all challenged by Insurance Company and there is no reason for accepting the statement of PW/1 Amna Khan for holding that her younger son is physical handicapped and was dependent upon her elder son. Accordingly, it has to be held that appellant no. 2 Rasid was dependent upon his elder brother, it was Sajid Khan who was maintaining appellant no. 2 and because of the accident Rasid Khan has suffered adversely on account of death of his brother and therefore, is entitled to seek compensation.

9. While interpreting a provision, the legislative intents and the purpose for which the provision is made have to be given paramount consideration. The Motor Vehicles Act is a beneficiary piece of legislation, enacted for granting compensation to family members of a person who dies in a motor accident, compensation is awarded to the claimants to meet the hardship which falls on the family due to death of the earning member or on whom the family was depended, that being so a provision have to be interpreted in such a manner that the legislation intent advanced, if the restricted interpretation canvassed by Shri S.S. Bansal is applied

it would deprive appellant no. 2 from claiming compensation even though the evidence available on record indicates that he was dependent on his brother for his living and due to the accident he is adversely effected. The legislative intents for enacting the Motor Vehicles Act was only to grant compensation and benefits to a person like appellant no. 2 and if the restricted meaning to the word "legal representative" as pleaded by the Insurance company is accepted, it would be against the legislative intent, which is impermissible. That being so we hold that Rasid Khan is a legal representative within the meaning of Section 166(1)(c) of the Motor Vehicles Act entitled to file application for compensation and in granting compensation to Rasid Khan, learned Tribunal has not committed any error warranting interference. Accordingly finding the objection raised by the Insurance Company to be wholly unsustainable, cross objection filed i.e. I.A. No. 3656/2006 is dismissed.

10. As far as enhancement of compensation is concerned the only question to be determined is with regard to assessment of the earning of Sajid Khan. Even though no documentary evidence is adduced, PW/1 Amna Bi mother of deceased and PW/2 Hari Singh owner of truck bearing CII 7814 have been examined and both these witnesses have categorically stated that Sajid Khan was earning Rs. 3,000/- per month as driver, in the absence of any evidence in rebuttal, this evidence cannot be ignored merely because documentary evidence is not produced, PW/2 Hari Singh owner of truck in his evidence, admits that he does not have any document in this regard was not sending any pay slip or record to the Labour Department nor maintaining any register or ledger, even otherwise as the accident had taken place in the year 2002 it can be easily assumed that a truck driver would be earning about Rs. 3000/- at that point of time. That being so we are of the considered view that in assessing the earing of Sajid at Rs. 1500/- per month, learned tribunal has committed grave error when from the statement of PW/1 Amna Bi and PW/2 Hari Singh it is seen that Sajid Khan was earning Rs. 3000/- per month. Accordingly the compensation is assessed as under:-

> Earning of Sajid Khan is amended at Rs. 3000/- per month, after deducting 1/3rd i.e. Rs. 1000/- towards self expenses dependency is assessed Rs. 2000/- per month, the annual dependency would come to Rs. 24,000/- as multiplier of 13 is applied, the total compensation would come to (Rs.24,000 x 13) i.e.Rs. 3,12,000/-, to this a further sum Rs. 20,000/- towards other heads like funeral expenses, loss of love and affection when added takes the compensation to Rs. 3,32,000/-, in our view this is the reasonable compensation to be awarded to the claimants in the facts and circumstances of the present case.

11. Accordingly, this appeal is allowed, compensation awarded is enhanced to Rs. 3,32,000/-. enhanced amount shall carry the interest @ 7% per annum from the date of award till the payment.

12. Accordingly, petition stands allowed and disposed of with the aforesaid.

I.L.R. [2008] M. P., 131
APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar

2nd August, 2007

GOPAL and anr. ...Appellants*

Vs.

CENTRAL BUREAU OF NARCOTICS, INDORE ...Respondent

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

The three Judges Bench of the Supreme Court in the case of *Pawan Kumar* (supra) has held specifically that in search of a bag/brief case or any such article or container etc. which is being carried by accused, is not a search of the person, hence, section 50 would not apply in such a case. In the instant case, the bag was not concealed in the body, therefore, search of the bags would not come within the ambit of search of 'person' as enshrined under section 50 of the NDPS Act. Hon' ble Shri Justice G.P. Mathur, speaking for the Bench in para 20 considered the observations made in the judgment rendered by the Constitution Bench in the case of *State of Punjab V/s Baldev Singh* [(1999)6 SCC 172]. as under:-

> "As pointed out in *State of Punjab V. Baldev Singh,* drug abuse is a social malady. While drug addiction casts into the vitals of the society, drug trafficking not only casts into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nations Conventions. Against illicit trafficking in Narcotic Drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in these kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of a second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article." (Para 8)

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

In the case of Majorsingh (supra) the Supreme Court has held that the provision of section 42 shall not apply when search and seizure have taken place on a public place. In the case at hand, along with the raiding party, Gazetted

*Cr. A. 1336/02: Indore

officer, Superintendent of Bureau PW-6 J.C. Shrivastava was present together with Inspector Ku. Smita Tamrakar and other officials of the Bureau. Therefore, the ;provision of Section 42 (2) of the NDPS Act would not apply. In the case of *Shriniwas Goud* (supra), the Supreme Court has held that the officers of Gazetted rank are not required to comply with the requirements of section 42(2) of the NDPS Act. The said requirement is confined to the cases where action is taken by the officers below the rank of Gazetted Officer without authorization. In the instant case, the authorization was also given by the Superintendent of the Bureau Shri J.C. Shrivastava (PW-6) to the Inspector Ku. Smita Tamrakar which is available in the document Ex. P/13 at place B to B. wherein secret information from the informant was recorded. This also shows clear compliance of section 42(12) of the NDPS Act for search, seizure and arrest on public place. Section 43 of the Act would apply and in this section, there is no such provision as prescribed under section 42 and 42(2) of the Act as held i n the case of *State of Haryana V/s Jarnailsingh* (supra). (Para 9)

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

Learned trial Court held the appellant Shyamubai guilty on the basis of seizure of bus travelling tickets recovered from her possession and both Shyamubai and appellant Goppal were sitting adjacent to each other on seat Nos. 27 and 28. This Court has perused the entire statements of the witnesses and given anxious consideration to the issue that whether the prosecution has proved beyond all reasonable doubt about conscious possession of brown sugar found in the black bag of appellant Gopal and is of the considered opinion that merely because both the appellants were travelling in one public bus sitting adjacent to each other and the tickets were seized from appellant Shyamubai, it would be very difficult to ;presume that she was knowing that the appellant Gopal Sharma was possessing heroin and kept the same with the consent and connivance of appellant Shyamubai. It is worthwhile to mention that the appellant Gopal Sharma was a resident of village Dogda P.S. Dug Tehsil Gangdhar District Jhalawad (Rajasthan) whereas Shyamubai widow of Karansingh was resident of village Karawan P.S. Pagaria District Jhalawad (Rajasthan) as described in the com;plaint filed by trhe Bureau. Both the appellants belong to separate caste and possibility of her travelling as an innocent passenger with the appellant Gopal Sharma cannot be ruled out, because from the bag which was possessing by her no incriminating article was seized. Their association from Indore Bus-Stand could be just as a chance meeting on Bus-Stand and at the time of taking tickets at many a time on Booking Windows male passengers request the lady copassenger also to take their tickets because the ladies are being given priority. All these possibilities and probabilities cannot

be ruled out regarding possession of tickets by Shuyamubai and travelling in the bus. Even it cannot be said that she was associated with the appellant Gopal. The witnesses of Narcotic Bureau have stated that the statements of both the appellants were recorded and they disclosed their association as well as keeping of heroin in the bag, but the statements of both the appellants were not proved and exhibited in Court. Therefore, the same cannot be used against them and on the basis of oral statement of witnesses of the Bureau, this Court is not satisfied and convinced to hold that Shyamubaui was in conscious possession of the seized heroin from the black bag possessed by appellant Gopal Sharma. The circumstances against Shyamubai are not pointing unerringly at her guilt excluding all reasonable hypothesis of her innocence. Therefore, in the considered view of this Court, she is entitled for getting benefit of reasonable doubt. (Para 23)

Cases referred :

(1) (2005) 4 SCC 350, (2)(1999) 6 SCC 172, (3) 2007 (3) Crimes 24 SC, (4) 2007 (3) Crimes 52, (5) (2004) 5 SCC 188.

N.S. Carada, for the appellants
Manoj Soni, for the respondent

JUDGMENT

S.L. Kochar, J. :–By this appeal, the appellants named above have challenged their conviction under section 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Herein-after referred to as the NDPS Act), and sentence of R.I. for ten years with fine of Rs. 1,00,000/-each and in default of payment of fine to suffer additional S.I. for six months passed in Special Case No. 4/2001 passed by the learned Special Judge, West Nimar. Mandleshwar, on 13.11.2002.

2. Briefly stated, the prosecution case as unfolded before the trial Court is that on 27.09.2001 in the evening at 4.00 PM PW-6 J.C. Shrivastava Superintendent, Central Narcotics Bureau (For short, herein-after referred to as (Bureau), Inspector R.K. Rajale (PW-7) and Sub-Inspector Girvarpuri (PW-5) jointly received a secret information from informant that the appellants named Gopal Sharma and Smt. Shyamubai wife of Karansingh were taking two kilograms of heroin illegally to Pune in a bus and they could be apprehended by checking the bus near Khaltaka. This information was recorded vide Ex. P/13 Supdt. Shri Shrivastava issued direction to PW-4 Inspector Kumari Swati Tamrakar an d also constituted a trapping party consisting of himself, Inspector PW-4 Ku. Swati Tamrakar, Sub Inspector PW-7 Girvarpuri, PW-7 Inspector R.K. Rajak, Constable Suresh (not examined) and Constable Yeshwantsingh (PW-3). They proceeded from Indore at 4.30 PM and reached at Khaltaka Police Out Post in District Khargone West Nimar and started checking the buses going from Indore to Pune. In the night at 10.30 PM 'Pushpak' bus bearing registration No. MP-07-F-2844 of M.P. State Road Transport Corporation was stopped. The said bus was being driven by driver PW-1 Ambalal and PW-2 Abdul Rashid was its conductor. The driver was apprised of the secret information and also was told about search of the bus. Upon search, they had suspicion on the passengers sitting on seat No. 27

and 28 (the appellants). PW-4 Inspector Ku. Smita Tamrakar obtained the consent from appellants while apprising them to be searched before the Magistrate by the Raiding Party in which Gazetted Officer PW-6 J.C. Shrivastava was also present. The appellants gave consent to be searched in presence of the Raiding Party. The proceeding of search and seizure was performed in presence of PW-1 Driver Ambalal and PW-2 Conductor Abdul Rashid. In a black bag of appellant Gopal, in its bottom , there was a hollow or cavity wherein two polythene packets were found. In those packets, gray colour powder was available. Weight of the said powder in one packet was one kilogram and that of another packet was 1.200 Kilograms. The appellants disclosed that the polythene bags were containing heroin. The Raiding Party tested the same by their testing kit and found it to be heroin, a product of opium.

3. PW-4 Ku. Smita Tamrakar, the Investigating Officer took out 5 grams heroin from each bag for chemical examination. She seized and sealed the same. Remaining heroin contained in the bag of the appellants was also seized and sealed. In the search of the bag of appellant Shyamubai no contraband article was seized. She was having two travelling ticket of seat Nos. 27 and 28. The consent letter Ex. P/1 was prepared regarding search and seizure and Ex. P/2 and P/3 were prepared with regard to the consent of the appellants. Through seizure memo Ex. P/9, two tickets Ex. P/6 and P/7 from appellant No'. 2 Shyamubai were seized. The appellants were arrested and their respective memos were Ex. P/8 and P/9. Spot map Ex. P/5 and facsimile of seal Ex. P/4 were prepared and after returning to Indore office, the appellants were put in lock-up. A detailed memorandum Ex. P/14 (F.I.R.) was handed over to the Superintendent. The seized articles were deposited in the MALKHANA and thereafter sent the sample to the Laboratory for examination Superintendent Shrivastava registered case No. 5/01 and appointed Inspector Shri R.K. Rajak (PW-7) as Investigating Officer for further action. The seized samples were sent to the Laboratory for examination and after examination report Ex. P/16 whereof was given by PW-8 Vimal Mohan Goyal, Assistant Chemical Examiner. After completion of investigation, Shri Rajak filed the complaint against the appellants for commission of offence punishable under section 8/21 of the NDPS Act.

4. The appellants abjured their guilt. According to them, they were falsely implicated by Bureau-team. They have not examined any witness in defence, whereas the prosecution examined as many as eight witnesses and adduced 36 documents to prove its case against the appellants. Learned trial Court finding the appellants guilty of the afore mentioned offence, convicted and sentenced them as mentioned herein-above.

5. Learned counsel for the appellant has vehemently argued that there is no compliance of mandatory provision of sections 42 and 50 of the NDPS Act, therefore, the whole trial would be vitiated and the statement of the prosecution witnesses are contradictory on material particulars like possession of bags by the appellants, their trapping and seizure proceedings.

6. Per contra, learned counsel for the Respondent (Bureau) has supported the impugned judgment and finding of the trial Court and submitted that in the facts

and circumstances of the case at hand, the provisions of sections 42 and 50 of the NDPS Act would not attract, because search of the bags of the appellants was taken on a public place and their personal search (search of "person") was not taken. Learned counsel has placed reliance on the judgment rendered by three Judges Bench of Supreme Court in the case of State of *Himachal Pradesh V/s Pawankumar* [(2005)4 SCC 350] and in the cases of *Madanlal V[s State of Himachaql Pradesh* [2003 Cri.L.R (SC 751], *State of Rajasthan V/s Baburam* [2007(3) Crimes 24 (SC)] , *State of Haryana V/s Suresh* [2007(3) Crimes 52 (SC)] , *State of Haryana V/s Jarnail Singh* [(2004)5 SCC 188], *Sajan Abraham V/s State of Kerala* [(2001)6 SCC 692], *Union of India V/s Majorsingh* [2006)9 SCC 170 and G. *Shriniwas V/s State of Andhra Opradesh* [2005)8 SCC 183].

7. Having heard learned counsel for the parties and after perusing the entire record, this Court is of the view that in the instant case provisions of sections 42 and 50 of the NDPS Act would not be attracted, because the search of the persons of the appellants was not taken by the Bureau Team or the officer of the Bureau. The bags of the appellants were with them. They were searched and in the bag of appellant No. 1 Gopal Sharma, heroin weighing 2 Kgs. 200 grams was seized and search and seizure was effected on a public place at Khaltaka Police Out Post where the Raiding Party of the Bureau was present for checking. The bus going from Indore to Pune in which the appellants were travelling was stopped and on the basis of the secret information, the appellants were identified and alighted from the bus. Thereafter, on search of the bag of appellant No. 1 Gopal heroin was found in his black bag whereas in the gray bag of appellant No. 2 Shyamubai wd/o Karansingh no contraband article was found. The proceedings of search and seizure took place in the night near or at Khaltaka Police Out Post Barrier/ NAKA by the Bureau Team with the help of Out Post police.

8. The three Judges Bench of the Supreme Court in the case of *Pawan Kumar* (supra) has held specifically that in search of a bag/brief case or any such article or container etc. which is being carried by accused, is not a search of the person, hence, section 50 would not apply in such a case. In the instant case, the bag was not concealed in the body, therefore, search of the bags would not come within the ambit of search of 'person' as enshrined under section 50 of the NDPS Act. Hon' ble Shri Justice G.P. Mathur, speaking for the Bench in para 20 considered the observations made in the judgment rendered by the Constitution Bench in the case of *State of Punjab V/s Baldev Singh* [(1999)6 SCC 172]. as under:-

> "As pointed out in *State of Punjab V. Baldev Singh,* drug abuse is a social malady. While drug addiction casts into the vitals of the society, drug trafficking not only casts into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nations Conventions. Against illicit trafficking in Narcotic Drugs, which the Government of India has

ratified. It is, therefore, absolutely imperative that those who indulge in these kind of nefarious activities should not go scot-free on technical pleas which come bandy to their advantage in a fraction of a second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article."

Also see : *State of Rajasthan V.s Baburam* [2007(3) Crimes 24 SC] and *State of Haryana V/s Suresh* [2007(3) Crimes 52]

9. In the case of *Majorsingh* (supra) the Supreme Court has held that the provision of section 42 shall not apply when search and seizure have taken place on a public place. In the case at hand, along with the raiding party, Gazetted officer, Superintendent of Bureau PW-6 J.C. Shrivastava was present together with Inspector Ku. Smita Tamrakar and other officials of the Bureau. Therefore, the ;provision of Section 42 (2) of the NDPS Act would not apply. In the case of *Shriniwas Goud* (supra), the Supreme Court has held that the officers of Gazetted rank are not required to comply with the requirements of section 42(2) of the NDPS Act. The said requirement is confined to the cases where action is taken by the officers below the rank of Gazetted Officer without authorization. In the instant case, the authorization was also given by the Superintendent of the Bureau Shri J.C. Shrivastava (PW-6) to the Inspector Ku. Smita Tamrakar which is available in the document Ex. P/13 at place B to B. wherein secret information from the informant was recorded. This also shows clear compliance of section 42(12) of the NDPS Act for search, seizure and arrest on public place. Section 43 of the Act would apply and in this section, there is no such provision as prescribed under section 42 and 42(2) of the Act as held i n the case of *State of Haryana V/s Jarnailsingh* (supra).

10. In the instant case, Girvar Puri received secret information from the informant. He apprised about the details of information to the Bureau Superintendent PW-6 J.C. Shrivastava and in their presence, recorded this information vide Ex. P/13. In this information, names and addresses of the appellants are mentioned specifically regarding illicit trafficking of heroin. This Panchnama Ex. P/13 is carrying the signatures of the Superintendent of Bureau PW-6 J.C. Shrivastava, Sub-Inspector PW-5 Girvar Puri, trapping and seizure Officer PW4 Ku. Smita Tamrakar, Inspector R.K.Rajak (PW-7) and they have also proved the same in Court. The Supreme Court in the case of *G. Shriniwas* (supra) has held that the officers of gazetted rank are not required to comply with the requirements of section 42(2) of the NDPS Act. The said requirement is confined to the cases where the action is taken by the officers below the rank of gazetted officer without authorization.

11. After receiving the secret information and its recording the Supdt. Shrivastavaa (PW-6) authorized inspector Kumari Smita (PW-4) for immediate action which is available at portion marked B to B on Ex. P/13. In this view of the matter, also the infringement of section 42 regarding sending of the information is not attracted. Superintendent J.C. Shrivastava was also the member of Raiding Party as stated by him as well as PW-4 Kumari Tamrakar (PW-4), PW-5

Girvarpuri, and Inspector PW-7 R.K. Rajak. Though the prosecution has led evidence regarding compliance of section 50 of the NDPS Act, to apprise the appellants about their right to be searched in presence of Magistrate or Gazetted Officer in writing vide memo Ex. P/2, as well as Ex. P/3 of appellant No. 2 Gopal Sharma and appellant No'. 2 Smt. Shyamubai respectively, on both these documents the appellants have given their consent of search of their person and luggage in presence of Superintendent Shri J.C. Shrivastava. This document is having signatures of Inspector Ku.Tamrakar, Panch-witnesses, driver of the bus PW-1 Ambalal and Conductor PW-2Abdul Rashid. These were the independent witnesses, but since the provision under section 50 of the NDPS Act regarding search of bags of the appellants is not applicable, therefore, this Court is not dealing with this aspect here in detail.

12. Now this Court shall deal with the contradictions; pointed out by the learned counsel for the appellants regarding identification of the appellants in the bus, situation of bags and procedure regarding search and seizure.

13. PW-1 Ambalal driver of the bus has stated that on 27.09.2001, he proceeded in the evening at 7.00 PM as a driver of the bus of M.P. State Road transport Corporation from Indore for Pune with conductor PW-2 Abdul Rashid. When they reached near the Barrier of Khalghat District Khargone in the night at about 9.00 PM, on getting signal by the police, he stopped the bus and ten to twelve persons entered inside the bus for checking the passengers and their baggages. They brought one man and a woman out side the bus who were sitting as passengers. He further testified that police started the proceeding of search and seizure and asked them to sign the Panchnamas prepared there and they put their signatures on the same. From the bag of appellant Gopal Sharma in two plastic packets, there was some kind of powder having yellow colour weighing about one kilogram each. It was called by them as "sukar sukar" and stated that it was very costly thing. He had no experience of the said article. The said packets were seized by the police and seizure memos were written. These proceedings took about 20 minutes to complete. Thereafter they were taken from Khalghat Barrier to the office (Out Post). The appellants were detained and he was permitted to take the bus. He admitted and proved his signatures on seizure memo Ex.P/1 at place A to A as well as on Panchhama of compliance of section 50 Ex. P/2 of appellant Gopal and Ex. P/3 of appellant Smt.Shyamubai. This witness has admitted his signatures on the memorandum of facsimile of seal Ex. P/4, spot map Ex. P/5 travelling tickets of Gopal Ex. P/6 and of Shyamubai Ex. P/7. He also proved his signature on the document Ex. P/3 regarding whole search and seizure proceedings as well as arrest of the appellants prepared in his presence. Their arrest memos are Ex. P/8 and P/9. This witness has also accepted about interrogation later on and recording of his statement by the police. This witness has also stated that because they were getting late, therefore,his signatures were taken on some blank ;papers, but no-where he has stated that out of the documents Ex. P/1 to P/9, which were the documents on which his signature on blank papers were taken. This statement he has given voluntarily. It appears that he wanted to speak truth and also wanted to favour the appellants. On all nine documents from Ex. P/1 to P/9 he admitted his signatures and preparation thereof in his presence. Learned

counsel has put much emphasis on the statement of this witness regarding taking of his signatures on blank papers, but on careful perusal of his entire statement as well as the statement of PW-2 Abdul Rashid, conductor of the same bus, the companion of PW-1, this Court is of the considered view that the proceedings of search and seizure from the bag of the appellant No. 1 Gopal Sharma which was containing 2.200 Kgs. of heroin, had taken place in their presence. It is the well recognized legal principle regarding reading of the statements of the witnesses and their appreciation that their veracity has to be considered as a whole and not by picking up one sentence in isolation.

14. In cross-examination PW-1 Ambalal driver has stated that the police party entered inside the bus on Khalghat barrier where the vehicles were being checked. Police brought out from inside the bus two passengers with bags. He was seeing sitting on the stearing by turning the neck behind. Police also called him and the conductor and started preparing the documents at the barrier office. He also admitted that on the third day, when he was returning he was interrogated at Khalghat barrier. In his cross-examination nothing has come out which may render his testimony useless for the prosecution. On over all reading of the statement of this witness Ambalal, this Court is fully satisfied that he was present at the time of search and seizure from the appellants and he signed on the documents Ex. P/1 to P/9 and in his presence from appellant No. 1 Gopal heroin was seized from his bag.

15. PW-3 Abdul Rashid, conductor of the bus has identified the appellants who were travelling in the bus . He also identified Ex. P/6 and P/7 travelling tickets bearing seat No. 27 and 28. The further say of this witness is that in the night at about 9.30 to 9.45 PM on Khalghat Toll tax barrier, the bus was stopped by the officials of Narcotic Department. They expressed their desire to check the bus and after taking about 15 to 20 minutes alighted from the bus along with the passengers sitting on seat No. 27 and 28 viz. The appellants. Each of these passengers were having one bag which were opened in their presence and two polythene packets having heroin were found in the bag and police party prepared the Panchnamas regarding search and seizure of brown sugar and took his and driver Ambalal's signatures on the documents. He gone through Ex. P/1 to Ex. P/9 and identified his signatures at portion B to B. After seizure proceedings, the police party allowed them to go and both the appellants were detained. In cross-examination, he stated that in their bus, so many passengers were travelling and he could not identify all the passengers unless some special event takes place. He also admitted that near Khalghat barrier, there was a police out post/Chowki. This witness has also supported the prosecution case and he is supposed to be an independent witness being conductor of the bus. He has corroborated the testimony of Ambalal driver of the bus on material particulars and stated about seizure of the brown sugar found in the bag. In cross-examination, he has stated that the police had taken their signatures on several documents and on some documents, the signatures were taken when the bus was stopped after crossing Khalghat barrier at the site of bifurcation of roads for taking meals by the drivers and conductors etc. The same statement has been given by PW-1 Ambalal in his cross-examination para 18.Learned counsel for the appellants could not point out

any substantial contradiction which may attach vulnerability to the testimony of both the independent Panch-witnesses .

16. PW-3 Yeshwantsingh Constable of the Bureau took sealed envelope of samples together with forwarding letter vide Ex. P/10 and facsimile seal Ex. P/11 to submit the same to Opium and and Alkalite Laboratory. He submitted the same and obtained receipt Ex. P/12 which has been proved by him. He submitted this receipt in the office of the Bureau Superintendent, Indore. PW-9 Vimal Mohan Goyal was the Chemical Analyser supported the version of PW-3 Yeshwantsingh Constable in regard to submission of sealed packets Articles A/1 and B/1 with forwarding letter Ex. P/10. He also confirmed that the seal and facsimile seal were intact and correct. He made entry regarding receipt of the samples in the Laboratory register at Sr. No. 255 and 256/2001. This witness has also proved the Chemical Examination report Ex. P/16 signed by him at place A to A and facsimile seal at place B to B. According to him, he found 19.09 per cent and 11.74 per cent heroin in the samples mentioned at Sr. No. 255 and 256 respectively in the laboratory register. He is qualified in Miscellaneous Organic Chemistry and has experience of 23 years regarding examination of narcotic drugs and up till now in Court he has tested about 10,000 sample. He has been cross-examined by the defence counsel regarding keeping of samples in the almirah, its position and kind of tests. This witness has admitted non-mention of, in the report Ex. P/16, name and number of test performed by him in the laboratory while testing the samples. In the opinion of this Court, it is not necessary to mention all these details in the report and there is no such provision available in the Act and Rules made thereunder. From the statement of this witness, the prosecution has established that both the samples were containing narcotic contraband article.

17. PW-4 Inspector Ku. Smita Tamrakar, PW-5 Sub Inspector Girvarpuri, PW-6 Supdt. C.B.N. Jagdishchandra Shrivastava and PW-7 Inspector of CBN Indore R.K. Rajak are the members of the raiding party. PW-5 Girvarpuri Sub Inspector received secret information about trafficking of narcotic drug by two persons, out of whom one was a man and another a woman from Indore to Pune. He apprised this information to PW-6 Supdt. Shrivastava in the office and prepared a memorandum Ex. P/13 to this effect. He proved his signature at portion D to D and signature of Shri Shrivastava on portion E to E . At that time,, Inspector Rajak was also with them in the office. He also signed on Ex. P/13 at portion F to F. The further say of this witness is that the Supdt. Shri Shrivastava directed PW-4 Inspector Ku. Smita Tamrakar for taking action on the secret information. He made an order in writing on Ex. P/13 at portion marked B to B and put his signature at portion C to C.

18. PW-4 Ku. Smita Tamrakar also recorded the statement of PW-5 Sub-Inspector Girvarpuri and PW-7 Inspector R.K. Rajak. She proved her signature on the secret information, memorandum Ex.P/13 at portion A to A and also the signature of Supdt. Shrivastava at portion B to B and constituted a raiding party including herself, with PW-6 Superintendent J.C. Shrivastava, Inspector R.K. Rajak, Sub Inspector Girvarpuri and constables. She has stated that they all reached near Khaltaka Out post and formed their checking barrier. In the night at about

10.30 PM 'Pushpak' bus of M.P. State Road Transport Corporation going from Indore to Pune reached there. They stopped the said bus and apprised the driver and conductor about secret information as well as search of the bus. They also asked them to be the witnesses to the proceedings and both agreed to it. On the basis of secret information, personality (HULIYA) description of the appellants mentioned im secret information, they asked their names. The male passenger disclosed his name as Gopal Sharma and the female passenger disclosed her name as Shyamubai. This witness identified the appellant Gopal in Court. Shyamubai was absent on that day. On confirmation of the secret information, they asked both the appellants to come down from the bus. Each of them were having bag, one was black in colour and the another was of gray colour. This witness has given detailed description of compliance of sections 50 and 42 of the NDPS Act. Since both these sections are not applicable in the instant case, therefore, this Court is not required to deal with the evidence in this regard.

19. . The members of raiding party first gave their own search and in the said search no incriminating article was found. On search of black bag, they found some clothes including two polythene packets each containing some gray colour powder kept inside the pocket of the bag in the bottom. The total weight of the packets was 2.200 Kilograms. On asking, the appellants disclosed that it was heroin. They tested that powder by their testing kit and found it to be heroin, a product of opium. Two samples of 5 grams each were taken from the white polythene packets and the same were sealed. Remaining powder was separately sealed. The second bag of gray colour was also searched. In the said bag, clothes of Shyamubai appellant No. 2 were found. The descriptions of the same were mentioned in the seizure-memorandum. No other incriminating article was found in that bag. From the possession of Shyamubai two travelling tickets were recovered description whereof was also mentioned in the seizure memo. This witness Inspector PW-4 Smita Tamrakar proved the seizure memo Ex. P/1 as well as the seizure of tickets Ex. P/9, tickets Ex. P/6 and P/7 and signature and thumb impression of the appellants on these documents. She has also proved the signatures of the witnesses along with the signature of Superintendent. Both the appellants were arrested and their arrest memos were prepared.

The further say of this witness is that the seized property was sealed and facsimile seal was also prepared Ex. P/4 which bears her signature and signatures of the Superintendent, witnesses and signature of Gopal as well as thumb impression of Shyamubai. Thereafter they all returned to Indore office and lodged the appellants in lock up. She prepared a detailed statement on the next day morning and submitted it to the Superintendent vide Ex. P/14. After this exercise, the Superintendent ordered for further investigation by R.K. Rajak Inspector. She handed over all the documents prepared by that time to Shri Rajak and seized property was deposited in the MALKHANA of the office and receipt whereof was taken on document Ex. P/14 at p lace D to D. All the seized articles were produced before the Court and identified by this witness as mentioned in paragraphs 24 and 25 of her deposition.

20. It is pertinent to mention here that the Article-A was the black bag in which one T-Shirt, one pant, one underwear and one Baniyan were found. In this bag in

the bottom there was a pocket (chamber). On opening the second bag of gray colour, it was found to contain one saree/LUGDA (in local parlance). It was marked as Article-B. The sealed packets of heroin were also opened. All these packets were bearing signatures of the witnesses, Investigating Officer, appellant Gopal and thumb impressions of appellant Shyamubai. These were marked as Article -C to Article -I.

21. According to the seizure memo Ex. P/1, the appellant Gopal was carrying black canvass bag whereas the appellant Shyamubai was carrying gray colour bag. On search of black bag, heroin was found. No contraband article was found in the gray colour bag. In the said bag, one printed saree/Lugda was found and bus tickets were seized from the possession of appellant Shyamubai. In para 31 last line of cross-examination, this witness PW-4 Ku. Tamrakar has deposed that both the appellants were keeping their bags on their laps. She denied the defence suggestion that the appellants were not having any bag. and signatures of the witnesses and accused were taken on blank papers. In para 34, she stated that the Gazetted officer (Superintendent) of Bureau was with them and they gave option to the appellants for their search in the presence of Gazetted Officer or the Magistrate available nearby. In cross-examination para 40, she has admitted that in seizure memo Ex. P/1 there is no mention of seizure of bus tickets from the appellant Shyamubai. She voluntarily stated that this fact is mentioned in personal search memorandum. She has denied the defence suggestion regarding no relation between the appellant Gopal Sharma and Shyamubai and both were travelling on their individual tickets. .

22. PW-5 Girvarpuri Sub Inspector has also stated about receiving the secret information and thereafter going on the spot, trapping the appellants, search and seizure, preparation of all the aforementioned documents and putting his signatures thereon. This witness, in para 4 has stated that the appellant Gopal Sharma was keeping a black rexine bag on his lap vide Article-A containing a pant, T-Shirt, underwear and a Baniyan and in the said bag in its bottom there was a secret pocket wherein two polythene packets containing gray colour powder were found. On asking, the appellant Gopal disclosed it to be heroin. From the statement of this witness and the statement of PW-6 J.C. Shrivastava and PW-7 R.K. Rajak Inspector, it is crystal clear that the black rexine bag was in possession of appellant Gopal Sharma in which heroin was found and gray colour bag was in possession of appellant Shyuamubai wherein no contraband article was found, except her saree.

23. Learned trial Court held the appellant Shyamubai guilty on the basis of seizure of bus travelling tickets recovered from her possession and both Shyamubai and appellant Goppal were sitting adjacent to each other on seat Nos. 27 and 28. This Court has perused the entire statements of the witnesses and given anxious consideration to the issue that whether the prosecution has proved beyond all reasonable doubt about conscious possession of brown sugar found in the black bag of appellant Gopal and is of the considered opinion that merely because both the appellants were travelling in one public bus sitting adjacent to each other and the tickets were seized from appellant Shyamubai, it would be very difficult to ;presume that she was knowing that the appellant Gopal Sharma was possessing

heroin and kept the same with the consent and connivance of appellant Shyamubai. It is worthwhile to mention that the appellant Gopal Sharma was a resident of village Dogda P.S. Dug Tehsil Gangdhar District Jhalawad (Rajasthan) whereas Shyamubai widow of Karansingh was resident of village Karawan P.S. Pagaria District Jhalawad (Rajasthan) as described in the complaint filed by the Bureau. Both the appellants belong to separate caste and possibility of her travelling as an innocent passenger with the appellant Gopal Sharma cannot be ruled out, because from the bag which was possessing by her no incriminating article was seized. Their association from Indore Bus-Stand could be just as a chance meeting on Bus-Stand and at the time of taking tickets at many a time on Booking Windows male passengers request the lady copassenger also to take their tickets because the ladies are being given priority. All these possibilities and probabilities cannot be ruled out regarding possession of tickets by Shuyamubai and travelling in the bus. Even it cannot be said that she was associated with the appellant Gopal. The witnesses of Narcotic Bureau have stated that the statements of both the appellants were recorded and they disclosed their association as well as keeping of heroin in the bag, but the statements of both the appellants were not proved and exhibited in Court. Therefore, the same cannot be used against them and on the basis of oral statement of witnesses of the Bureau, this Court is not satisfied and convinced to hold that Shyamubaui was in conscious possession of the seized heroin from the black bag possessed by appellant Gopal Sharma. The circumstances against Shyamubai are not pointing unerringly at her guilt excluding all reasonable hypothesis of her innocence. Therefore, in the considered view of this Court, she is entitled for getting benefit of reasonable doubt.

24. This Court did not find any material any substantial contradictions in the statements of the prosecution witnesses which may cause any serious dent to the prosecution case making appellant Sharma liable for acquittal. Learned counsel has pointed out that in the seizure memo Ex. P/1 in column No. 2 date and time of incident/seizure of heroin was mentioned afterwards and not at the time of preparation of this document. Learned counsel has pointed out at the document Ex. D/1 wherein the date and time is not mentioned. This argument has no weight because the author of document Ex. P/1 i. e. PW-4 Ku.Smita Tamrakar has not been shown the document Ex. D/1 and given opportunity to explain the same. No question was put to this witness on th is aspect. The document was put to PW-7 Inspector R.K. Rajak and he expressed his ignorance about this fact, because he was not the author of this document. Ex. D/1 is the photo-stat copy and it cannot be said that it is the exact photo stat copy of Ex. P/1. Who filed this document is not clear from the statements of the prosecution witnesses. The defence has also not explained as to how and from where they found this document and used the same while cross-examining the witness PW/7 R.K.Rajak. R.K. Rajak (PW-4) has stated that this was filed while taking departmental remand , but he has no-where stated that he got done the photo-stat copy of Ex. P/1 and he filed the same for taking remand. It is well known that while taking the photo-stat copy of any document by tricks some thing can be omitted and some thing can be added or excluded. If the defence was certain on this point, it could have called the author of the document Ex.P/I PW-4 Inspector Ku.Smita Tamrakar. But, no such

step was ever taken during the course of trial. All the witnesses have in unequivocal terms stated that at the time of trapping the appellants at the Barrier the proceeding of search and seizure were drawn and they signed on the documents.

25. *Ex-consequenti,* in view of the foregoing legal and factual discussion, this appeal deserves to be allowed in part. The conviction and sentence of the appellant Gopal Sharma as awarded by the trial Court are hereby affirmed while the conviction and sentences of the appellant Shyamubai are setaside. It appears from the record that the appellant No. 2 Shyamubai though was granted order of suspension of sentence on 22.07.03, but she has not furnished any bail and surety bonds. Therefore, the trial Court is directed to verify this fact and if she is inside the jail she be released forth with if not required in any other criminal case. Office is directed to send a copy of this order to the trial Court along with its record for immediate compliance.

I.L.R. [2008] M. P., 143
APPELLATE CRIMINAL
Before Mr. Justice S.K. Kulshrestha &
Mrs. Justice Manjusha P. Namjoshi
3 September, 2007

RAMESH & anr. ...Appellants*
Vs.
STATE OF M.P. ...Respondent

Penal Code, Indian (45 of 1860)-Sections 302/34 & 201-No Eye-Witness, report of F.S.L. indicates human blood on articles other than Article "F" which only was blood stained-Conviction based mainly on alleged extra judicial confession and F.S.L. Report-The finding of blood on articles seized from accused though creates suspicion against accused, the suspicion however strong, can not take place of the proof-The two circumstances relied upon by the prosecution do not fall in the category of the circumstances which clinchingly prove the guild of the accused persons-They are entitled to benefit of doubt-Appeal allowed.

Learned counsel for the appellants has submitted that there are no eye-witnesses to the incident and the conviction is based mainly on the alleged extrajudicial confession and report of the Forensic Science Laboratory, which indicates human blood on articles other than Article 'F' which was only blood stained. Learned counsel, therefore, submits that all the circumstances even if taken together at their face value, do not constitute evidence which shows that offence is not established against the appellants.

Coming to the prosecution evidence with regard to circumstances of blood having been found on articles seized from the accused, it is noticed that while other articles were stated to be stained with the human blood, Article 'F' was found stained only with blood. The learned A.S.J. has found that this piece of evidence corroborates the evidence with regard to extra-judicial confession. What nexus the learned AS.J. has found between the extrajudicial confession and the blood on these Articles is beyond comprehension. One has to borrow the material

*Cr.A. 613/07. Indore

from record and not from his imagination. The evidence of extra-judicial confession having been found unnatural, it does not leave room for harbouring a notion that blood found on the articles corroborates the testimony of extrajudicial confession. The finding of the blood on the articles seized from accused though creates suspicion against the accused, the suspicion however strong, cannot take place of proof. In view of these circumstances, the report of the F.S.L. does not conclusively establish the guilt of the accused.

In the case of circumstantial evidence, each circumstance should point to the guilt of the accused and should not be compatible with any hypothesis of his innocence. The circumstances taken together should make a complete chain pointing to the guilt of the accused and should not be such as can be explained and indicate his innocence. The two circumstances relied upon by the prosecution do not fall in the category of the circumstances which clinchingly prove the guilt of the accused persons. Thus, the accused persons are entitled, atleast to the benefit of doubt. (Paras 6, 21 & 22)

Akash Sharma, Adv. for the appellants
Girish Desai, Dy.A.G. for the respondent/State

Cur.adv.vult

JUDGMENT

The Judgment of the Court was delivered by **S.K. KULSHRESTHA, J.** :–This appeal is directed against the judgment dated 25th April, 2007, passed by the learned Additional Sessions Judge, Sendhwa, District Badwani(M.P.) in Sessions Trial No.61/2005 by which the learned A.S.J. has convicted each of the appellants under Section 302 of the I.P.C. read with Section 34 thereof and also under Section 201 of the I.P.C. and sentenced them to suffer imprisonment for life and fine of Rs.500/-and also rigorous imprisonment for three years and fine of Rs.250/-, respectively thereunder.

2. While the case was fixed for hearing on admission and I.A. No.3294/2007 for suspension of sentence and grant of bail, in view of the controversy involved and the glaring infirmity in the appreciation of the evidence, with the consent of the learned counsel for the parties, the appeal was finally heard.

3. The appellants have been prosecuted for the said offence on the ground that they caused the death of their brother Balam by causing injuries with an axe and thereafter, disposed of his body by burying it, with a view to screen the offence committed by them. According to the case of the prosecution, on 20/07/2005, at about 7.00 or 7.30 p.m., the deceased, husband of complainant Chuntibai(P.W.10), had gone to the field to see his crops. Since, he did not return by the time expected, a report was lodged on 23/07/2005, on the basis of the information given by Richa son of Tebda(P.W.4) and Richa son of Surbhan (P.W.5) to the effect that he had been killed by her brothers-in-law by causing injuries and had thereafter, burried him.

4. On the basis of the report lodged by the complainant, the police arrived at the place of the incident and prepared the spot map. Autopsy Surgeon was called to conduct the autopsy of Balam. The accused persons were arrested and on the basis of the information furnished by them recorded under Section 27 of the

Evidence Act, seizures were made and the seized articles were sent to the Forensic Science Laboratory. After completion of the investigation, the accused were prosecuted.

5. On charges being leveled against the accused persons for offence under Section 302 I.P.C., in the alternative 302 read with Section 34 of the I.P.C, and Section 201 thereof, the accused denied having committed any offence. They pleaded that they have been falsely implicated. However, on trial, the learned A.S.J., found the appellants guilty as herein above stated and convicted and sentenced them. It is against this conviction that the present appeal has been filed.

6. Learned counsel for the appellants has submitted that there are no eye-witnesses to the incident and the conviction is based mainly on the alleged extrajudicial confession and report of the Forensic Science Laboratory, which indicates human blood on articles other than Article 'F' which was only blood stained. Learned counsel, therefore, submits that all the circumstances even if taken together at their face value, do not constitute evidence which shows that offence is not established against the appellants.

7. The learned Dy. A.G. has controverted the contention of the learned counsel for the appellants and has stated that there is nothing that shows effective extra judicial confession, articles seized from the accused persons were also found lood stained and article other than Article 'F' were having stains of human blood. Once it was satisfactorily demonstrated, that articles were blood stained having human blood, the accused should have explained how they sustained blood stains. Under these circumstances, the learned Dy. A.G. has supported the judgment of the trial Court, and contended that it does not call for any interference.

8. We have heard the learned counsel for the parties and perused the judgment of the trial Court.

9. It is clear that there are no eye-witness, the learned Judge has taken into consideration two circumstances, namely :-

(1) That the accused persons had made extra-judicial confession of Chuntibai(P.W.10), Chuntibai which was in turn, transmitted to the Police and ;

(2) There were blood stains on the articles seized from the accused persons and that of the deceased.

10. With reference to the evidence of extra-judicial confession, Richa son of Tebda (P.W.4) and Richa son of Surbhan(P.W.5) have been examined. They have, however, not stated that they had witnessed the actual killing of the deceased. Richa son of Tebda(P.W.4) has admitted in the cross-examination that Ramesh and Kalsingh had not been visiting their house before and even after the incident. The learned Judge has observed that it was not shown by the defence why the said witness was not visiting their house. One simply wonders as to how the defence was in a position to read the mind of a person and to show why he was not visiting their house or were not on amicable terms. Statement of Richa son of Surbhan(P.W.5) is also to the same effect.

11. The learned A.S.J. has examined the testimony of Richa son of Tebda(P.W.) and Richa son of Surbhan(P.W.5) in the backdrop of the testimony of Chuntibai(P.W.10), wife of the deceased. Chuntibai has deposed that Richa had informed her that her husband has been killed by her brothers-in-laws and buried in the field. She has also stated that between them, partition of the land has already taken place, but there was a dispute of her husband with Narsingh and it was obvious that her husband was killed.

12. In the context of the above statement, it is luculent that the motive ascribed to the appellants for killing their own brother is not established as nothing has been brought to show that appellants were partisan with Narsingh and they wanted the deceased to be exterminated to remove the obstacle.

13. Batibai(P.W.12), daughter of the deceased, deposed in the Court that she had gone to the house of the appellants and the appellants were not found there, but she had seen some blood stained clothes in the house. The learned A.S.J. has believed and acted upon the testimony of Richa son of Tebda (P.W.4) and Richa son of Surbhan(P.W.5) as projected by Chuntibai(P.W.10) and Batibai(P.W.12).

14. The learned A.S.J. has observed that the accused persons had not stated that the witnesses Richa son of Tebda(P.W.4), Richa son of Surbhan(P.W.5), Chuntibai(P.W.10) and Batibai(P.W.12) were enmically disposed towards them and, therefore, they had been falsely implicated. We may point out that nothing has been brought on record to prove that accused had any motive for which they were tempted to kill the deceased.

15. This takes us to the second limb of the prosecution case. Ajay Sengar(P.W.13) investigated the case and on 24/7/05, he prepared the spot map (Exhibit-P/12). Accused Ramesh and Kalsingh, who had been arrested under Arrest Memo(Exhibit-P/14 and P/15) and they had given intimation with regard to the place where the dead body of the deceased had been burried of which memorandum Exhibit-P/16 was prepared. He also revealed the place which was smeared with blood, which was recorded in Exhibit-P/17. Information was also given with regard to the axe. An axe was seized, which was allegedly used by the accused persons, vide memorandum Exhibit-P/18 and another axe from accused Kalsingh was seized vide Exhibit-P/19. A handkerchief was seized from accused Ramesh vide Exhibit-P/20. Apart from seizing the blood stained clothes, a turban was found near the spot which was seized by the Investigating Officer. All these articles were sent to the Forensic Science Laboratory for examination vide letter Exhibit-P/22 and the report Exhibit-P/24 of the Laboratory was received.

16. We may, at the outset observe that insofaras memoranda pertains to the place where dead body was buried and blood stains were found, it does not strengthen the case of the prosecution. The report with regard to the place where dead body was buried had already been made by Chuntibai(P.W.10) on the basis of the information given to her by Richa son of Tebda(P.W.4) and Richa son of Surbhan(P.W.5).

17. Under these circumstances, it is not a case of any fact having been discovered in pursuance of the information given by the accused and therefore, the documents

prepared under Section 27 of the Evidence Act do not help the case of the prosecution.

18. In the F.S.L. Report(Exhibit-P/24), the turban (Article-A/1), Shawl(Article-A/2), Shirt(Article-A/3), Underwear(Article-A/4), earth and gravel (Article-B & C), Safa i.e. turban (Article-D), Shawl(Article-E) and axe(Article-F) were examined. It was stated that Articles A/1, A/2, B, D and E were stained with human blood and Article-F was stained with blood only.

19. Learned counsel for the appellants has also stated that from the blood found on the articles, no inference of guilt of the appellants can be drawn unless, any other cogent and reliable evidence is found to substantiate the same. It may also be pointed out that the axe(Article-F) was found stained with blood only and not with human blood. The report does not disclose the blood group.

20. The fact of extra-judicial confession made by Richa son of Tebda(P.W.4) and Richa son of Surbhan(P.W.5) and disclosed after three days to Chuntibai(P.W.10) clearly creates doubt as to whether any such extra-judicial confession was made to these witnesses. The witnesses have related the extra-judicial confession, according to the prosecution, in unison, which appears incredible. It belied the well settled rule that everybody has his own way of expressing an event and in such a case, it is not expected that the witnesses had informed the widow of the deceased Chuntibai(P.W.10), in the same words as uttered by Chuntibai(P.W.10). The delay in relating their extra-judicial confession to the wife of the deceased and also to the fact that the accused persons had no reason to make such a confession before the strangers as observed by the learned A.S.J. that they were not on visiting terms, appears unnatural and incomprehensible. This part of the evidence, therefore, deserves to be discarded.

21. Coming to the prosecution evidence with regard to circumstances of blood having been found on articles seized from the accused, it is noticed that while other articles were stated to be stained with the human blood, Article 'F' was found stained only with blood. The learned A.S.J. has found that this piece of evidence corroborates the evidence with regard to extra-judicial confession. What nexus the learned AS.J. has found between the extrajudicial confession and the blood on these Articles is beyond comprehension. One has to borrow the material from record and not from his imagination. The evidence of extra-judicial confession having been found unnatural, it does not leave room for harbouring a notion that blood found on the articles corroborates the testimony of extrajudicial confession. The finding of the blood on the articles seized from accused though creates suspicion against the accused, the suspicion however strong, cannot take place of proof. In view of these circumstances, the report of the F.S.L. does not conclusively establish the guilt of the accused.

22. In the case of circumstantial evidence, each circumstance should point to the guilt of the accused and should not be compatible with any hypothesis of his innocence. The circumstances taken together should make a complete chain pointing to the guilt of the accused and should not be such as can be explained and indicate his innocence. The two circumstances relied upon by the prosecution do not fall in the category of the circumstances which clinchingly prove the guilt of the accused

persons: Thus, the accused persons are entitled, atleast to the benefit of doubt.

23. In the above framework, the prosecution has failed to prove the guilt of the appellants. The appellants are therefore, acquitted. The appellants are in Jail. They be released forthwith if not required in connection with any other crime.

I.L.R. [2008] M. P., 148
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
6 September 2007

RANCHHOD ...Appellant*
Vs.
STATE OF MP ...Respondent

Penal Code, Indian (45 of 1860)–Sections 395 and 397-Accused can not be convicted for offence U/s 397 IPC with the aid of S. 34 or 149 IPC-No clear evidence that which appellant was having which kind of deadly weapon at the time of commission of dacoiti-Held-Conviction U/s 397 set aside-Appeal partly allowed.

On going through the statements of all the eye witnesses and victim of the incident, there is no clear evidence that which appellant was having which kind of deadly weapon at the time of commission of dacoity. Therefore, offence U/S.397 of the IPC is not made out against the appellants. It is well settled legal position that the accused cannot be convicted for offence U/S.397 of the IPC with the aid of Sec.34 or 149 of the IPC, only those accused persons can be convicted U/S.397 of the IPC against whom there is specific evidence present about possession of deadly weapon in their hand at the time of the incident and the weapon was visible to the witnesses and victims. See *Phool Kunwar Vs. Delhi Administration* [AIR 1975 SC 905]. (Para 6)

Case relied :

AIR 1975 SC 905.

Iqbal Ahmed, A.S. Rathore, Manoj Saxena and *Zeeshan Ali* for the appellant.

Lokesh Bhatnagar, GA for the State.

Cur. adv. vult.

J U D G M E N T (ORAL)

S.L. Kochar, J. :–All the aforesaid appeals are arising out of same judgment of conviction and sentence, hence the same are taken up together and dispose of by this common judgment.

2. The appellants have filed these appeals, challenging their conviction U/S.395 read with 397 of the IPC, sentenced to undergo RI for seven years with fine of Rs.5,000/-to each appellant, in default whereof to undergo RI for one year, passed by learned III Addl. Sessions Judge, Ujjain in ST No.18/2004, judgment dated 23/8/2005.

3. According to the prosecution case, on 22/8/2003 in the night at 10 pm

*Cr.A. 1132/05. Indore

complainant Ramsingh, after taking night meal, was sleeping along with his family members inside the house. Some of his family members were sleeping outside the house. In the night at 1.30 a.m he over heard the cry of his mother and nephew, at that time there was light of electric bulb. He saw that 8-10 persons having lathi and farsi were assaulting them and asking for ornaments. He gave Rs.200/-to appellant Ramchandra. The miscreants assaulted him and his family members and also looted silver ornaments and cash amount. He identified deceased appellant Salim on spot. He named Govind, Ramchandra, Salim and Ranchod in the FIR. The appellants were arrested and from their possession looted property was seized. The property was identified in T.I parade. During the course of investigation, police held T.I parade of only accused Vikram who has been acquitted by the trial Court. The names of the appellants appeared in 161 statement of the witnesses. After investigation, appellants were charge-sheeted for the above mentioned offences. The appellants denied the charges and pleaded innocence. The learned trial Court found the appellants guilty, convicted them as mentioned herein above.

4. The learned counsel for appellants have argued only point that offence U/S.397 of the IPC is not made out against the appellants because there is no specific evidence on record about possession of dangerous weapon or use thereof during the course of incident. They have also submitted that appellants are in jail since last more than four years and for offence U/S.395 of the IPC, there is no minimum jail sentence prescribed. The learned counsel for appellants prayed for reduction in jail sentence.

5. Having heard the learned counsel for parties and after perusing the entire record, this Court is of the view that conviction of the appellants U/S.397 of the IPC is not sustainable because there is no specific evidence against individual appellants regarding use of deadly weapons like farsi, sword or country made pistol during the course of incident. Padambai (PW.2) Shyamubai (PW.4), Sayarabai (PW.9) and other eye witnesses have named deceased appellant Salim having farsi and also assaulted some of the witnesses by farsi. Salim has died during the pendency of appeal and his appeal has already been abated. Against the present appellants, there is no consistent specific evidence about possession of deadly weapon. Basant Singh (PW.10), Ratanlal (PW.11), Ramsingh (PW.14) and Heeralal (PW.17) have stated in Court that appellant Ranchod was having country made pistol and also threatened them by showing the same, but this statement of these witnesses in Court is not available in their case diary statements and they were confronted with their case diary statements regarding this important and material omissions which amount to contradiction for which these witnesses have not assigned any reasonable and plausible explanation.

6. On going through the statements of all the eye witnesses and victim of the incident, there is no clear evidence that which appellant was having which kind of deadly weapon at the time of commission of dacoity. Therefore, offence U/S.397 of the IPC is not made out against the appellants. It is well settled legal position that the accused cannot be convicted for offence U/S.397 of the IPC with the aid of Sec.34 or 149 of the IPC, only those accused persons can be convicted U/S.397 of the IPC against whom there is specific evidence present about possession of deadly weapon in their hand at the time of the incident and the

weapon was visible to the witnesses and victims. See *Phool Kunwar Vs. Delhi Administration* [AIR 1975 SC 905].

7. In this view of the matter, conviction U/S.397 of the IPC is not sustainable against any of the appellants. Therefore, conviction and sentence under this Section are hereby set aside. For commission of offence U/S.395 of the IPC this is true that minimum jail sentence is not prescribed, but looking to the nature of the offence, the appellants are convicted U/S.395 of the IPC, sentenced to RI for five years and fine of Rs.5,000/-(rupees five thousand) to each appellants, in default of payment of fine they shall suffer additional RI for one year.

8. In the result, these appeals are allowed in part on the terms indicated herein above. Original judgment is retained in Cr.Appeal No.1132/2005 and a copy whereof be placed in the record of connected Cr.Appeal Nos.1246/2005, 1086/2005 and 1072/2005.

I.L.R. [2008] M. P., 150
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
23 October, 2007

MUNNILAL YADAV ...Appellant*
Vs.
STATE OF M.P. ...Respondent

Criminal Procedure Code, 1973 (2 of 1974) - Section 452 - Disposal of property at conclusion of trial - Appellant tried for offences punishable under Sections 395, 397 and 396 - Appellant acquitted - Trial Court directed for retention of gun, cartridges and wrist watch seized from possession of appellant till conclusion of trial of absconding accused person - Held - Court has discretion to dispose property in any of three modes specified in Section 452 - Discretion is inherently judicial function - Manner of disposal is not to be made arbitrarily but judicially - When accused is acquitted Court should normally restore property to person from whose custody it was taken - Even if gun was used for commission of any offence for which absconding accused are to be tried, no useful purpose would be served by retaining custody for indefinite period - Property restored to appellant on certain conditions - Appeal allowed.

As explained further, the words "may make such order as it thinks fit" in the section, vest the Court with a discretion to dispose of the property in any of the three modes specified in the section. But the exercise of such discretion is inherently a judicial function. The choice of the mode or manner of disposal is not to be made arbitrarily, but judicially in accordance with sound principles founded on reason and justice, keeping in view the class and nature of the property and the material before it. One of such a well-recognised principles is that when after an inquiry or trial the accused is discharged or acquitted, the Court should normally restore the property of class (a) or (b) to the person from whose custody it was taken. Departure from this salutary rule of practice is not to be lightly made, when there is no dispute or doubt - as in the instant case - that the property in question was seized from the custody of such accused and belonged to him.

*Cr.A. No. 1189/2001, Jabalpur

Consequently, the appeal is allowed and the impugned order is modified. Instead, it is directed that if the appellant furnishes a "Supurdginama" in the sum of Rs.25,000/- (Rupees twenty five thousand) with a solvent surety in the like amount to the satisfaction of the trial Court, incorporating the following conditions:-

(i) That he would produce the same as and when directed by the trial Court.

(ii) That, in the meantime, he shall not make use of gun for any unlawful purpose;

the seized gun be restored to the appellant.

(Paras 6 & 10)

Case Relied on :

AIR 1979 SC 1829.

V.K. Pandey, for the appellant

S.Paliwal, for the respondent/State

Cur.adv.vult,

JUDGMENT

R.C. Mishra, J. :–This is an appeal, under section 454 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') against the order, as contained in the operative part of a common judgment dated 30.04.2001 passed by III A.S.J., Chhatarpur in S.T.Nos. 86/97,213/96 and 140/90, directing retention of a 12 bore gun, ten cartridges and a wrist watch, allegedly seized from the possession of the appellant in custody of Court till conclusion of the trial of the absconding accused persons.

2. The appellant is amongst the persons, who were prosecuted and tried on the charges of the offences punishable under sections 395 read with Section 397 and 396 of the Indian Penal Code. As per seizure memo (Ex.P-20), the investigating officer S.N. Singh had seized the gun as the firearm used in commission of the dacoity with murder as early as on 17.07.1995. Although, for want of incriminating evidence, learned trial Judge acquitted the appellant of the offences yet, he proceeded to direct retention of gun on the ground that some of the accused were still absconding.

3. Learned counsel for the appellant has contended that the gun seized from him has nothing to do with the trial of the absconding accused persons.

4. The question that arises for consideration is, whether in the circumstances of the case, the impugned direction to retain the gun in the custody of Court deserves any interference.

5. An analysis of Section 452 of the Code would show that it refers to property or document (a) which is produced before the Court, or (b) which is in the custody of the Court, or (c) regarding which any offence appears to have been committed, or (d) which has been used for the commission of any offence. Then, at the conclusion of the enquiry or trial, the disposal of any class of the property listed above, may be made by (i) destruction (ii) confiscation, or (iii) delivery to any person entitled to the possession thereof. *(N. Madhvan Vs. State of Kerala* (AIR 1979 SC 1829) relied on).

6. As explained further, the words "may make such order as it thinks fit" in the section, vest the Court with a discretion to dispose of the property in any of the three modes specified in the section. But the exercise of such discretion is inherently a judicial function. The choice of the mode or manner of disposal is not to be made arbitrarily, but judicially in accordance with sound principles founded on reason and justice, keeping in view the class and nature of the property and the material before it. One of such a well-recognised principles is that when after an inquiry or trial the accused is discharged or acquitted, the Court should normally restore the property of class (a) or (b) to the person from whose custody it was taken. Departure from this salutary rule of practice is not to be lightly made, when there is no dispute or doubt - as in the instant case - that the property in question was seized from the custody of such accused and belonged to him.

7. Section 454 of the Code corresponds to section 520 of the old Code. The language of old section 520 was somewhat ambiguous and there was a conflict of judicial decisions on its interpretation as to whether there was or was not an independent right of appeal conferred on any party against an order passed under any of the three preceding sections. That section has therefore been altered conferring a right of appeal on any person aggrieved by court's order under section 452. Apart from resolving conflicting judicial decisions, the provision was considered necessary because the party aggrieved by the order whether interim or otherwise directing disposal of property might not be the same as the party aggrieved by the main judgment. Admittedly, the respondent/State has not preferred any appeal against acquittal of the appellant.

8. Even assuming for the sake of arguments that the gun was used in the commission of any offence for which the absconding accused are to be tried, no useful purpose would be served by retaining it in custody for an indefinite period particularly when there is no reasonable ground to predict or even suspect that in the event of restoration, the appellant would misuse the firearm.

9. Taking into consideration, the facts and circumstances of the case, including prospective necessity of production of the gun during trial of the other accused persons since absconding, I am of opinion that the impugned order deserves modification.

10. Consequently, the appeal is allowed and the impugned order is modified. Instead, it is directed that if the appellant furnishes a "Supurdginama" in the sum of Rs.25,000/- (Rupees twenty five thousand) with a solvent surety in the like amount to the satisfaction of the trial Court, incorporating the following conditions:-

(i) That he would produce the same as and when directed by the trial Court.

(ii) That, in the meantime, he shall not make use of gun for any unlawful purpose;

the seized gun be restored to the appellant.

Appeal allowed.

I.L.R. [2008] M. P., 153
APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

30 October, 2007

SHAKUNTALI KOL ...Appellant*

Vs.

STATE OF M.P. ...Respondent

Narcotic Drugs And Psychotropic Substances Act (61 of 1985)- Section 42(2) - Power of entry, search, seizure and arrest without warrant or authorisation - House of appellant searched on information received at Kotwali Sidhi - Gunny bag containing 1 Kg 100 grams of ganja recovered - Compliance of mandatory provision of Section 42(2) - Held - Admittedly immediate official superior was out of headquarters–Acknowledgment of receipt of relevant entry of rojnamcha Sanha with covering letter given on his behalf by Constable contained crime number which could be ascertained only after recording of F.I.R.–F.I.R. recorded at 7 P.M. whereas relevant entry of rojnamcha Sanha with covering letter received by constable at 5 P.M.–Acknowledgment being post timed document indicative of fact that information was sent after arrest of appellant - Not established that search was carried out after complying with mandatory provision of Section 42(2)- Appellant acquitted - Appeal allowed.

Coming to the question of compliance with sub-section (2) of Section 42 of the Act, it would be seen that the immediate official superior viz. Dy. S.P., Sidhi was, admittedly, out of headquarters. Moreover, the acknowledgment (Ex.P-11A) given on his behalf by constable Mahendra Pratap Singh (PW2) contained the Crime No.100/07 that could be ascertained only after recording of the FIR (Ex.P-29) at about 7.00 p.m. whereas according to Mahendra Pratap, the envelop containing the covering letter and the copy of relevant entry of the Roznamcha was received by him at 5.00 p.m. Thus, the acknowledgment (Ex.P-11A), being a post-timed document, was indicative of the fact that the information was sent to the office of Dy.S.P. only after arrest of the appellant. In other words, it was not established beyond a reasonable doubt that the search was conducted after complying with the mandatory requirement of the sub-section. As explained by the Apex Court in *State of Punjab vs. Balbir Singh* (1994) 3 SCC 299, the effect of such non-compliance will certainly have a bearing on the appreciation of evidence of the official witnesses and the other material depending upon the facts and circumstances of each case. (Para 8)

Cases Relied on :

(1) (1994) 3 SCC 299, (2) (2004) 10 SCC 557.

Santosh Kumar Singh, for the appellant

G.S. Thakur, Panel Lawyer for the respondent

Cur.adv.vult

JUDGMENT

R.C. Mishra, J. :–This appeal has been preferred against the judgment

*Cr.A. No. 1469/07. Jabalpur

dated 05.07.2007 passed by the Special Judge [under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act')], Sidhi in Special Case No.259/2007, whereby the appellant stands convicted under Section 20(b)(ii)(B) of the Act and sentenced to undergo R.I. for one year and to pay a fine of Rs.2000/- and in default to suffer R.I. for one month. She was tried on the charge of being found in an illegal possession of 1 Kg and 100 grams of Ganja that is cannabis/hemp within the meaning of Section 2(iii)(b) of the Act.

2. The prosecution case, in short, is that on 11.02.2007 at about 4.20 p.m., a credible information was received at Kotwali Sidhi to the effect that the appellant was indulged in sale of ganja in her house only. Accordingly, Sub-Inspector R.K. Dwivedi (PW9) conducted a raid at the house of the appellant. The raiding party included woman constable Saroj Rawat (PW5). After apprising the appellant of her legal right under which she could require presence of a Senior Officer, her house was searched by joining panch witnesses Kamta Prasad (PW1) and Ramvilas Tomar (PW6). During the search, a gunny bag containing 1 Kg and 100 grams of ganja was recovered. The contraband was duly seized. Two samples of 50 gms. each were drawn. One of the samples was forwarded to FSL, Sagar for chemical examination. Corresponding report (Ex.P-31) indicated that the sample contained ganja. After completion of the investigation, charge-sheet was put up before the Special Court.

3. The appellant pleaded not guilty. However, in the examination, under Section 313 of the Code of Criminal Procedure, it was asserted that she was falsely implicated at the instance of one Babulal Bhujwa who immediately after death of her husband wanted to grab her house.

4. To bring home the charge, the prosecution examined as many as 9 witnesses including S.I. R.K. Dwivedi (PW9), woman constable Saroj Rawat (PW5) and the panch witnesses. The defence was sought to be substantiated by Siyabai (DW1), an inhabitant of same locality.

5. On consideration of the entire evidence on record, the learned Special Judge, for the reasons recorded in the impugned judgment, found the appellant guilty of the offence charged with. He, therefore, convicted and sentenced her as indicated hereinabove.

6. Legality and propriety of the impugned conviction have been assailed on the various grounds. However, learned counsel for the appellant laid emphasis on non-compliance of mandatory provisions of Sections 42 and 50(4) of the Act in the alleged search & seizure of the contraband and the inconsistencies in the statements of Detecting Officer R.K. Dwivedi (PW9) and other witnesses thereto. But, learned Government Advocate, while making reference to the incriminating pieces of evidence, contended that the impugned conviction was fully justified.

7. At the outset, it may be observed that there was no necessity of following the procedure prescribed under Section 50 of the Act, as it was a search of the premises and not that of a person. In this view of the matter, the contention that search of the house in exclusive possession of the appellant ought to have been carried by woman constable Saroj Rawat (PW5) only is apparently misconceived.

8. Coming to the question of compliance with sub-section (2) of Section 42 of the Act, it would be seen that the immediate official superior viz. Dy. S.P., Sidhi was, admittedly, out of headquarters. Moreover, the acknowledgment (Ex.P-11A) given on his behalf by constable Mahendra Pratap Singh (PW2) contained the Crime No:100/07 that could be ascertained only after recording of the FIR (Ex.P-29) at about 7.00 p.m. whereas according to Mahendra Pratap, the envelop containing the covering letter and the copy of relevant entry of the Roznamcha was received by him at 5.00 p.m. Thus, the acknowledgment (Ex.P-11A), being a post-timed document, was indicative of the fact that the information was sent to the office of Dy.S.P. only after arrest of the appellant. In other words, it was not established beyond a reasonable doubt that the search was conducted after complying with the mandatory requirement of the sub-section. As explained by the Apex Court in *State of Punjab vs. Balbir Singh* (1994) 3 SCC 299, the effect of such non-compliance will certainly have a bearing on the appreciation of evidence of the official witnesses and the other material depending upon the facts and circumstances of each case.

9. Although, Sub-Inspector R.K. Dwivedi (PW9) substantially reiterated the prosecution version as incorporated by him in the detailed report (Ex.P-30) forwarded to the S.P. Sidhi yet, the fact remains that none of the panch witnesses has fully corroborated his statement. On the contrary, their evidence suffers from the following infirmities :-

(i) Both the independent witnesses namely Kamta Prasad (PW1) and Ramvilas Tomar (PW6) were declared hostile and the public prosecutor was able to elicit certain incriminating, yet inconsistent, facts in the cross-examination of Ramvilas only. For example, according to Ramvilas Tomar (PW6), the appellant was apprehended in her house only by Munshiji i.e. Head Constable Ravi Karan Pandey (PW4) whereas Ravi Karan clearly asserted that the appellant was arrested while selling ganja in front of her house. However, S.I. R.K. Dwivedi (PW9), other official witnesses namely Ramsiya Jaiswal (PW7) and Saroj Rawat (PW5) as well as the panch witness Ramvilas had deposed that the appellant was found inside her residence.

(ii) Saroj Rawat (PW5) contradicted this fact that every member of the raiding party had got himself/herself searched prior to commencement of search in the house of the appellant. Curiously enough, she questioned as to why she should have been subjected to search by the appellant. Further, even after being declared hostile by the prosecution, she fairly admitted that all the documents pertaining to search and seizure were prepared at the police station only.

(iii) There is an apparent inconsistency between the panchnama (Ex.P-2) and corresponding consent letter (Ex.P-2A) inasmuch as in the panchnama, appellant's willingness to get her house searched by the Sub-Inspector was mentioned but in the letter,

her consent to get the search done by woman constable Saroj Rawat was also recorded. Further, according to SI R.K. Dwivedi (PW9), the appellant was found all alone in her house whereas Saroj Rawat, unequivocally, admitted that appellant's 4-year-old son was also present there.

(iv) The contraband, allegedly seized from the possession of the appellant, was weighed by Sainik Ramsiya (PW7) and by not any member of the public. Moreover, while corroborating the aforesaid fact, he was not able to disclose that from whom he had brought the balance and weights.

10. These infirmities, being serious in nature, were sufficient to discredit the prosecution evidence whereas the probability of defence was clearly established by the evidence of Siyabai (DW1) who resides in the immediate proximity of the spot of search.

11. To sum up, not only the violation of the mandatory provision of Section 42(2) of the Act entitled the appellant to acquittal *(State of Orissa vs. A. Rajeshwar Patra* (2004) 10 SCC 557 relied on) but the material contradictions in the statements of detecting officer S.I. R.K. Dwivedi (PW9) and the other witnesses of search also pointed to an irresistible conclusion that the prosecution story was unworthy of credence.

12. In the result, the appeal is allowed and the impugned conviction and consequent sentences passed against the appellant are hereby set-aside. Instead, she is acquitted of the charge. Accordingly, she be released forthwith if not required in any other offence. The fine amount, if deposited, be refunded to the appellant.

Appeal allowed.

I.L.R. [2008] M. P., 156
APPELLATE CRIMINAL
Before Mr. Justice K.S. Chauhan
20 November, 2007

D.N. BHARTHARE ...Appellant*
Vs.
STATE OF M.P. ...Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, (33 of 1989), Section 3(1)(ix), Criminal Procedure Code, 1974, Section 154–Delay in lodging F.I.R–Prosecutrix a girl aged about 10 years was going from Bhopal to Patan along with her parents–They alighted at Jharkheda to change bus–Father sat near a hotel and girl also went there–Appellant went there and caused her to sit in his lap–Appellant inserted his finger in her vagina–Girl and her parents proceeded to Patan to attend marriage–Lodged F.I.R. after returning therefrom–Held–Delay in lodging F.I.R. has been properly explained by prosecution - It cannot be said that appellant has been falsely implicated–Girl is not resident of Jharkheda–No reason to implicate appellant falsely–Appeal Dismissed.

*Cr.A. No. 858/1993. Jabalpur

In the light of the aforesaid pronouncements and keeping in view the facts and circumstances of the case, I found that the delay in lodging the F.I.R. has been properly explained by the prosecution. The defence of the appellant is that on account of enmity he has been falsely implicated. He has adduced the defence in this regard wherein Ramesh Chandra Upadhyay (DW-1) has tried to establish that there were no good relations of Laxmi Narayan teacher with him and with appellant. But, on appreciation of evidence, it cannot be said that the appellant has been implicated on account of such enmity. The reason is that there is no relationship of victim with this teacher Laxminarayan. She is also not the resident of Village Jharkheda. She was on the way to Patan and alighted at Jharkheda only to change the bus. Therefore, there is no reason to implicate him falsely by complaint. (Para 35)

Cases Referred :

(1) AIR 1991 SC 63, (2) AIR 2003 SC 1164, (3) AIR 2000 SC 1812, (4) (2003) 1 WLC 34.

Y.K. Gupta, for the appellant

Pankaj Dixit, Penal Lawyer 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 18.08.1993 passed by the Special Judge, Sehore in Special Case No.69/92 whereby the appellant has been convicted under Section 3(1)(xi) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced thereunder to R.I. for 1 year with fine of Rs.300/- in default to further R.I. for 2 months.

2. The prosecution case in brief is that on 04.02.1992 Hemlata (PW-1), aged about 10 years was going with her parents from Bhopal to Patan. They alighted at Jharkheda to change the bus. Pannalal (PW-3) - father of Hemlata (PW-1) sat at Hotel of Banwarilal (PW-4). Hemlata (PW-1) also went there. The appellant came there and talked with her. He caused to sit her in his lap, put his hand into her chaddi and inserted his finger in her vagina. She cried and ran towards her mother Janki Bai (PW-2) and told about it. Meanwhile, the appellant went away. On enquiry, Banwarilal (PW-4) told them that he was the teacher. Then they proceeded to Patan to attend marriage in their relations and returned therefrom on 06-02-1992. Hemlata (PW-1) lodged the report Ex.P/1 at Police Station, Doraha where the crime No. 36/92 under Section 354 I.P.C. and 3(1)(xi) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was registered. Map was prepared. Statements of the witnesses were recorded, accused was arrested. After completing the investigation, the charge sheet was filed in the Court of C.J.M., Sehore from where the case was committed on 11-11-1992 to the Sessions Court.

3. The appellant stood charged under section 3(1)(xi) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 that on 04-02-1992

at 6:00 p.m. at village, Jharkheda he used criminal force to Hemlata a member of Scheduled Caste with intent to outrage her modesty.

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 six witnesses and the appellant examined only one witness. After appreciating the evidence, the trial Court found appellant guilty under Section 3(1)(xi) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and convicted thereunder as stated in Para No.1 of this Judgment. Being aggrieved by the judgment, finding and sentence passed by the trial Court, the instant appeal has been preferred under Section 374(2) of the Code of Criminal Procedure on the grounds mentioned therein.

6. Learned counsel for the appellant has submitted that the report is delayed. No such incident was possible at public place when her father was sitting nearby to her. There was no any possibility of such incident. There was no any intention to outrage her modesty. No injury has been caused. There is no medical examination. The prosecution has failed to establish the guilt against the appellant beyond reasonable doubt. Therefore, the finding of guilt is erroneous, deserves to be set aside and the appellant is entitled for acquittal.

7. On the other hand, Shri P.K. Dixit, learned P.L. appearing on behalf of the respondent/State supported the judgment, finding and sentence passed by the trial Court mainly contending that the victim has given the evidence against appellant. Her evidence is corroborated by the evidence of her parents. Therefore, the prosecution has proved the case against the appellant beyond reasonable doubt. He has rightly been convicted and sentenced by the Trial Court hence does not call for 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 3(1)(xi) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989 for using force with intend to outrage her modesty?

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

10. Hemlata (PW-1), Janki Bai (PW-2) and Pannalal (PW-3) have deposed that on that day they were going to Patan and alighted at village Jharkheda. They were waiting for a bus to Patan. There was a Tea Stall. Pannalal (PW-3) sat at the bench lying there. Hemlata also went there and sat beside her father.

11. Banwarilal (PW-4) has also supported the fact that these persons came from Bhopal sitting there, waiting for a bus.

12. Hemlata (PW-1) has deposed that the appellant came there, sat beside her and started talking with her. She told him entire things then he took her in his lap and inserted his finger in her vagina. She started weeping and told her mother who in turn told to her father.

13. She has further deposed that she suffered pain but there was no bleeding or swelling.

14. Thus, from her evidence it is manifestly clear that appellant inserted his

finger in her vagina. Her evidence in this regard is quite intact and has not been shattered in cross examination.

15. Janki Bai (PW-2) has also stated that the appellant was sitting beside her daughter. After an hour, she came weepingly and told her that accused put his hand in her Chhaddi, and was fondling her private part. She apprised this fact to her husband.

16. Pannalal (PW-3) has also stated that the appellant remained sitting beside her daughter for 10 minutes then his daughter cried and ran towards her mother who came there and apprised that the person who was sitting beside Hemlata has inserted finger in her vagina.

17. Both the witnesses have deposed that the appellant ran away from there.

18. Thus, the parents of victim Hemlata have clearly supported her evidence regarding the incidence.

19. Banwarilal (PW-4) has also stated that the appellant came to his Tea Stall, took tea and remained up to ten minutes and then went away. The appellant has also admitted this fact in the examination of accused recorded under section 313 of Cr.P.C.

20. Thus, this fact is well established that accused was present at the tea stall of Banwarilal (PW-4).

21. Hemlata (PW-1), Janki Bai (PW-2) and Pannalal (PW-3) have stated that then they went to Patan to attend marriage in their relation, returned therefrom and alighted at Jharkheda.

22. Hemlata (PW-1) has deposed that the appellant started quarrelling with her father.

23. Janki Bai (PW-2) has deposed that the appellant was standing at the door of School and her daughter pointed him out. The people advised him to touch the feet of victim but he refused saying that she is not god. He caught the collar of her husband and started scuffling.

24. Pannalal (PW-3) has also deposed that there were several persons of Jharkheda village. They carried them to School. The Sarpanch was also present there. The victim identified the appellant amongst the teachers. He started quarrelling with him and his wife. Then they went to Police Station to lodge the report.

25. From the evidence of these witnesses, it is evident that when they returned from village, Patan and alighted at Jharkheda the victim identified the appellant and on asking as to why he has committed such an act he denied and further started scuffling with the parents of victim.

26. Thus, it is clear from this evidence that victim identified the appellant who instead of resolving the dispute, quarreled with her parents.

27. Ramesh Chandra Upadhyay (DW-1) has also stated that on 05-09-1992 he came to know that some incident has taken place.

28. Suresh Bhargava (PW-6) has stated that on 06.02.1992 Bharat Choudhary,

Head Constable of Police Station, Doraha has recorded the F.I.R. (Ex. P/1). The investigation was done by him. He prepared the map (Ex.P/3) before Kailash (PW-5) and recorded the statements of the witnesses. He has proved the contradictions and omissions brought in the evidence of witnesses.

29. No doubt some contradictions have been brought in evidence of Janaki Bai (PW-2) and Pannalal (PW-3) but they are not on the material point and hence of no significance.

30. The main defence of the appellant is that the F.I.R. is belated but the reasons of delay has been sufficiently explained by the prosecution. The victim and her parents were going to attend the marriage in their relation. The bus came therefore they proceeded to Patan and when they returned therefrom and asked the appellant as to why he has done so instead of pacifying the matter he started scuffling with the parents of the victim. Therefore, they went there to lodge the report. The Trial Court has considered this aspect in great detail and has rightly came to the conclusion that the prosecution has properly explained the delay in lodging the F.I.R.

31. In the case of *Tara Singh Vs. State of Punjab*, AIR 1991 SC 63 the Apex Court has held thus:-

> "It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, it is not wise to expect from villagers that they would rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-sticken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Unless there are indications of fabrication, the Court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay.

32. In the case of *Amar Singh v. Balwinder Singh*, AIR 2003 SC 1164 it has been held that:

> "There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It is necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR."

33. In the case of *State of Rajasthan v. N.K.*, AIR 2000 SC 1812 it has been held that:

> "A mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case abroad. The Court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the Court, it can not be counted against the prosecution."

34. In the case of *Ramdev v. State of Rajasthan*, (2003) 1 WLC 34, it has been held thus:

> "Where eye-witness are reliable and trustworthy, mere delay in filing FIR would be no ground to discard the entire prosecution case."

35. In the light of the aforesaid pronouncements and keeping in view the facts and circumstances of the case, I found that the delay in lodging the F.I.R. has been properly explained by the prosecution. The defence of the appellant is that on account of enmity he has been falsely implicated. He has adduced the defence in this regard wherein Ramesh Chandra Upadhyay (DW-1) has tried to establish that there were no good relations of Laxmi Narayan teacher with him and with appellant. But, on appreciation of evidence, it cannot be said that the appellant has been implicated on account of such enmity. The reason is that there is no relationship of victim with this teacher Laxminarayan. She is also not the resident of Village Jharkheda. She was on the way to Patan and alighted at Jharkheda only to change the bus. Therefore, there is no reason to implicate him falsely by complaint.

36. Kailash (PW-5) who is said to be in relation of victim has not even supported the fact that the victim told him about the incident. Moreover, no any evidence is adduced as to what was the enmity even of this witness Kailash (PW-5) with the appellant. Thus, there was no question of falsely implicating the appellant at the behest of this witness.

37. There is overwhelming evidence against the appellant and it is clearly established that the appellant inserted the finger in vagina of victim with intent to outrage her modesty and his act is clearly covered under Section 3(1)(xi) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and trial Court has rightly found him guilty and sentence thereunder. I affirm such finding. No leniency is required in the matter of sentence. The appellant being a teacher has committed such condemnable act with a girl of 9-10 years. Therefore, the sentence passed by the trial Court cannot be said excessive hence the sentence passed by the Trial Court is also hereby affirmed. There is no merit or substance in this appeal and hence deserves to be dismissed.

38. Consequently, the appeal fails and is dismissed accordingly. The appellant is on bail. His bail bonds are cancelled. He be directed to appear before the C.J.M., Sehore on 14.12.2007 to serve out the remaining part of the sentence.

I.L.R. [2008] M. P., 162
APPELLATE CRIMINAL
Before Mr. Justice K.S. Chauhan
20 November, 2007

JAGANNATH ...Appellant*
Vs.
STATE OF M.P. ...Respondent

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

The present case is neither of dispossess nor interference in his rights but simplicitor a case of mischief caused by grazing cattle by the appellant. The damage was not caused on account of his being a member of Scheduled Caste. Thus all the ingredients required to prove the offence under Section 3(1)(v) of SC & ST Act have not been established by the prosecution. Therefore the trial court has committed an illegality in convicting the appellant under Section 3(1)(v) of SC & ST Act. Hence such finding cannot be affirmed. (Para 23)

Case Referred :

2000 Cr.L.J. 711.

Ruksana, for the appellant
S.K.Kashyap, Dy. G.A. for the respondent

Clur.adv.vult

JUDGMENT

K.S. CHAUHAN, J. :–This criminal appeal has been preferred under Section 374(2) of Cr.P.C. being aggrieved by the judgment, finding and sentence dated 22-09-1993 passed by Special (Sessions) Judge (SC/ST), Narsinghpur, in Special Criminal Case No.18/93 whereby the appellant has been convicted under Section 427 of I.P.C. and Section 3(1)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989 and sentenced thereunder for 1 year and 4 years R.I. with fine of Rs.200/-, in default, further R.I. for 2 months respectively with the direction to run sentences concurrently.

2. The prosecution case, in brief, is that Ravi alias Ravishankar, a member of Scheduled Caste, resident of village Nayagoan, submitted a report to Harijan Cell, Narsinghpur, wherein it was mentioned that he had sown Jwar and Arhar crops in his field. The accused persons caused the cattle to enter upon his field and damaged his crops. When he prevented them, they used filthy language and ran towards him to assault him by weapons like Farsa, Gadasia and axe and intimidated him. He submitted the written report. Enquiry was made, map was prepared and statements of witnesses were recorded. The report was sent to

*Cr.A. No. 936/1993, Jabalpur

P.S. Themi wherein Crime No.193/92 under Section 294,427,506-B/34 of I.P.C. and Section 3(1)(v) of SC & ST Act was registered. After completing investigation, charge sheet was filed in the Court of C.J.M., Narsinghpur wherein Criminal Case No.165/93 was registered which was committed to the Court of Sessions on 11-02-1993.

3. The accused persons were charged under Section 427,294, 506-B(II) of I.P.C., Section 3(1)(v) and 3(1)(x) of SC & ST Act, alleging that on 30-09-92 at village Murachh, they caused to enter the cattle in the field of complainant Ravi alias Ravishankar, a member of Scheduled Caste and caused damage to his crops amounting to Rs. 50/- or upwards, interfered with the enjoyment of his rights over his land, used filthy language, extended threats and intentionally insulted or intimidated with intend to humiliate him in a place within public view.

4. The accused persons abjured the guilt and claimed to be tried contending that they have been falsely implicated.

5. The prosecution examined as many as 5 witnesses and the defence examined only 3 witnesses. After considering the evidence, the trial court found that the prosecution failed to establish the guilt against Balram, Nijamsingh and Gammadsingh and acquitted them from all the charges levelled against them. The present appellant Jagannath was also acquitted from the charge under Section 294, 506- Part-II of I.P.C. and Section 3(1)(x) of SC & ST Act, but convicted under Section 427 I.P.C. and Section 3(1)(v) of SC & ST Act and sentenced thereunder as mentioned in para No.1 of this judgment. Being aggrieved by the judgment finding and sentence of the trial court, this appeal has been preferred by Jagannath on the grounds mentioned in the memo of appeal.

6. The learned counsel for the appellant submitted that the trial court has not appreciated the evidence in the proper perspective. PW-3 Ravishankar and PW-5 Hariram are interested witnesses. The trial court has committed illegality in disbelieving the defence evidence. The fact that Tahsildar, Revenue Inspector and Patwari visited the spot and ordered to remove the encroachment, was sufficient to through away the prosecution case. It was also submitted that the charges were not proved that the appellant grazed the field of complainant by cattle. The prosecution failed to prove the guilt beyond reasonable doubt against the appellant. Therefore finding of guilt is erroneous which deserves to be set aside and the appellant is entitled for acquittal.

7. On the other hand, Shri S.K. Kashyap, Dy. Govt. Advocate, appearing on behalf of the State/respondent submitted that it has been proved beyond reasonable doubt that the appellant grazed the field of Ravishankar, a member of Scheduled Caste damaging his crops. The trial court has rightly convicted and sentenced the appellant, hence it does not call for any interference.

8. The main point for consideration in this appeal is whether the trial court has committed an illegality in convicting the appellant under Section 427 of I.P.C. and Section 3(1)(v) of the SC & ST Act.

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

10. Ravishankar (PW-3) has deposed that appellant caused the cattle entered

into his field and grazed his crops. When he refused, he used filthy language and ran towards him to assault. At his cries, his sons Balram, Nijamsingh and Gammatsingh reached there armed with Ballam, Farsa and axe. They also used filthy language and ran towards him to assault but he escaped from there.

11. Hariram (PW-5) the uncle of complainant Ravishankar has also corroborated his statement by deposing that appellant grazed crops by cattle and he prevented him to do so and when Ravishankar was carrying the cattle out of the field, appellant tried to assault him. Sons of appellant Jagannath were also armed with weapons and they also ran towards complainant to assault him. As a result thereof, Ravishankar flied away on account of fear.

12. Ravishankar (PW-3) has also deposed that the appellant caused damage of Jwar and Arhar crops sown in the area of 2 - 2. 1/2 acres of land. Hariram (PW-5) has also supported this fact by deposing that the appellant caused damage amounting to 5 - 6 bags of crops.

13. Both these witnesses have stated that the appellant caused damage of crops of Jwar and Arhar of complainant by grazing by the cattle.

14. Ravishankar (PW-3) though admitted his signature on document - Ex. D/1 but denied its contents. He has stated that this document was written by an advocate and his signatures were obtained by him.

15. On perusal of this document, it is manifestly clear that this document is in the form of an affidavit but it has not been sworn in before any competent authority. Its contents have not been proved.

16. Both these witnesses have denied regarding sowing of crops on the way resulting into obstruction on the way which was opened by the Revenue Authorities by grazing its crops by the cattle. However, the appellant adduced the defence evidence in this regard by examining Netram (DW-1), Matilal (DW-2) and Anil Kumar (DW-3).

17. Netram (DW-1) who was Patwari of village Dhamna has stated that on 28-09-92 that Tahsildar removed the crops sown in the encroached area. Likewise Anil Kumar Soni (PW-3) who was also the Patwari of village Nayagaon has also stated that on 26-09-92, the crops which were sown on the way were removed by Tahsildar. Matilal (DW-2) has also given evidence that Ravishankar had sown the crops on the way, complaint was made to the Collector, in consequence thereof, the way was opened by grazing such crops by cattle by Tahsildar.

18. If the entire evidence, as adduced by the defence is accepted, then it can be said that the Revenue Authorities removed the crops from the encroached area, but the prosecution case is that the crops which were sown in the field of complainant was grazed and damaged. Therefore the defence is of no consequence.

19. Pansarilal (PW-4), though declared hostile by the prosecution, has also stated that complainant Ravishankar was crying that appellant has grazed his crops by cattle. He rushed there, but in the meantime the appellant Jagannath and others ran away. D.R. Asatkar (PW-1) has prepared the map (Ex. P/3) which shows the area grazed by cattle.

20. Thus, from the evidence adduced in this case, it is clearly established that the appellant caused the cattle to enter upon the field belonging to the complainant Ravishankar with intent to cause the damage of his crops. The complainant Ravishankar has sustained the loss of 5 - 6 gunny bags of his crops. Hence the trial court has not committed any illegality in finding him guilty under Section 427 I.P.C. Such finding being based on record is hereby affirmed.

21. Now, the point for consideration is whether his conviction under Section 3(1)(v) of SC & ST Act is legally justified or not.

22. Section 3(1)(v) of the Act is reproduced as under :-

> " Whoever, not being a member of a Scheduled Caste or Scheduled Tribe, wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights over any land, premises or water, shall be punishable with imprisonment for a term which shall not be less than 6 months, but which may extended to 5 years and with fine."

The provisions of this section were considered by this Court in the case of Janggu alias *Shobit and others Vs. State of M.P.* reported in 2000 Cri.L.J. 711 wherein it has been held :-

> "For securing a conviction under Section 3(1)(v), the prosecution, for the first cause is required to show that the accused has wrongfully dispossessed a member of S.C. or S.T. from his land or premises. Wrongful dispossession, in the opinion of this Court, presupposes positive and de facto possession. Unless a man is shown to be in actual physical possession of the property, he cannot be dispossessed. I have already found that the complainant was not in de facto possession. If a person is not in possession of the property, then he cannot be dispossessed. The second clause of Section 3(1)(v) provides that if somebody interferes with the enjoyment of complainant's rights over any land, premises or water, then he shall be punished. On a fair reading, the words "enjoyment of his rights" must be read in juxta position with the words "any land, premises and water", the first clause refers to the personal lands while the second clause relates to any land, premises or water. In fact the second clause applies to a case where the right to enjoy any land, premises or water has been interfered. For securing conviction under the second clause, the prosecution is required to prove that the complainant had some rights and he was enjoying the said rights over any land, premises or water. The second clause would cover a contingency relating the rights of easements, right of way and fetching of the water etc. Unless it is proved by the prosecution that the complainant had a right and was enjoying the same, prosecution would not be entitled to say that because accused did not permit the complainant to take possession of the property which he was allegedly entitled he be convicted."

23. The present case is neither of dispossess nor interference in his rights but simplicitor a case of mischief caused by grazing cattle by the appellant. The damage was not caused on account of his being a member of Scheduled Caste. Thus all the ingredients required to prove the offence under Section 3(1)(v) of SC & ST Act have not been established by the prosecution. Therefore the trial court has committed an illegality in convicting the appellant under Section 3(1)(v) of SC & ST Act. Hence such finding cannot be affirmed.

24. The conviction under Section 427 I.P.C. is well merited and the sentence passed thereunder is also not excessive hence does not call for interference.

25. Consequently, the appeal is partly allowed. Conviction and sentence passed under Section 3(1)(v) of SC & ST Act is hereby set aside whereas the conviction and sentence passed under Section 427 of I.P.C. is hereby maintained.

26. The appellant is on bail. His bail bonds are cancelled. He be directed to appear before C.J.M., Narsinghpur on 14.12.2007 to serve out the remaining part of sentence.

I.L.R. [2008] M. P., 166
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh
7 December, 2007

RAJESH ...Appellant*
Vs.
STATE OF M.P. ...Respondent

A. Penal Code, Indian (45 of 1860) - Section 304B - Dowry Death or Accidental Death - Deceased sustained burn injuries in the house of appellant/ husband - In her statement to police she stated that she accidentally caught fire from stove - Parents and brother of deceased also visited hospital after getting information of incident - They signed Panchayatnama in which it was specifically mentioned that they had no suspicion against anyone in relation to death of deceased - Mother of deceased later on submitted typed complaint alleging that Appellant and Parents-in-law of deceased had treated her for demand of dowry - Held - Order sheet of Trial Court reveals that public prosecutor did not dispute that dying declaration was recorded by police - Father of deceased also admitted in his cross examination that deceased had disclosed to him about accident - Mother of deceased had also admitted that during the entire period of treatment she was at hospital and incurred all necessary expenses- Appeal allowed - Appellant acquitted.

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

*Cr.A. No. 357/1993. Jabalpur

The trial court rejected the dying declaration, Ex. D3, of Sunanda Bai by holding that it was suspicious as there was no evidence to show as to where and how it was recorded. In Gaffar Badshaha Pathan Vs. State of Maharashtra (2004) 10 SCC 589 the Supreme Court has held that it was one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. The Supreme Court also held that when the dying declaration relied upon by the accused shows that it is a case of accident, as has been recorded in the present case, it would be for the prosecution to explain the circumstances under which the same was recorded and establish by leading satisfactory evidence as to why it should be discarded and not acted upon. Nothing of this kind was done by the prosecution to explain the circumstances under which the dying declaration, Ex. D3, of Sunanda Bai was made. The trial court was, therefore, wrong in rejecting the dying declaration, Ex. D3, and ignoring similar oral dying declaration of Sunanda Bai made to none other than her father Ram Sewak (P.W.5). (Para 8)

Case Referred :

(2004) 10 SCC 589.

Kunal Dubey, for the appellant
J.K. Jain, G.A. for the respondent

Cur.adv.vult

JUDGMENT

AJIT SINGH, J. :–Appellant, Rajesh, stands convicted under Section 304-B of the Indian Penal Code and sentenced to rigorous imprisonment for eight years by the impugned judgment dated 16.4.1993 passed in Sessions Trial No.131/1990 by the First Additional Sessions Judge, Hoshangabad.

2. The facts giving rise to this appeal are as under:

The appellant hails from village Karanpur, District Hoshangabad. He was married to Sunanda Bai on 27.6.1989 of village Saikheda, District Narsinghpur. On 29.8.1989, sometime during afternoon, Sunanda Bai sustained burn injuries in the house of appellant. She was taken for treatment to the District Hospital, Hoshangabad. On the same day the police recorded her statement, Ex. D3, in the hospital wherein she stated that she accidentally caught fire from a stove while preparing tea and at that time her husband and in-laws were not present in the house. Sunanda Bai also stated that she had no quarrel with them. On receiving the information about the incident, mother Saroj Bai (P.W.1), brother Satish (P.W.4) and father Ram Sewak (P.W.5) also reached the hospital to attend her. Unfortunately, Sunanda Bai could not sustain the burn injuries and died in the hospital on 3.9.1989 while undergoing treatment. The police prepared a Panchayatnama dated 3.9.1989, Ex. P4, with Saroj Bai (P.W.1), Satish (P.W.4) and Ram Sewak (P.W.5) as witnesses which clearly states that they had no suspicion against anyone in relation to the death of Sunanda Bai and that she died on account of receiving burn injuries from a stove. Dr. S. N. Kataria (P.W.3),

after performing the post mortem examination on the body of Sunanda Bai, in his report, Ex. P7, opined that her cause of death was shock and septicemia due to extensive burn injuries.

3. On 6.9.1989 Saroj Bai (P.W.1) submitted a typed complaint at Police Station, Sohagpur, against the appellant and his parents namely, Atar Singh and Choti Bai, alleging that they treated Sunanda Bai with cruelty for demand of Luna, T.V. and Gold and set her on fire after pouring kerosene and tying her legs. The typed complaint was later registered as first information report, Ex. P2. The police, after investigation, charge sheeted the appellant and his parents named above for offences under sections 306, 302 and 304-B of the Indian Penal Code.

4. The defence of appellant was that Sunanda Bai accidentally caught fire from a stove in his house when no one was present. He relied upon the dying declaration, Ex. D3, of Sunanda Bai and examined witnesses Ram Krishna (D.W.1), Neemchand (D.W.2), Pannalal (D.W.3) and Mohan (D.W.4) in support of his defence.

5. The trial court rejected the defence of appellant and mainly relying upon the evidence of Saroj Bai (P.W.1), Ram Sewak (P.W.5) and Dr. S. N. Kataria (P.W.3) convicted and sentenced him as aforesaid. It, however, acquitted the parents of appellant in the absence of any trustworthy evidence against them.

6. The question which calls for determination in this appeal is whether Sunanda Bai died accidentally or she was subjected to cruelty in connection with demand of dowry resulting into her death by burns.

7. There can be no dispute as to how Sunanda Bai sustained burn injuries could have been best disclosed by her alone. Ex. D3 is a carbon copy of the police statement of Sunanda Bai recorded on the date of incident. It also bears her thumb impression. Order sheet dated 20.3.1993 of the trial court reveals that the public prosecutor did not dispute that the said statement was recorded by the police and admitted the same whereupon it was exhibited. In Ex. D3 Sunanda Bai has clearly stated that she accidentally caught fire from a stove while preparing tea when neither her husband nor in-laws were present in the house and that she had no quarrel with them. Ram Sewak (P.W.5) has also admitted in paragraph 5 of his evidence that in the hospital, on his asking, Sunanda Bai disclosed that she accidentally caught fire from a stove while preparing food. This admission by Ram Sewak (P.W.5) about oral dying declaration by Sunanda Bai further confirms the defence of appellant that Sunanda Bai accidentally caught fire. Ram Sewak (P.W.5), Saroj Bai (P.W.1) and Satish (P.W.4) also knew that Sunanda Bai accidentally caught fire or else they would not have signed Panchayatnama, Ex. P4, regarding her accidental death clearly mentioning that there was no suspicion against anyone. Ram Sewak (P.W.5) and Saroj Bai (P.W.1), however, tried to explain about this in their evidence on the plea that they were under depression but they have not stated that they so acted under any direct or indirect influence from the accused persons.

8. The trial court rejected the dying declaration, Ex. D3, of Sunanda Bai by holding that it was suspicious as there was no evidence to show as to where and how it was recorded. In *Gaffar Badshaha Pathan Vs. State of Maharashtra* (2004) 10 SCC 589 the Supreme Court has held that it was one thing for an

accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. The Supreme Court also held that when the dying declaration relied upon by the accused shows that it is a case of accident, as has been recorded in the present case, it would be for the prosecution to explain the circumstances under which the same was recorded and establish by leading satisfactory evidence as to why it should be discarded and not acted upon. Nothing of this kind was done by the prosecution to explain the circumstances under which the dying declaration, Ex. D3, of Sunanda Bai was made. The trial court was, therefore, wrong in rejecting the dying declaration, Ex. D3, and ignoring similar oral dying declaration of Sunanda Bai made to none other than her father Ram Sewak (P.W.5).

9. It is also worth noting that Saroj Bai (P.W.1) has categorically admitted in her evidence that during the entire period of treatment of Sunanda Bai at the hospital, appellant and his parents attended her and incurred all the necessary expenses. Similar is the evidence of Ram Sewak (P.W.5). This is yet another reason to believe that appellant did not set Sunanda Bai on fire or else he and his parents would not have attended her and incurred expenses for her treatment. The trial court too has substantially disbelieved their evidence that Sunanda Bai was tied with a rope and thereafter set on fire by the accused persons and that she made an oral dying declaration against the appellant in the hospital. As already stated above, the trial court has also acquitted the parents of appellant of all the charges by disbelieving the evidence of Saroj Bai (P.W.1) and Ram Sewak (P.W.5) against them. The evidence of Anil Kumar (P.W.2) is only to the extent that appellant had made a customary demand of T.V. at the time of "Tika" ceremony. His evidence does not help the case of prosecution against the appellant at all.

10. Dr. S. N. Kataria (P.W.3) in his report, Ex. P7, did not mention that the death of Sunanda Bai was not accidental. He, however, in his cross-examination by the counsel of accused persons, opined that the nature of burn injuries on Sunanda Bai possibly could not have been on account of accident. This opinion of the doctor is not conclusive and is based on probabilities. It would be, therefore, unsafe to convict the appellant solely on such an opinion of the doctor in the absence of any corroboration.

11. For these reasons, I hold that Sunanda Bai died accidentally and the allegations made against the appellant and his parents by Saroj Bai (P.W.1) and Ram Sewak (P.W.5) that they treated her with cruelty for demand of dowry were afterthought and false. The conviction and sentence of appellant are, therefore, set aside and he is acquitted.

12. The appeal succeeds and is allowed.

I.L.R. [2008] M. P., 170
APPELLATE CRIMINAL

Before Mr. Justice S.K. Kulshrestha and
Mrs. Justice Manjusha P. Namjoshi
7 December, 2007

THAKURLAL ...Appellant*
Vs.
STATE OF M.P. ...Respondent

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

From a bare reading of the formula adopted for finding the extent of the burns, it is clear that the formula does not require that the part on which burns have been caused should have been completely affected. Thus, even if smaller portion of the head is burnt, the percentage of the body surface would remain 9 subject to the provision made for head, thigh and leg, as also in the case where the whole part is affected by burns. The above chart also provides 9% burns in the case of right upper extremity, but it does not contemplate or imply that whole body should have been affected by burns as there is no system of reducing the percentage, if the part is not wholly burnt. What is contemplated is that the limb which is affected should be taken to have been burnt to the extent of percentage mentioned against each area of the body. Under these circumstances, it was not necessary that there should have been 100% burns in case of each and every part of the body for coming to the conclusion that the extent of burns was 100%.

We may also clarify that in case of burns, even if a part is smeared with kerosene, the burnt portion extends to other part of the body which may not have been covered by kerosene poured over the body. Learned Judge has totally ignored that even if the smaller portion was smeared with kerosene, the possibility of the burns extending to the parts which were dry, was not ruled out. Under these circumstances, merely on account of the extent of burns being 100%, the learned Judge could not have rule out the possibility of the death having been caused by suicide. The burn marks found on the finger tip of the accused as per report Ex.P/24 by Dr. Kamal Kishore Kansotiya (PW-13) are also not conclusive of the fact that the accused poured kerosene over the deceased and set her on fire.

*Cr.A. No. 925/2001. Indore

Even if his explanation that he was not present in the house at the time of the incident is not believed, the prosecution cannot succeed by merely referring to the insignificant burns on the tip of the finger of the accused Thakurlal. We may also point out that had the death preceded with grappling or quarrel, the deceased would not have let off the accused by causing only one nail mark.

(Para 10 and 11)

Jai Singh, with *Raghuveer Singh,* for the appellant
Girish Desai, Dy. A.G., for the respondent

Cur.adv.vult

JUDGMENT

The Judgment of the Court was delivered by S.K. KULSHRESTHA, J.:–By this appeal, the appellant assails the legality, validity and propriety of the judgment dated 08.08.2001 passed by the learned Special Sessions Judge, Mandleshwar in Session Trial No.77/2001 by which the appellant has been convicted for an offence punishable under Section 302 of the Indian Penal Code and sentenced to rigorous imprisonment for life and fine of Rs.7,000/-. In default of payment of fine, the judgment directs the appellant to undergo simple imprisonment for 2 years. The appellant has also been convicted under Section 201 of the Indian Penal Code and sentenced to rigorous imprisonment for 3 years and fine of Rs.2,000/-.

2. The appellant was prosecuted for having voluntarily caused death of his second wife Sunita on the night of 31st December, 2000 at about 09.00 p.m. The marriage of Sunita was solemnized with the accused in the month of April in the year preceding her death while first wife of the accused namely Shakuntala (PW-3) was living and accused, through the said nuptial had five children. It was not disputed that both, Sunita and Shakuntala, were living in the same house but in different rooms but they had separate kitchens. According to the prosecution, on 31.12.2000 at about 08.00 or 09.00 p.m., accused Thakurlal reported to the police vide Ex.P/25 that his wife had a quarrel with his first wife and when he returned home, he found that his second wife Sunita had died of burns. On the basis of this information, a case of sudden death was registered and after summoning the witnesses, inquest was held on the body, of which memo Ex.P/2 was prepared. After inspecting the spot, spot map Ex.P/14 was prepared and the statements of the witnesses were recorded. During the said investigation, the accused was made to remove his clothes, which were seized as they were smelling of kerosene. The investigation revealed that because the deceased Sunita had not cooked for Shakuntala and her children, the accused had quarreled with the deceased and during the course of the said quarrel, he had poured kerosene on her and set her on fire. It was also stated that the accused had made extra judicial confession in this behalf before the witnesses.

3. The dead body of Sunita was forwarded to hospital for postmortem examination and after examining the body, the autopsy surgeon Dr. Basant Kanungo (PW-6) gave autopsy report Ex.P/13. According to the report, the mode of death was asphyxia due to respiratory failure as a result of extensive burns. It was stated that the extent of burn was 100% varying from 2nd to 3rd degree. The details of the burns were mentioned in the autopsy report Ex.P/13, which read as under: -

"**Head:** - Total burn 9% hair burnt and singed skin completely burnt cuticle pealed off.

Chest: - Total burn 36% skin burnt and blackened cuticle pealed off and abdomen (front and back).

Both upper extremities total burn 18% skin completely burnt cuticle pealed off. Perineum completely burnt hair burnt and signed 1%.

Both lower extremities: - completely burnt on both sides skin blackened cuticle pealed off. Burn 36%. Total burn 100% Degree of burn II to III degree. All burns antemortem."

4. The accused and his first wife were also sent for medical examination and were seen by Dr. Kamal Kishore Kansotiya (PW-13) who gave report Ex.P/23 in respect of Shakuntalabai, first wife of the accused and Ex.P/24 in respect of the accused. As per Ex.P/23, Shakuntalabai had sustained one contusion measuring 1 inch x 1 inch on the left thigh and another contusion measuring ½ inch x 1 inch on the right thigh. The report Ex.P/24 reveals that the accused had a burn blister on the tip of right hand finger and an abrasion due to nail mark on the left cheek.

5. The prosecution alleged that Shakuntala and her children on having shifted to village Babalia, there ensued quarrel between the accused and his first wife Shakuntala; with the result, she left his house and shifted to village Gujarmohana. It was also stated that because his second wife, deceased Sunita did not cook meals for Shakuntala and her children, accused got enraged and after an altercation with Sunita, he poured over her the kerosene and set her on fire and with a view to extricate himself from the consequences of his act, he gave false information to the Police that she had died during his absence. It was stated that the fact that the accused had burn marks on his finger and also had an abrasion on his face, were the evidence to belie that he was not present at the time Sunita was burning. It was in these premises that the accused was prosecuted for the above offences.

6. The prosecution examined 14 witnesses to prove its case while the accused examined himself as DW-1 and his witness Dayaram as DW-2. From amongst the witnesses examined by the prosecution, PW-1 Jairam is a witness to the inquest and seizure of the burnt mattress and quilt while PW-2 Bondar, PW-3 Shakuntala, PW-4 Gangaram and PW-5 Radheshyam turned hostile and did not support the prosecution. PW-9 Naveenchand Jain, PW-10 Ajay proposed to be examined to prove that the accused had made extra judicial confession also did not support the prosecution case. PW-12 Rakesh also did not support the case of the prosecution in respect of extra judicial confession. In the above factual matrix, the case of the prosecution hinges on the testimony of Dr. Basant Kanungo (PW-6), Anita Chauhan (PW-7), sister of the deceased, Manjubai (PW-8), tenant of the accused and Rajubai (PW-11), mother of the deceased Sunita.

7. At this stage we deem it necessary to clarify that the evidence of the prosecution is purely circumstantial right from the beginning and, therefore, we have to see whether the circumstances relied upon by the prosecution points to the guilt of the accused and are incompatible with any hypothesis of his innocence. Also, whether the circumstances make a complete chain, which rules out the

innocence of the accused and proves his guilt. The circumstances enumerated by the prosecution have been discussed by the learned Special Sessions Judge in paragraphs 44, 64 and 65.

8. As per the finding, learned trial Judge has observed in paragraph 64 of the impugned judgment that there had been quarrel between the accused and the deceased as deposed to by PW-8 Manjubai. It has further been observed that it was unnatural that first wife PW-3 Shakuntala would come to the village to leave it only a short while thereafter and it was also considered strange that Shakuntala had sustained injuries in both her thighs as per report Ex.P/23 and Manjubai (PW-8), tenant of the appellant had clearly deposed to the circumstances in which the incident took place. Learned trial Judge, however, discarded the evidence with regard to the extra judicial confession. It was also observed that since the deceased had sustained 100% burns, it could not have been a case of suicide.

9. We propose to deal with the last circumstance first. We have also referred to the medical evidence namely the evidence of PW-6 Dr. Basant Kanungo and his report Ex.P/13. It appears that the learned trial Judge has got himself swayed by the fact that the report states that it was a case of 100% burns and thus, the possibility of it being a case of suicide was ruled out. According to the learned Judge, had it been a case of suicide, it was not possible for the deceased to have completely drenched herself in kerosene and then to set herself afire. We are constrained to observe that the approach of the learned trial Judge was misdirected. Before proceeding to consider the aspect further, we may point out that the degree of burns and the extent of burns are counted on the basis of the formula "RULE OF NINES". The said formula is reproduced hereunder for better understanding of the factual matrix: -

"RULE OF NINES" FOR ESTIMATING PERCENTAGE OF BODY SURFACE INVOLVED IN BURNS

Anatomic area	Percent of body surface
Head	9
Right upper extremity	9
Left upper extremity	9
Right lower extremity	18
Left lower extremity	18
Anterior trunk	18
Posterior trunk	18
Neck	1

In Modi's Medical Jurisprudence and Toxicology, Twenty Third Edition, calculation of the burns in relation to the varying ages has been laid down as under: -

AREA	AGE 0 yrs	1 yr	5 yr	10 yrs	15 yrs	adult
A=½ of Head	9 ½	8 ½	6 ½	5 ½	4 ½	3 ½
B=½ of one Thigh	2 ¾	3 ¼	4	4 ½	4 ½	4 ½
C= ½ of one Leg	2 ½	2 ½	2¾	3	3 ¼	3 ½

10. From a bare reading of the formula adopted for finding the extent of the burns, it is clear that the formula does not require that the part on which burns have been caused should have been completely affected. Thus, even if smaller portion of the head is burnt, the percentage of the body surface would remain 9 subject to the provision made for head, thigh and leg, as also in the case where the whole part is affected by burns. The above chart also provides 9% burns in the case of right upper extremity, but it does not contemplate or imply that whole body should have been affected by burns as there is no system of reducing the percentage, if the part is not wholly burnt. What is contemplated is that the limb which is affected should be taken to have been burnt to the extent of percentage mentioned against each area of the body. Under these circumstances, it was not necessary that there should have been 100% burns in case of each and every part of the body for coming to the conclusion that the extent of burns was 100%.

11. We may also clarify that in case of burns, even if a part is smeared with kerosene, the burnt portion extends to other part of the body which may not have been covered by kerosene poured over the body. Learned Judge has totally ignored that even if the smaller portion was smeared with kerosene, the possibility of the burns extending to the parts which were dry, was not ruled out. Under these circumstances, merely on account of the extent of burns being 100%, the learned Judge could not have rule out the possibility of the death having been caused by suicide. The burn marks found on the finger tip of the accused as per report Ex.P/24 by Dr. Kamal Kishore Kansotiya (PW-13) are also not conclusive of the fact that the accused poured kerosene over the deceased and set her on fire. Even if his explanation that he was not present in the house at the time of the incident is not believed, the prosecution cannot succeed by merely referring to the insignificant burns on the tip of the finger of the accused Thakurlal. We may also point out that had the death preceded with grappling or quarrel, the deceased would not have let off the accused by causing only one nail mark.

12. This takes us to the other evidence on which the prosecution has placed reliance. We have also pointed out that the learned Special Sessions Judge has not believed the testimony with regard to the extra judicial confession. The remaining testimony remains confined to the testimony of PW-7 Anita Chouhan, sister of the deceased, PW-8 Manjubai, tenant of the accused and PW-11 Rajubai, mother of the deceased.

13. To begin from the beginning, Anita Chouhan (PW-7) has testified that her sister and the first wife Shakuntala were living in the same house but in different rooms. She has stated that the accused used to come drunk and beat Sunita and when ever Sunita came to her in village Balsamundra, she used to complain about it. She had also shown burn marks. She has further stated that on 01.01.2001, accused talked to her over the phone at 07.00 a.m. and informed that his first wife and her father had set her sister on fire. When she rushed to the place of the incident, she took the accused aside and asked him as to what was the factual position. The accused informed her that since Sunita had not cooked food for Shakuntala and her children, he had poured kerosene over her and set her on fire. In her cross examination, she has admitted that her sister had written a letter Ex.D/2 to the accused to the effect that if the accused did not marry her, she

would commit suicide. She has also resiled from the statement to the police that the accused had told her over the phone that her sister had been burnt by Shakuntala and her father.

14. PW-8 Manjubai, tenant of the accused, stated before the Court that on the date of incident, accused knocked her door at about 08.00 or 08.30 p.m. and stated that he had been ruined as Sunita her poured over herself kerosene and committed suicide. He had also asked for a motorcycle so that he could rush to the police station and report the matter. She has, however, deposed that at about 07.00 or 07.30 p.m. she heard voices indicating quarrel between the accused and his wife Sunita. In paragraph 15 of her deposition, she has clearly admitted that her police statement had been read over to her by SHO before she took the witness box.

15. PW-11 Rajubai is the mother of deceased Sunita. She has stated that Anita had learnt over the phone that her sister had sustained burns. Accordingly, they rushed to the village of the accused where the accused admitted that he had caused the burns. She has stated that Anita had not told her that Shakuntala had caused burns to the deceased.

16. We may refer to the deposition of the accused Thakurlal and other DW-2 witness Dayaram. It is trite that the defence witnesses are also entitled to the same weight-age as the prosecution witnesses. The accused had deposed that between him and the deceased, there was a love marriage. On 31.12.2000, his first wife had come to his house at about 04.00 p.m. and he had left the house at 06.00 p.m. to go to the market. When he returned, he noticed that Sunita was in flames. Accordingly, he took up water and tried to douse the fire. He then rushed to his tenant Manju and asked for a motorcycle, but since he did not receive any help from the persons of the locality, he went to village Gurjarmohana to arrange for a motorcycle and came back to Bablai. He could, with great difficulty reach the police station at 04.00 a.m. and when he wanted that this report be recorded, Chowkidar was sent out and a demand of Rs.40,000/- was made. He was also assaulted by the police. The evidence of DW-2 Dayaram discloses that he had received a telephone from the police station making demand of money.

17. We have already referred to the circumstances which conclude that grounds on which the learned Special Judge had refused to believe the accused that it was a case of suicide, were non-existent. Learned Special Sessions Judge was persuaded by the facts not substantiated by the record. The calculation of the burns as 100% did not imply that each and every portion of the limb for which calculation is to be made, was affected by fire. The finding that it was not possible for the deceased to have poured sufficient kerosene over her body to have access to each and every part of her body was infirm in the light of the fact that even if a smaller part of the body or the limb was covered by any inflammable substance, the spread of flame may also travel to such parts which are dry. With regard to the evidence of cruelty and the information having been given about the suicide of the deceased, suffice would be to say that immediate information to the relatives of the deceased indicates that the accused did not want to hide the incident. We are not at all satisfied with the finding of cruelty and strained relations between

the accused and his second wife as projected through PW-7 Anita Chouhan, PW-8 Manjubai and PW-11 Rajubai. We have already observed that circumstantial evidence should be such as each circumstance points to the guilt of the accused and the circumstances taken together form a complete chain, which points to the guilt of the accused and is incompatible with any hypothesis of his innocence. The circumstances relied upon by the prosecution, apart from being insufficient, do not make out a complete chain inconsistent with the innocence of the accused. Under these circumstances, we are of the view that although the evidence creates a strong suspicion against the accused, as he was the only person present in the house, the suspicion cannot take the place of proof.

18. Accordingly, this appeal is allowed. The conviction and sentence passed against the accused are set aside and he is acquitted of all the charges. The accused is in jail. He be forthwith released, if not required in connection with any other matter.

Appeal allowed.

I.L.R. [2008] M. P., 176
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh and Mr. Justice Rakesh Saksena
12 December, 2007

PREM SINGH & ors. ...Appellants*
Vs.
STATE OF M.P. ...Respondent

Penal Code, Indian (45 of 1860) - Sections 302, 304 Part II - Murder or Culpable Homicide not amounting to murder - Deceased and two witnesses were going back to their village after marketing - Deceased sat for urinating - House of appellant happened to be in front of that place - Appellant raised call as to who was there - Appellant started hurling abuses which was objected by deceased and witnesses - Appellant assaulted deceased with a lathi on his chest - Other accused persons inflicted lathi blows on the neck and waist of deceased - 3 ribs were found fractured and lungs were found ruptured at the site of fractures - Cause of death was respiratory failure due to shock resulting from laceration of lungs - Held - Appellant did not know that who is urinating in front of his house - He assaulted the deceased on a spur of moment - There was no premeditation, motive or intention to cause death - Appellant also did not repeat the blow - Exception 4 of Section 300 of I.P.C. is attracted - Appellant convicted under Section 304 Part II - Appeal partly allowed.

While dealing with the question as to what offence has been committed, it is relevant to note that appellant Jawan Singh, who opened the assault on deceased, did not know as to who was urinating in front of his house. He suddenly started abusing the deceased. When deceased and Nahala objected, suddenly, on the spur of the moment, he inflicted Lathi blow on the chest of the deceased. There appears no premeditation, motive or any intention on his part to cause the death of deceased. The incident appears to be the result of the annoyance caused in the

*Cr.A. No. 2316/1998. Jabalpur

mind of accused Jawan Singh by the act of deceased in urinating in front of his house. It has not been said by any witness that appellant Jawan Singh repeated the blow. In such circumstances we are of the view that the prosecution has failed to establish that Jawan Singh assaulted the deceased with the intention of causing his death or with the intention of causing such bodily injuries, which he knew to be likely to cause the death. Thus, Exception 4 of Section 300 of the Indian Penal Code is clearly attracted. However, since he inflicted Lathi blow on the chest of the deceased, it can reasonably be inferred that he knew that it was likely to cause his death or such bodily injury that was likely to cause his death. (Para 16)

Case Referred :

2005 Cr.L.J. 1742.

Saba Naqvi, for the appellants
R.S. Patel, Addl. A.G. for the respondent

Cur.adv.vult

JUDGMENT

The Judgment of the Court was delivered by RAKESH SAKSENA, J.:–Since both the appeals arise out of the common judgment, they are being disposed of by this common order.

2. Appellants Prem Singh and Dhyan Singh of Criminal Appeal No.2315/98 have been convicted under Section 323 of Indian Penal Code and sentenced to rigorous imprisonment for one year whereas appellant Jawan Singh of Criminal Appeal No. 2316/98 has been convicted under Section 302 of Indian Penal Code and sentenced to imprisonment for life.

3. Aforesaid appellants have filed their respective appeals against the judgment dated 18.9.1998, passed by Additional Sessions Judge, Burhanpur, in Sessions Trial No. 102/92.

4. In short, the prosecution story is that complainant Surpal along with his father-in-law Banshi had gone to the market of village Doifodia. In the market, Nahala (PW-5) also met them. After marketing, at about 7 O'clock, all of them were going to village Magardoh. As soon as they reached near that village, Banshi sat there for urination. In front of that place, there happened to be the house of accused Jawan Singh. Jawan Singh raised call as to who was there, whereupon Banshi and Nahala replied that they were guests. Jawan Singh started hurling filthy abuses, whereupon Banshi and Nahala protested saying as to why he was abusing them. Suddenly Jawan Singh came there with a Lathi and assaulted Banshi on his chest. Banshi fell down. Thereafter, Prem Singh and Dhyan Singh also came there and inflicted Lathi blow on his neck and waist. Surpal and Nahala picked up Banshi and took him to the house of Surpal. Other accused persons then pelted stones at them and also on the house. Surpal went to village Dhaba and informed Phundia (PW-1) and along with him went to lodge the report at Police Station Khaknar. Shesh Narayan Tiwari, Sub Inspector, recorded first information report (Ex. P/5) under Sections 307, 336, 147 and 452 of the Indian Penal Code. By the time police reached village Magardoh, Banshi had already

died. After preparing inquest, the dead body of Banshi was sent for postmortem examination. Dr. Arun Kumar (PW-7), Assistant Surgeon, Community Health Centre, Khaknar, performed the postmortem examination and vide his report Ex. P/8 found following injuries on the body of deceased:-

(1) Abrasion on left lower side of chest on lateral aspect. Size 1/4" x 1/4", red in colour.

(2) Abrasions in front of chest 2" below and sternal angle on right side, 1/4" x 1/4", red in colour.

(3) Abrasion with contusion on top of left shoulder. Size 1/4" x 1/4", greenish blue in colour.

On internal examination 5th rib of right side and 6th and 7th ribs of left side were found fractured. Lungs were found ruptured at the site of fractures. Lungs were collapsed. The injuries were ante-mortem in nature and were caused by hard and blunt object. In his opinion, the cause of death was respiratory failure due to shock resulting from laceration of lung on left side and haematoma leading to asphyxia. It was homicidal.

5. After investigation, the charge sheet was filed and the case was committed for trial.

6. Trial Court framed the charge under Sections 147, 302 and 149 of Indian Penal Code. All the accused abjured their guilt and pleaded false implication.

7. During trial, prosecution examined eight witnesses to substantiate the accusation. Mainly the prosecution rested on the evidence of Phundia (PW-1), Surpal (PW-4), Nahala (PW-5), Arun Kumar (PW-7) and Shesnarayan Tiwari, Sub Inspector (PW-8).

8. After appreciating the evidence, learned trial Judge held Jawan Singh guilty under Section 302 of Indian Penal Code and Prem Singh and Dhyan Singh under Section 323 of Indian Penal Code. Except Jawan Singh, all the accused persons were acquitted of the charge under Section 302/149 of Indian Penal Code.

9. Learned counsel for the appellants, Ms. Saba Naqvi, submits that the trial Court has committed error in convicting the appellants. The evidence of all the eye witnesses viz. Surpal and Nahala is not reliable. She submits that the appellant Jawan Singh had no intention to cause death of deceased. The incident had erupted suddenly. The assault on deceased was not premeditated. Since there had been a wordy quarrel between the deceased and the accused, appellant Jawan Singh cannot be held guilty under Section 302 of Indian Penal Code. At the most, it could be a case under Section 304-II of Indian Penal Code. She submits that the appellants Prem Singh and Dhyan Singh had remained in custody for a period of one year and fifteen days during course of the trial and appellant Jawan Singh had remained in custody till 15.8.2002. Thereafter he was released on probation.

10. On the other hand, learned counsel for the State, Shri R.S. Patel, Additional Advocate General, submits that the evidence adduced by the prosecution is reliable. From the evidence of Surpal Singh (PW-4) and Nahala (PW-5), it has been established beyond doubt that appellant Jawan Singh had assaulted the deceased by Lathi causing dangerous injuries, as a result of which he died. He submits that

in the circumstances of the case, the conviction of appellant Jawan Singh, under Section 302 of Indian Penal Code, is fully justified.

11. The conviction of the appellants is mainly based upon the evidence of eye witnesses Surpal (PW-4) and Nahala (PW-5). Surpal (PW-4) testified that while he, Nahala and deceased were going to their village, deceased sat for urination in front of the house of Jawan Singh who hurled filthy abuses, whereupon deceased and Nahala objected. Suddenly Jawan Singh inflicted a Lathi blow on the chest of deceased, as a result of which he fell down. Thereafter, Prem Singh reached there and inflicted Lathi blow on the neck of deceased. Thereafter, Dhyan Singh came and inflicted a Lathi blow on his waist. When he and Nahala were carrying Banshi (deceased) to his house, other accused persons pelted stones at them and also at his house. He went to village Jamunia and along with Phundia went to Police Station Khaknar and lodged the report.

12. The incident had occurred around 7 O'Clock in the evening. First information (Ex. P/5) was lodged by Surpal (PW-4) at 1.30 O'clock in the night. The distance of police station from village Magardoh is around 17 Kms. Thus, it appears that this witness lodged the first information without any delay. The testimony of this witness finds corroboration from the version given by him in the first information report. On perusal of the evidence of Nahala (PW-5), it is seen that he has also repeated the same story, as given by witness Surpal. The evidence of witness Surpal is fully corroborated from the evidence of this witness.

13. Dr. Arun Kumar (PW-7), who performed the postmortem examination of the dead body of Banshi, found three abrasions on the chest and shoulder of the deceased. 5th Rib of the right side and 6th and 7th ribs of the left side were found fractured. On the site of fractures, the lungs of the deceased were found lacerated. The death has been caused due to asphyxia. Though, according to this witness, the death was homicidal, but he did not say that the injuries found on the body of the deceased were sufficient in the ordinary course of nature to cause death of the deceased.

14. The evidence of Surpal (PW-4) finds support from the medical evidence as well as from the evidence of Phundia (PW-1). Phundia has categorically deposed that Surpal had come to his house at about 11 O'clock in the night and informed him about the incident and then both of them went to lodge the report at police station. Along with the police they had gone to village Magardoh, where they found Banshi lying dead. The evidence of all the aforesaid witnesses appear natural and trustworthy.

15. From appraisal of the aforesaid evidence, it has been amply established that the appellants had assaulted the deceased by means of Lathis. It has also been established that as a result of injury caused by accused Jawan Singh, ribs of deceased were fractured and his lungs were ruptured by the broken ribs, which caused asphyxia, resulting into his death.

16. While dealing with the question as to what offence has been committed, it is relevant to note that appellant Jawan Singh, who opened the assault on deceased, did not know as to who was urinating in front of his house. He suddenly started abusing the deceased. When deceased and Nahala objected, suddenly, on the

spur of the moment, he inflicted Lathi blow on the chest of the deceased. There appears no premeditation, motive or any intention on his part to cause the death of deceased. The incident appears to be the result of the annoyance caused in the mind of accused Jawan Singh by the act of deceased in urinating in front of his house. It has not been said by any witness that appellant Jawan Singh repeated the blow. In such circumstances we are of the view that the prosecution has failed to establish that Jawan Singh assaulted the deceased with the intention of causing his death or with the intention of causing such bodily injuries, which he knew to be likely to cause the death. Thus, Exception 4 of Section 300 of the Indian Penal Code is clearly attracted. However, since he inflicted Lathi blow on the chest of the deceased, it can reasonably be inferred that he knew that it was likely to cause his death or such bodily injury that was likely to cause his death.

17. In *Ravi Kumar vs. State of Punjab*-2005 CRI.L.J. 1742, the Apex Court held that for applicability of Exception 4 of Section 300 of Indian Penal Code, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. Heat of passion requires that there must be no time for the passion to cool down.

18. In view of the above discussion, we are of the considered opinion that the conviction of the appellant Jawan Singh under Section 302 of Indian Penal Code is not justified. In the factual background of the case, it will be appropriate to convict the appellant Jawan Singh under Section 304-II of Indian Penal Code instead of Section 302 of Indian Penal Code, as has been done by the trial Court. Accordingly, his conviction is altered to Section 304-II of Indian Penal Code. His sentence of life imprisonment is set aside, instead he is sentenced to the period of rigorous imprisonment of five years, already undergone by him. He shall be released forthwith, if not required in any other case. His appeal (Criminal Appeal No. 2316/98) is allowed to the aforesaid extent.

19. So far as the conviction of appellants Prem Singh and Dhyan Singh under Section 323 IPC is concerned, it has been established from the above evidence that they had caused simple injuries to deceased after the fatal injury was caused by appellant Jawan Singh. The impugned order of conviction and sentence, in this regard, passed by the trial Court is affirmed. Their appeal (Criminal Appeal No. 2315/98) is dismissed. They have already served out their jail sentences.

20. Copy of this order be kept in the file of Criminal Appeal No. 2316/98.

I.L.R. [2008] M. P., 180
CIVIL REVISION
Before Mr. Justice K.K. Lahoti
2 November, 2007

BABLU MANDAL ...Applicant*
Vs.
SMT. VANDANA BHOWMIK ...Non-Applicant

A. Civil Procedure Code (5 of 1908)–Order IX Rule 13, Indian

*C.R. No 257/2007. Jabalpur

Succession Act, 1925, Sections 263, 268 - Whether provisions of Order IX Rule 13 C.P.C. are applicable in respect of setting aside ex parte order in probate proceedings - Applicant filed application for grant of probate on the basis of will allegedly executed in his favour by husband of respondent - Summons issued to respondent were received back with endorsement that she has refused to accept the same - Ex parte order was passed - Respondent filed application for setting aside ex parte order on the ground that no summon was tendered or served on her - Applicant objected the maintainability of application for setting aside exparte order - Held - Section 268 of Act, 1925 provides that proceedings regarding grant of probate and letters of administration shall be regulated so far as the circumstances of case permit, by C.P.C. - Section 263 of Act, 1925 gives wide power to Court to revoke or annul a grant for just cause - Though provision of O. 9 of C.P.C. not been made applicable but Section 263 provides that grant of probate may be revoked or annulled for just cause - Non service of summons or defected service or fraudulent service are just cause within meaning of Section 263(a) of Act, 1925 - In order to show sufficient cause for defendant for non appearing before Court, the provisions of O. 9 Rule 13 read with Section 263 of Act, 1925 can be invoked - Revision dismissed.

On the basis of the aforesaid judgments, it is submitted by the petitioner that provisions of Order 9 C.P.C are not applicable in the case and the Court below erred in entertaining the application under Order 9 Rule 13 C.P.C. But Section 268 of the Act provide that the proceedings of the Court of District Judge in relation to the granting of probate and letters of administration shall save as otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908. Section 141 of C.P.C provides the procedure in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. In view of the aforesaid specific provision under Section 268 of the Act and Section 141 of the C.P.C., the matter may be examined in the light of provisions contained in Section 263 of the Act. Though the provision of Order 9 of the C.P.C. has not been made specifically applicable,but Section 263 of the Act provides that the grant of probate may be revoked or annulled for just cause and just cause shall be deemed to exist where the proceedings were defective in substance. If the probate was obtained by non service, or defected service or by a fraudulent service on the other side, it can be very well be treated as a just cause within the meaning of Section 263(a) of the Act. So where the provisions of Section 263 of the Act are wide in nature and meet out all the exigencies including the exigencies enumerated in order 9 Rule 13 of the C.P.C. it may very well be found that the provision of Order 9 Rule 13 C.P.C can be invoked in a proceeding for revocation or annulment A grant of probate on showing that the proceedings were defective in substance can be revoked or annulled. In the opinion of this Court, the provisions of Order 9 Rule 13 of the C.P.C are not directly applicable, but to show that the service on the defendant was defective or there was a sufficient cause to the defendant for non appearing before the Court when an ex parte proceedings were directed against the applicant and for this limited purpose, the provisions of Order 9 Rule 13 read with Section 263 of the Act can be invoked.

B. Words and Phrases - Wrong mentioning of provision - Mere wrong mention of provision when power can be exercised under different provision by itself is not sufficient ground to deny justice.

It is the settled law that mere mention of wrong provision of law when the power can be exercised under a different provision by itself is not sufficient ground to deny justice in the matter and merely the application which ought to have been filed under Section 263 of the Act was filed under Order 9 rule 13 C.P.C will not be a ground to reject the application under Order 7 rule 11 of the C.P.C. If the facts stated in the application are sufficient, then it is a just cause for revocation or annulment of a grant in favour of a party. In this case, the respondent had stated that she never refused the summon of the Court as she was available at home and no one approached to her for service of summon. In the opinion of this Court, it was a just cause for invoking the jurisdiction of the Court under Section 263 of the Act. (Para 11)

Cases Referred :

(1) AIR 1971 Patna 391, (2) AIR 1985 Calcutta 275, (3) AIR 1997 SC 1055, (4) AIR 1986 Karnataka 167, (5) AIR 1999 Kerala 320.

Ashok Lalwani, for the applicant
Shobhit Aditya, for the non-applicant

Cur.adv.vult

ORDER

K.K. LAHOTI, J. :–This revision is directed against the order dated 20th July, 2007 by the Second Additional District Judge, Bhopal in case no.MJC No.93/2007 by which petitioner's application under Order 7 rule 11 C.P.C was rejected.

2. The facts of the case are as under:

(a) Late Sukhram Bhowmik was husband of respondent Smt. Vandana Bhowmik. He died on 17.12.2003. The applicant filed an application for grant of probate on the basis of will dated 22.4.2003 stated to be executed by late Sukhram Bhowmik in his favour by which first floor of a dwelling house MIG 48, Sector 3-A, situated at Saket Nagar, Bhopal stated to be bequeathed in favour of the applicant.

(b) The application filed before the Second Additional District Judge was registered as M.J.C.17/2006 in which summon was issued to the respondent/non-applicant. The summon was returned back with the report that respondent refused to accept the same and on the basis of this, respondent was proceeded an ex parte and final order dated 30.10.2006 Annexure R/3 was passed against the respondent thereby a probate was granted in favour of the petitioner.

3. The respondent asked the petitioner to vacate the accommodation which was in possession of the petitioner, as an employee of husband of respondent. The petitioner informed to the respondent that the Court had issued probate in his favour on basis of will which was executed by Sukh Ram Bhowmik. On getting this knowledge, respondent after seeking legal advice, filed an application under

Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred as C.P.C.) on 15.3.2007 for setting aside ex parte order dated 30th October, 2006 on the ground that no summon was tendered or served on the respondent on 14.3.2006. It was alleged by respondent that she was at her home along with her sister on that date, but no one came to her to serve the summon. The will alleged by the petitioner is a forged will and the petitioner obtained probate without information to respondent/non-applicant. On getting information in respect of proceedings, the respondent filed an application before the Court along with an application under Section 5 of the Limitation Act to condone the delay occurred in filing the application, supported by documents regarding the treatment of the respondent. Copy of the application is on record as Annexure R/4.

4. The application was registered as MJC No.93/2007 and the trial Court issued notice to the petitioner petitioner filed reply denying the allegations of the application and has also filed an application under Order 7 rule 11 of C.P.C alleging that the provisions of Order 9 rule 13 of C.P.C are not applicable in the proceedings of probate, under provisions of Indian Succession Act, 1925 and the application be dismissed.

5. The trial Court considering the facts of the case and relying on judgment of Patna High Court in *Mst. Tribeni Kuer and another vs. Shankar Tiwari and others* AIR 1971 Patna 391 and a judgment of Calcutta High Court in *Vimla Kantasen Gupta vs. Sarojini Koner* AIR 1985 Calcutta 275 found that the provisions of Order 9 of the C.P.C are applicable in the proceedings of probtate under the Indian Succession Act, 1925 and rejected the application under Order 7 rule 11 of the C.P.C. This order is under challenge in this petition.

6. The learned counsel appearing for the petitioner submitted (a) that the provisions of Order 9 rule 13 C.P.C are not applicable in the proceedings of probate and the Court below erred in rejecting the application filed by the petitioner.(b) That when the provision of order 9 rule 13 is not applicable, the rejection of the application was misconceived. It is submitted that this revision be allowed, the impugned order be set aside, and the application under Order 7 Rule 11 C.P.C filed by the petitioner be allowed and the application filed by respondent under Order 9 rule 13 C.P.C.be dismissed.

7. The learned counsel appearing for the respondent supported the order passed by the Court below and submitted that the provisions of Order 9 rule 13 of the C.P.C are applicable in the present case and the Court below has rightly rejected the application filed by the petitioner. In the case, no summon was served on the respondent and the petitioner by manipulation had got endorsed the summon as 'refused' while in fact, the respondent who is a widow old lady was sick and was available at home and there was no question of refusal of the summon. The application was filed under Order 9 rule 13 C.P.C. showing sufficient cause for setting aside ex parte order. Reliance is placed to Apex Court judgment in *Mrs. Nalini navin Bhagwati vs. Chandravadan M. Mehta* (AIR 1997 SC 1055), *Smt. Tribeni Kaur vs. Shankar Tiwari* AIR 1971 Patna 391, and *Bimla Kanta Sengupta vs. Sarojini Koner* AIR 1985 Calcutta 275 and submitted that this revision may be dismissed with costs.

8. In this case, only question is whether the provisions of Order 9 Rule 13 C.P.C are applicable in respect of setting aside ex parte order in the probate proceedings under Chapters II and III of the Indian Succession Act, 1925.

9. Section 268 of the Act provides that the proceedings of the Court of District Judge in relation granting probate and letters of administration shall save as otherwise provided , be regulated, so far as the circumstances of the case perm t, by the Code of Civil Procedure, 1908. So the procedure envisaged in the C P.C. 1908 has been made applicable and by virtue of Section 141 of the C.P.C., th procedure provided in the C.P.C in regard to suits shall be followed as far as it made applicable, in all proceedings in any Court of civil jurisdiction In view of the aforesaid, the procedure envisaged in the C.P.C is applicable and regulate the proceedings of Chapters II and III of the Act. As per Section 2 (bb) "District Judge" has been defined a Judge of a principal Civil Court of original jurisdiction. Order 9 rule 13 C.P.C provides setting aside decree ex parte against defendant and it gives right to the defendant to apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, and if the Court is satisfied that the summon was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms and condition. The provision of Order 9 rule 13 provides two contingencies: summons sent was not duly served or the applicant was prevented by any sufficient cause from appearing when the case was called for hearing. Under Section 263 of the Indian Succession Act, 1925 revocation or annulment of grant can be directed on existence of a just cause. Section 263 reads thus:

> **263. Revocation or annulment for just cause.-** The grant of probate or letter of administration may be revoked or annulled for just cause.
>
> *Explanation.-* Just cause shall be deemed to exist where-
>
> (a) the proceedings to obtain the grant were defective in substance; or
>
> (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
>
> (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
>
> (d) the grant has become useless and inoperative through circumstances; or
>
> (e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."

10. Section 263 gives wide power to the Court, who granted probate or letters of administration to revoke or annul a grant for just cause.Just cause has been explained in Section 263 itself. From reading of Rule 9 Order 13 of the Code, it is apparent that Order 9 Rule 13 provides power to the Court to set aside ex parte decree in specific circumstances, but under Section 263 of the Act, the Court is empowered to revoke or annul a grant for just cause, which has been explained under Section 263 of the Act. The explanation under Section 263 is exhaustive and on recording a finding that there exists a just cause, the Court granting probate or letters of administration is having jurisdiction to revoke or annul such grant. Section 263 provides that on existence of fact that the grant was obtained in proceedings which were defective in substance, or the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case, or the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the ground, though such allegation was made in ignorance or inadvertently, or the grant has become useless and inoperative through circumstances, or the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of II or III Part of the Act, or the inventory or account furnished to Court was untrue in a material respect, the grant of probate may be revoked or annulled.

The Explanation also illustrate various circumstances of just cause in which the grant may be revoked or annulled. If service on the other side was defective or without a due service on the respondent, the probate was obtained , then the aforesaid ground in substance covered under explanation (a) and the proceedings can be treated as defective, and probate can be revoked under Section 263 of the Act. From the perusal of the aforesaid facts, it is apparent that the provisions of Section 263 of the Act are wide and exhaustive, and gives jurisdiction to the Court to revoke or annul the grant for just cause, and non service or defective service is one among the grounds on which probate can be revoked or annulled.

11. It is the settled law that mere mention of wrong provision of law when the power can be exercised under a different provision by itself is not sufficient ground to deny justice in the matter and merely the application which ought to have been filed under Section 263 of the Act was filed under Order 9 rule 13 C.P.C will not be a ground to reject the application under Order 7 rule 11 of the C.P.C. If the facts stated in the application are sufficient, then it is a just cause for revocation or annulment of a grant in favour of a party. In this case, the respondent had stated that she never refused the summon of the Court as she was available at home and no one approached to her for service of summon. In the opinion of this Court, it was a just cause for invoking the jurisdiction of the Court under Section 263 of the Act.

12. Now, the question may be considered whether the provisions of Order 9 rule 13 of the C.P.C are applicable in the matter. The decision cited may be seen firstly. The Apex Court in *Nalini Navin Bhagwati* (supra) held that to revoke probate or letter of administration a miscellaneous application would lie which

shall be decided on the facts either summarily or after recording evidence. In this case, the Apex Court had not considered this aspect that for revocation of probate whether the provisions of Order 9 rule 13 can apply or not? The aforesaid judgment is on a different point.

In *Smt. Triveni Kuer* (supra), the Division Bench of Patna High Court held in para 9 :

> Considering the circumstances of the case, I am of the opinion that the provisions of Order 9, Rule 13 of the Code of Civil Procedure are applicable to probate proceedings and, as such, it cannot be stated that the learned District judge has no jurisdiction to set aside the ex parte revocation order passed in Revocation case".

In *Bimla Kanta Sengupta*(supra), a Division Bench of Calcutta High Court, considering this aspect held thus:

> ".. .. ..
>
> We accordingly, hold that in view of S.141 of the Code and particularly in view of Ss. 268 and 295 of the Indian Succession. Act, R.9 of O.9 of the Code is applicable to a probate proceedings dismissed for default and may be pressed into action for its restoration."

13. In *Employment Officer, Vs. S.Evarinathan*(AIR 1986 Karnataka 167) , the Karnataka High Court held that the succession certificate is neither decree nor order and cannot be executed under Order 21 of the C.P.C. In *V.M. Skaria v. K.T.George* :AIR1999 Kerala 320, the Kerala High Court held that the order granting or refusing latter of administration is not decree. Mere fact that the application on being contentious was converted into suit does not make an order a decree.

On the basis of the aforesaid judgments, it is submitted by the petitioner that provisions of Order 9 C.P.C are not applicable in the case and the Court below erred in entertaining the application under Order 9 Rule 13 C.P.C. But Section 268 of the Act provide that the proceedings of the Court of District Judge relation to the granting of probate and letters of administration shall save as otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908. Section 141 of C.P.C provides the procedure in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. In view of the aforesaid specific provision under Section 268 of the Act and Section 141 of the C.P.C., the matter may be examined in the light of provisions contained in Section 263 of the Act. Though the provision of Order 9 of the C.P.C. has not been made specifically applicable,but Section 263 of the Act provides that the grant of probate may be revoked or annulled for just cause and just cause shall be deemed to exist where the proceedings were defective in substance. If the probate was obtained by non service, or defected service or by a fraudulent service on the other side, it can be very well be treated as a just cause within the meaning of Section 263(a) of the Act. So where the provisions of Section 263 of the Act are wide in nature and meet out all the exigencies including the exigencies enumerated in order 9 Rule 13

of the C.P.C. it may very well be found that the provision of Order 9 Rule 13 C.P.C can be invoked in a proceeding for revocation or annulment A grant of probate on showing that the proceedings were defective in substance can be revoked or annulled. In the opinion of this Court, the provisions of Order 9 Rule 13 of the C.P.C are not directly applicable, but to show that the service on the defendant was defective or there was a sufficient cause to the defendant for non appearing before the Court when an ex parte proceedings were directed against the applicant and for this limited purpose, the provisions of Order 9 Rule 13 read with Section 263 of the Act can be invoked.

14. In view of the aforesaid discussion, the Court below has rightly rejected the application filed by the applicant under Order 7 rule 11 of the Code in which no error of jurisdiction is found. This revision is without merit and is accordingly dismissed with costs.

I.L.R. [2008] M. P., 187
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Vyas
30 November, 2007

MUNSHI and ors. ...Applicants*
Vs.
STATE OF M.P. ...Non-Applicant

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

A temporary custody was sought and *prima facie* it was found that present petitioners are the rightful owners of the cattles then they should not have been asked to deposit the value of the cattles, because when they themselves are prima facie rightful owners of the cattles and no one else has claimed the custody, then the cattles should have been given in temporary custody to the present petitioners after obtaining proper security and no more than that. It is apparent that the condition imposed by learned Trial Court is extremely harsh and it is not possible to comply such condition and to deposit thousands of rupees for taking the cattles even in temporary custody. (Para 4)

A.K. Saraswat, for the applicants
Raghuvir Singh Chauhan, for the non-applicant

Cur.adv.vult

ORDER

S.C. Vyas, J. :–The short question which is involved in this petition is only this that whether a condition of depositing value of the cattles in cash can be imposed while handing over the cattles in temporary custody u/S. 451 and 457 of the Cr.P.C.

*M.Cr.C. No. 5172/2007. Indore

2. Learned counsel for the petitioners submitted that Additional Sessions Judge, Mandsaur allowed the Criminal Revision no.275/07 and 278/07 moved by the present petitioners for temporary custody of the cattles to be handed over to the present petitioners but at the same time has also imposed a condition that Rs.3000/- for each cattle should be deposited by the present petitioners in the Court in cash. He submitted that this condition is quite harsh and it is not possible for the petitioners to comply this condition and to deposit the entire amount in cash. He submitted that in a subsequent order which has been passed regarding temporary custody of some other cattles which were seized in the same crime, such condition was not imposed and therefore the order impugned is discriminating and is liable to be quashed. He has drawn attention of this Court towards the order dated 22.09.07 passed in Criminal Revision No.286/07 by Third Additional Sessions Judge, Mandsaur.

3. It appears that crime no.220/07 has been registered by police YD Nagar, Mandsaur in respect of the same cattles and the cattles were seized and offence was registered under different sections of Madhya Pradesh Krishi Pashu Parikshan Adhiniyam, Madhya Pradesh Gowansh Pratishedh Adhiniyam as well as Prevention of Cruelty on Animals Act, etc. Present petitioners claimed temporary custody of the cattles on the ground that they are the rightful owners. Earlier their application was dismissed by Court of Judicial Magistrate First Class and criminal revision preferred by them was allowed and the cattles were ordered to be given in temporary custody to the present petitioners. In that order of temporary custody the condition which has been challenged in this petition has been imposed.

4. From the perusal of the order passed in two different criminal revision by the two different Court of Sessions, in respect of same crime number clearly shows that in the subsequent order no such condition of depositing cash amount has been imposed and therefore the order which has been passed in respect of the present petitioners clearly appears discriminating and is liable to be quashed on this ground alone. Apart from this a temporary custody was sought and *prima facie* it was found that present petitioners are the rightful owners of the cattles then they should not have been asked to deposit the value of the cattles, because when they themselves are *prima facie* rightful owners of the cattles and no one else has claimed the custody, then the cattles should have been given in temporary custody to the present petitioners after obtaining proper security and no more than that. It is apparent that the condition imposed by learned Trial Court is extremely harsh and it is not possible to comply such condition and to deposit thousands of rupees for taking the cattles even in temporary custody.

5. Therefore, on both the grounds the petition succeeds and is allowed. The condition imposed by the Revisional Court for depositing the cash amount is hereby quashed and at the place of this condition petitioners are permitted to produce solvent security of that amount to the satisfaction of the concerning Court.

6. With these directions the petition is disposed of.
