I. L. R. (2008) MADHYA PRADESH

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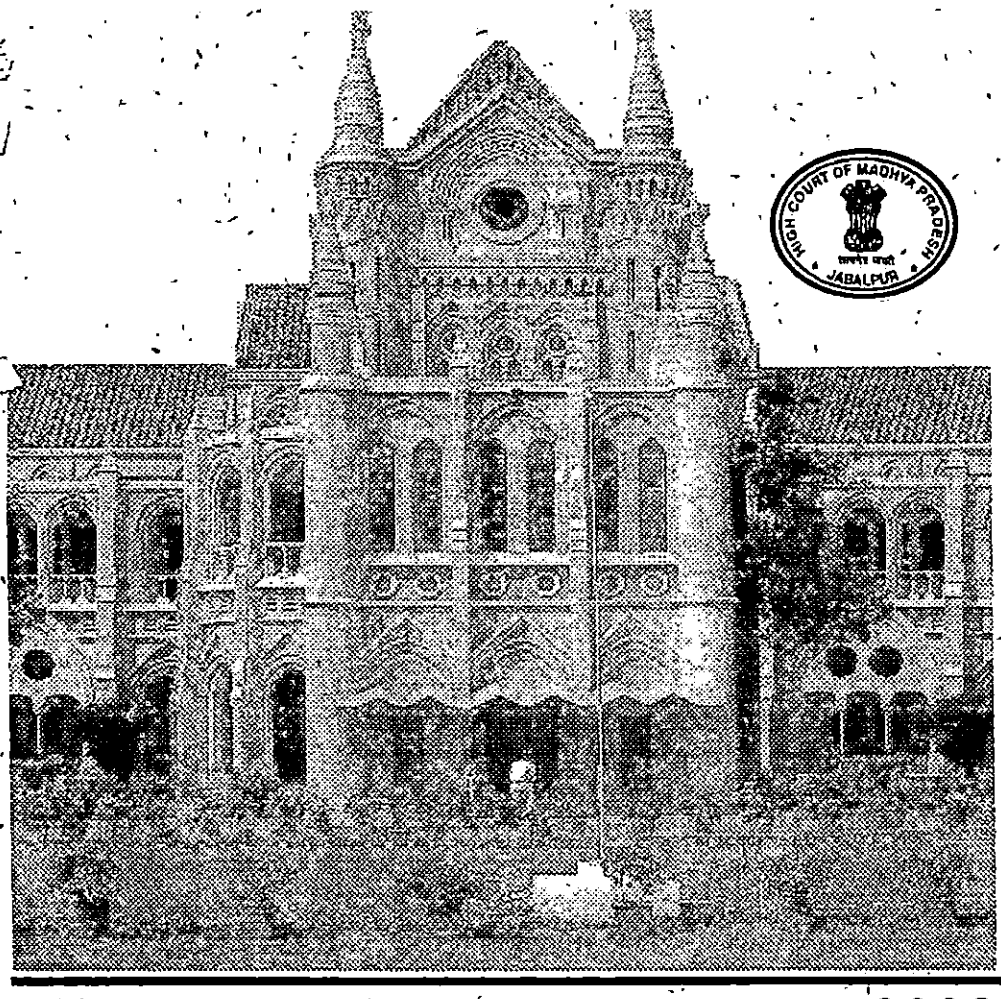

July (Price Rs.30) 2008
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K.S. Chauhan, J

GYASI LAL NAPIT
Vs.
STATE OF M.P.

A. Prevention of Food Adulteration Act (37 of 1954), Section 13(2) - *Report of Public Analyst - Report of Public Analyst sent by U.P.C. - Applicant has not denied receipt of the same - Not exercised his right for getting part of sample analysed by Central Laboratory - Applicant has not been prejudiced in any way.* 1999(1) MPLJ 613, 2002(4) MPLJ 523, 2005(3) MPLJ 458, 2005(4) MPLJ 276 (Rel.)

क. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 13(2) – लोक विश्लेषक का प्रतिवेदन – खाद्य विश्लेषक का प्रतिवेदन यू.पी.सी. द्वारा भेजा गया – आवेदक ने उसके मिलने से इंकार नहीं किया है – केन्द्रीय प्रयोगशाला से नमूने के अंश का विश्लेषण करा पाने का अपना अधिकार प्रयोग नहीं किया – आवेदक पर किसी तरह का प्रतिकूल प्रभाव नहीं पड़ा। 1999 (1) MPLJ 613, 2002(4) MPLJ 523, 2005(3) MPLJ 458, 2005(4) MPLJ 276 (अवलंबित)

B. Prevention of Food Adulteration Act (37 of 1954), Section 16(1)(a)(ii) - ***Delay in prosecution*** *- Sample of milk collected on 25.04.1987 - Complaint filed on 15.03.1988 - Nothing on record to show that another part of sample became unfit for analysis - No question to quash complaint - Revision dismissed.* 1999(1) MPLJ 669 (Rel.).

ख. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा **16(1)(a)(ii)** – अभियोजन में विलम्ब – दूध का नमूना 25.04.1987 को लिया गया – परिवाद 15.03.1988 को पेश – अभिलेख पर यह दर्शित करने के लिए ऐसा कुछ नहीं कि नमूने का दूसरा भाग विश्लेषण के लिये अनुपयुक्त हो गया – परिवाद अभिखण्डित करने का प्रश्न ही नहीं – पुनरीक्षण खारिज। 1999(1) MPLJ 669 (अवलंबित)

Satish Chaturvedi, for the applicant.
A.L. Patel, G.A., for the non-applicant/State.

***Cr.R. No.371/1997 (Jabalpur), D/- 25 March, 2008.**

(55)

N.K. Mody, J

KRISHNA (Smt.) & ors.
Vs.
CHIEF MUNICIPAL OFFICER, NAGAR PANCHAYAT, RAU & ors.

Motor Vehicles Act (59 of 1988), Sections 2(44), 166 - *Accident occurred due to rash and negligent driving of Tractor - Deceased was rolled over by the wheel of tanker which was attached to a tractor - Tribunal has exonerated the insurer on the ground that tractor was insured but not the tanker - Held - If there would not have been any rash and negligent driving of tractor, the tanker would not have moved - Thus, accident was combined effect of use of tractor & tanker -Insurer held liable.*

मोटर यान अधिनियम (1988 का 59), धारायें 2(44), 166 – ट्रेक्टर के उतावलेपन व असावधानी से चलाने से दुर्घटना घटी – ट्रेक्टर से जुड़े टेंकर के पहिये से मृतक कुचला था – अधिकरण ने बीमाकर्ता को इस आधार पर मुक्त किया कि ट्रेक्टर बीमित था लेकिन टेंकर नहीं – अभिनिर्धारित – यदि ट्रेक्टर को उतावलेपन व उपेक्षापूर्वक से न चलाया जाता तो टेंकर नहीं चलता – अतः दुर्घटना ट्रेक्टर व टेंकर के उपयोग के संयुक्त प्रभाव से घटी – बीमाकर्ता उत्तरदायी।

V.S. Chouhan, for the appellants.
N.K. Maheshwari, for the respondent No.1.
R.S. Suroliya with *Milind Phadke,* for the respondent No.3.

***M.A. No.2857/2004 (Indore), D/- 15 April 2008.**

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(56)

Mrs. Sushma Shrivastava, J

LAVKESH REDDY
Vs.
STATE OF M.P.

Arms Act (54 of 1959), Section 25(1-B)(b) - ***Possession of arms of specified description*** - *Applicant was having Khukri type knife in his hand and was intimidating public - Nothing on record that blade of knife was more than 6" long or 2" wide - Held - Courts below erred in holding that applicant was found in possession of knife having blade of prohibited dimensions as specified in notification issued u/s 4 - Applicant acquitted - Revision allowed.*

आयुध अधिनियम (1959 का 54), धारा 25(1–बी)(बी) – विनिर्दिष्ट किस्म के आयुध का कब्जा – आवेदक के हाथ में खुकरी के प्रकार का चाकू था और वह जनता को डरा रहा था – अभिलेख पर ऐसा कुछ नहीं कि चाकू का फल 6" से अधिक लम्बा या 2" से अधिक चौड़ा था – अभिनिर्धारित – अधीनस्थ न्यायालयों द्वारा यह अभिनिर्धारित करना कि अधिनियम की धारा 4 के अन्तर्गत जारी की गई अधिसूचना में विनिर्दिष्ट प्रतिबन्धित आकार के फल का चाकू आवेदक के कब्जे में पाया गया, त्रुटिपूर्ण है – आवेदक दोषमुक्त – पुनरीक्षण मंजूर।

Sanjeev Saxena, for the applicant
Sushila Paliwal, G.A., for the non-applicant.

***Cr.R. No.864/1998 (Jabalpur), D/- 3 March, 2008.**

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(57)

R.C. Mishra, J.

NISHANT
Vs.
PRAKASH CHAND

Negotiable Instruments Act (26 of 1881), Section 138 - ***Cause of Action*** *- Complainant presented cheques which were dishonoured - Issued notice to the applicant - Did not file the complaint but presented the cheques once again - Issued second notice to the applicant - Filed complaint thereafter - Held - If dishonour of cheque has once snowballed into a cause of action, it is not permissible for a payee to create another cause of action with same cheque - It was first notice of demand that gave rise to cause of action - No application for condonation of delay filed - It would not be possible to convict applicant for the offence - Proceedings quashed.* AIR 1998 SC 3043, (2004) 13 SCC 498, (2005) 4 SCC 417. (Ref.)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – वाद कारण – परिवादी ने चेक पेश किये जो अनादरित हुए – आवेदक को सूचनापत्र जारी हुआ – परिवाद प्रस्तुत नहीं किया बल्कि पुनः चेक पेश किये – आवेदक को दूसरा सूचनापत्र जारी किया गया – उसके उपरांत परिवाद पेश किया – अभिनिर्धारित – यदि चेक का अनादरण होकर एक बार वाद कारण उत्पन हो गया, तो पाने वाले को उसी चेक से अन्य वाद कारण सृजन करने की अनुमति नहीं दी जा सकती है – मांग का पहला सूचनापत्र था जिससे वाद कारण उत्पन्न हुआ – विलम्ब को क्षमा किये जाने हेतु कोई आवेदन पेश नहीं – आवेदक को अपराध के लिए दोषसिद्ध करना संभव नहीं होगा – कार्यवाही अभिखण्डित।

I. Hussain, for the applicant.
R.P. Khare, for the non-applicant.

M.Cr.C. No.1810/2007 (Jabalpur) D/-14 March, 2008

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(58)

Mrs. Sushma Shrivastava, J

RADHIKA PRASAD GUPTA
Vs.
STATE OF M.P.

A. **Evidence Act (1 of 1872), Section 3 -** ***Evidence - Sole Testimony of Food Inspector*** *- Corroboration of main witness by independent witness is a rule of prudence and not requirement of law - Testimony of Food Inspector cannot be rejected for want of corroboration by independent witness.* AIR 2004 SC 1236 (Rel.)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य – खाद्य निरीक्षक की एकमात्र साक्ष्य – मुख्य साक्षी का स्वतंत्र साक्षी से समर्थन दूरदर्शिता का नियम है विधि की अपेक्षा नहीं – खाद्य निरीक्षक का अभिसाक्ष्य स्वतंत्र साक्षी के समर्थन के अभाव में निरस्त नहीं किया जा सकता है। AIR 2004 SC 1236 (अवलंबित)

B. Prevention of Food Adulteration Act (37 of 1954), Section 2(xiii) - *Sale - Packets of Turmeric Powder lying at the shop - In absence of any evidence it cannot be held that turmeric powder kept along with other articles was not intended for sale or applicant had bought them for personal use - Even sale of an article to a Food Inspector for analysis is also a sale.* AIR 1973 SC 484 (Rel.)

ख. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 2(xiii) – विक्रय – पिसी हल्दी के पैकेट दुकान पर रखे हुए – किसी साक्ष्य के अभाव में यह अभिनिर्धारित नहीं किया जा सकता कि अन्य वस्तुओं के साथ रखी पिसी हल्दी विक्रय के लिये आशयित नहीं थी अथवा आवेदक ने उन्हें निजी उपयोग के लिए खरीदा था – यहां तक कि खाद्य निरीक्षक को विश्लेषण हेतु किसी वस्तु का विक्रय भी विक्रय ही है। AIR 1973 SC 484 (अवलंबित)

C. Prevention of Food Adulteration Act (37 of 1954), Section 2(xiia) - *Primary Food - Turmeric Powder cannot be held to be a primary food.* FAC 1981(1) All 16 (Rel.)

ग. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 2(xiia) – प्राथमिक खाद्य – पिसी हल्दी प्राथमिक खाद्य होना अभिनिर्धारित नहीं किया जा सकता। FAC 1981(1) All 16 (अवलंबित)

P.R. Bhave with *B.P. Yadav,* for the applicant.
R.S. Shukla, Panel Lawyer, for the non-applicant/State.

***Cr.R. No.934/98 (Jabalpur), D/- 8 May, 2008.**

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(59)

Arun Mishra & Mrs. Sushma Shrivastava, JJ

RAJENDRA
Vs.
STATE OF M.P.

A. Evidence Act (1 of 1872), Section 3 - *Appreciation of Evidence - Evidence of mother of deceased cannot be disbelieved merely on the ground that she was not mentioned as an eye witness in FIR - More so, her presence on the place of occurrence as an eye witness is also borne out from the testimony of another witness.*

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – मृतक की माँ के साक्ष्य पर केवल इस आधार पर अविश्वास नहीं किया जा सकता कि उसका नाम प्रथम सूचना रिपोर्ट में प्रत्यक्षदर्शी साक्षी के रूप में उल्लिखित नहीं – अन्य साक्षियों के साक्ष्य से भी उसकी घटना स्थल पर प्रत्यक्षदर्शी साक्षी के रूप में उपस्थिति निश्चित होती है।

B. Evidence Act (1 of 1872), Section 3 - *Evidence - Related and interested witness - Evidence of mother of deceased cannot be discarded merely on the ground that she is closely related to deceased - If it is otherwise found to be trustworthy and credible.* 2006 AIR SCW 4143 (Ref.).

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य – रिश्तेदार और हितबद्ध साक्षी – मृतक की माँ की साक्ष्य केवल इस आधार पर अमान्य नहीं की जा सकती कि वह मृतक की करीबी रिश्तेदार है – यदि यह अन्यथा विश्वसनीय और प्रमाणिक होना पाया जाए। 2006 AIR SCW 4143 (संदर्भित)

C. Penal Code (45 of 1860), Sections 302, 304 Part II - ***Murder or culpable homicide not amounting to murder*** - *Appellant having no prior enmity with deceased - Incident occurred on account of intermeddling with water pipe leading to altercation and scuffle - Appellant pushing deceased into empty well - Deceased died due to head injury - As deceased was pushed in empty well it could be inferred that appellant had knowledge that his act was likely to cause death - Act of appellant falls under Section 304 Part II - Appellant acquitted under Section 302 and convicted under Section 304 Part II.*

ग. दण्ड संहिता (1860 का 45), धारायें 302, 304 भाग दो – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अपीलार्थी की मृतक से कोई पूर्व–शत्रुता नहीं – घटना पानी के पाइप के साथ दखलंदाजी करने के कारण घटित और वाग्युद्ध बढ़कर हाथापाई हुई – अपीलार्थी ने मृतक को खाली कुऐं में धकेल दिया – सिर में आयी उपहति के कारण मृतक की मृत्यु हुई – चूंकि मृतक को खाली कुऐं में धकेला गया इस पर यह निष्कर्ष निकाला जा सकता है कि अपीलार्थी को यह ज्ञान था कि उसके कृत्य से मृत्यु कारित होना संभाव्य था – अपीलार्थी का कृत्य धारा 304 भाग दो के अन्तर्गत आता है – अपीलार्थी धारा 302 के अन्तर्गत दोषमुक्त और धारा 304 भाग दो के अन्तर्गत दोषसिद्ध।

Siddharth Datt, for the appellant.
Sudesh Verma, G.A., for the respondent.

***Cr.A. No.466/93 (Jabalpur), D/- 9 April, 2008.**

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(60)

R.C. Mishra, J.

RAMPRASAD
Vs.
SMT. SUDHABEN & ors.

A. Negotiable Instruments Act (26 of 1881), Sections 9, 138 - ***'Holder in due course'*** - *Cheque drawn in favour of person who is dead - Complaint on behalf of his legal heirs maintainable.* 1996 Cr.L.J. 3153, 2004 (1) 422 (Ker), AIR 1964 Puj 497 (Ref.)

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 9, 138 – 'सम्यक् अनुक्रम धारक' – चेक जिस व्यक्ति के पक्ष में दिया गया उसकी मृत्यु हो गई – उसके वैध वारिसों की ओर से परिवाद पोषणीय।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482, Negotiable Instruments Act, 1881, Section 138 - *Legally enforceable debt - Prosecution cannot be quashed at threshold for dishonour of cheque issued for repayment of a time barred debt - Not possible to conclude that cheques in question were drawn in respect of debt or liability which was completely barred from being enforced.* 2001 Cr.L.J. 24, (2003) 2 Ker LT 613, 2007 Cr.L.J. 2776, (2002) 2 SCC 642 (Ref.)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, परक्राम्य लिखत अधिनियम, 1881, धारा 138 – वैध रूप से प्रवर्तनीय ऋण – अवधि बाधित ऋण के प्रतिसंदाय के लिये जारी चेक के अनादर का अभियोजन प्रारम्भ में ही अभिखण्डित नहीं किया जा सकता – यह निष्कर्ष निकालना संभव नहीं है कि प्रश्नगत चेक पूरी तरह से प्रवर्तन से वर्जित ऋण या देनदारी के संबंध में जारी किये गये थे।

Imtiaz Hussain, for the applicant.
Vivek Rusia, for the non-applicants.

***M.Cr.C. No.9324/06 (Jabalpur) D/- 10 March 2008.**

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(61)

A.P. Shrivastava, J

STATE BANK OF INDIA
Vs.
M/S SIDDHARTH HOTEL & ors.

Civil Procedure Code (5 of 1908), Section 34 - *Scope - If a loan is for commercial transaction, appellant is entitled to contractual rate of interest and the court cannot limit rate of interest to 6% p.a. - Held - Appellant is entitled to interest at the rate of contractual rate of interest i.e. 15% p.a. from the date of decree till realization.* (1999) 6 SCC 51 (Rel.).

सिविल प्रक्रिया संहिता (1908 का 5), धारा 34 – विषय क्षेत्र – यदि ऋण वाणिज्यिक संव्यवहार के लिये हो, अपीलार्थी संविदात्मक दर से ब्याज पाने का हकदार है और न्यायालय ब्याज को 6% वार्षिक तक सीमित नहीं कर सकता – अभिनिर्धारित – अपीलार्थी ब्याज की संविदात्मक दर अर्थात् 15% वार्षिक डिक्री की तारीख से वसूली तक ब्याज पाने का हकदार। (1999) 6 SCC 51 (अवलम्बित).

B.K. Agrawal with *Aniket Naik,* for the appellant.
B.D. Jain, for the respondent No.4.

***F.A. No.170/1997 (Gwalior), D/- 17 June, 2008.**

I.L.R. [2008] M. P., 1575

SUPREME COURT OF INDIA

Before Mr. Justice S.B. Sinha & Mr. Justice V.S. Sirpurkar

22 January, 2008*

VIDYADHARI & ors. ... Appellants

Vs.

SUKHRANA BAI & ors. ... Respondents

Succession Act (39 of 1925), Section 372 - *Succession Certificate -* *Deceased leaving two wives and four children from second wife - Second wife nominated by deceased in official records to receive claims - Trial Court granted succession certificate to second wife - High Court reversed the order and granted succession certificate in favour of first wife as divorce by custom could not be proved - Held - Second wife in her application had pointed out the names of four children - Second wife cannot claim to be legal heir but she had the status of nominee - She continued to stay with deceased and was person of confidence of deceased and had born four children - She was always preferable even to legally wedded wife who had never stayed with deceased - High Court was not justified in granting claim of first wife to the exclusion of the nominee of deceased and also to his legitimate legal heirs - First wife would be entitled to 1/5th share only - Appeal allowed.* (Paras 10, 11 & 12)

उत्तराधिकार अधिनियम (1925 का 39), धारा 372 – उत्तराधिकार प्रमाण–पत्र – मृतक की दो पत्नियाँ एवं दूसरी पत्नी से चार संतानें थी – मृतक द्वारा शासकीय अभिलेखों में दूसरी पत्नी को दावों को प्राप्त करने के लिये नामित किया – विचारण न्यायालय ने उत्तराधिकार प्रमाण–पत्र दूसरी पत्नी को दिया – उच्च न्यायालय ने आदेश उलटा एवं उत्तराधिकार प्रमाण–पत्र प्रथम पत्नी के पक्ष में दिया क्योंकि रूढ़ि द्वारा तलाक साबित नहीं हो सका – अभिनिर्धारित – दूसरी पत्नी ने अपने आवेदन में चारों संतानों के नाम इंगित किये थे – दूसरी पत्नी विधिक उत्तराधिकारी होने का दावा नहीं कर सकती किन्तु उसकी हैसियत नामित की थी – वह मृतक के साथ लगातार रही एवं मृतक की विश्वासपात्र थी एवं चार संतानों को जन्म दिया – वह हमेशा वैध विवाहित पत्नी जो कभी मृतक के साथ नहीं रही, से अधिक पसंद की गई – उच्च न्यायालय का मृतक के नामिती एवं वैध उत्तराधिकारियों को छोड़कर प्रथम पत्नी का दावा स्वीकार करना, न्यायसंगत नहीं था – प्रथम पत्नी केवल 1/5 हिस्से की अधिकारी होगी – अपील मंजूर।

Cases referred :

AIR 1997 SC 10, AIR 1998 MP 114, (2000) 2 SCC 431, (2002) 2 SCC 637.

JUDGMENT

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. :– Leave granted.

2. A common judgment of the High Court of Madhya Pradesh at Jabalpur, disposing of two Miscellaneous Appeals is in challenge before us. The appeals were filed by one Smt.Sukhrana Bai claiming herself to be the widow of one Sheetaldeen.

*C.A. No.575/2008

Sheetaldeen was working as a CCM Helper in Mines P.K.1 of the Western Coalfields at Pathakheda and died on 9.5.1993 while in service. Two separate applications came to be filed under Section 372 of the Indian Succession Act for obtaining succession certificate with respect to the movable properties of deceased Sheetaldeen, one of them was filed by Vidhyadhari registered as Succession Case No.3/96 while the other came to be filed by Sukhrana Bai which was registered as Succession Case No.10/95. Both the cases were joined and tried together by the Trial Court which allowed the application filed by Vidhyadhari (SC No.3/96) and dismissed the one filed by Sukhrana Bai (SC No.10/95). Sukhrana Bai, therefore, filed two Miscellaneous Appeals being MA 33/1998 and MA 43/1998 which came to be allowed by the High Court in favour of Sukhrana Bai. Vidhyadhari, therefore, is before us in this appeal. Before we proceed with the matter, a factual background would be necessary.

3. Admittedly, Sukhrana Bai was the first wife of Sheetaldeen, while during the subsistence of this marriage, Sheetaldeen got married with Vidhyadhari. Two sons and two daughters were born to Vidhyadhari, they being Smt.Savitri, Naresh @ Ramesh, Ms.Chanda @ Durga and Baliram, while Sukhrana Bai does not have any children.

4. Vidhyadhari in her application before the Trial Court (SC No.3/96), besides herself, disclosed the names of her children as the legal heirs of Sheetaldeen. It was also revealed that deceased Sheetaldeen had nominated her for receiving amounts under the Provident Fund, Family Pension Scheme and Coal Mines Deposits Life Scheme. She also disclosed that she has received a sum of Rs.45036/- towards gratuity amount of the deceased from the employer of Sheetaldeen, i.e., Western Coalfields Ltd. She, therefore, claimed the Succession Certificate on the basis of the nominations besides her marriage with Sheetaldeen.

5. As stated above, both the Succession Cases came to be consolidated and tried together. In SC No.10/95, filed by Sukhrana Bai, Vidhyadhari raised an objection that Sukhrana Bai was not the heir of deceased Sheetaldeen and though Sheetaldeen initially nominated Vidhyadhari to receive the dues after his death as per Form A, subsequently he cancelled that nomination and filled in a second Form A in which he had nominated Smt.Vidhyadhari and in description of his family members he had indicated her to be the wife, one Naresh as his son and Ms.Chanda @ Durga as his daughter. It was also pointed out that Sukhrana Bai had not claimed any dues from the office of Sheetaldeen. WCL which is a party, contended that the non-applicant had no knowledge about the valid marriage between the deceased and Sukhrana Bai and it was also admitted that Sheetaldeen had nominated Vidhyadhari to receive the total amount and had registered her as his nominee. Following issues came to be framed by the Trial Court:

> "(1) Whether the legal widow of the deceased Sheetaldeen is the applicant Smt.Sukhrana of Case No.10/95 or Vidhyadhari of Case No. 3/96?

(2) Whether Smt.Savitri, Naresh aias Ramesh, Ms.Chanda alias Durga and Baliram, as mentioned in the application of Case No.3/96 are the children of applicant Vidhyadhari, sired by deceased Sheetaldeen ?

(3) If yes, whether they are the heirs of deceased Sheetaldeen?

(4) For receiving the amount due to deceased Sheetaldeen, issuance of Succession Certificate in whose favour would be just and proper?

(5) Relief and expenses?

Both oral and documentary evidence was led by both the parties. Sukhrana Bai examined herself as AW1 along with three other witnesses, namely, Kanhaiyalal (AW2), Ram Prasad (AW3) and Shivnath (AW4). On the basis of the evidence led, the Trial Court held Vidhyadhari to be the legal widow of deceased Sheetaldeen. It was also held that the children Smt.Savitri, Naresh @ Ramesh, Ms.Chanda @ Durga and Baliram mentioned in SC No.3/96 were sired by deceased Sheetaldeen and were his children. They were also held to be heirs of deceased Sheetaldeen. The Trial Court also held that the Succession Certificate was liable to be issued in favour of Vidhyadhari and not in favour of Sukhrana Bai. In its judgment the Trial Court referred to an admission made by Vidhyadhari in her affidavit Exhibit C-7 wherein she had stated on oath that she is the second wife of Sheetaldeen and Sukhrana Bai was the first wife. The Trial court also referred to the proved fact that Sheetaldeen initially had nominated Sukharana Bai as a nominee indicating her to be his wife in Form A. After discussing the voluminous oral evidence led by the parties, the Trial Court held that Sukhrana Bai was earlier married to Sheetaldeen and there were no issues out of this wedlock and thereafter Sheetaldeen married Vidhyadhari and for about 20 to 25 years he lived with Vidhyadhari till his death while Sukhrana Bai never came to stay with him. The observation of the Trial Court in para 18 of the its Judgment is as under:

> "...which means that either Sukhrana Devi deserted him or Sheetaldeen left her."

The Trial Court then proceeded to hold in Para 19 that Sheetaldeen belonged to the 'Shudra' community and in Shudra community if the wife deserts her husband and no effort is made by the husband to take her back as his wife then under Hindu law it is presumed that divorce has taken place between the two, as has been held by the Supreme Court in *Govind Raju vs. K. Muni Swami Gonder & Ors.* [AIR 1997 SC 10]. A finding was given that Sheetaldeen had divorced Sukhrana Bai and solemnized second marriage with Vidhyadhari and, therefore, the marriage of Vidhyadhari could not be said to be illegal. On that basis the Trial Court excluded the claim of Sukhrana Bai and granted the claim of Vidhyadhari holding that she was entitled to receive the amount of Rs.1,30,000/- from WCL towards Sheetaldeens Provident Fund, Life Cover Scheme, Pension and amount of Life Insurance and amount of other dues payable to the successor of Sheetaldeen on his death. It was also observed in para 23 as under:

"....In that amount, applicant Vidhyadhari and her sons and daughters will have equal share. On receipt of the said amount, applicant Vidhyadhari shall distribute the amount to her sons and daughters as per their share...."

Resultantly the Trial Court dismissed Sukhrana Bais application.

6. The High Court, however, concluded that the theory of customary divorce between Sukhrana Bai and Sheetaldeen was a myth. It was noted that there was no evidence on record to hold that customary divorce had taken place between Sukhrana Bai and Sheetaldeen nor was there any pleading about the factum of any customary divorce or existence of any custom. Relying on a reported decision in *Smt.Savitri Devi v. Manorama Bai* [AIR 1998 MP 114], the High Court came to the conclusion that the alleged customary divorce between Sukhrana Bai and deceased Sheetaldeen was not established. Stopping here itself, the High Court allowed both the appeals and directed that the Succession Certificate should be granted in favour of Sukhrana Bai.

7. Learned counsel appearing for the appellant Vidhyadhari strenuously urged that the High Court could not have straightaway granted the claim of Sukharana Bai. Learned counsel pointed out that in grant of certificate in favour of Sukhranai Bai, the claim of four children was altogether ignored as, admittedly, Sukhrana Bai had sought the certificate for herself alone. Learned counsel points out that even if the theory of divorce between Sukhrana Bai and Sheetaldeen is described and even if Vidhyadhari is not held to be his legal wife since the children admittedly were sired by Sheetaldeen, they were legitimate children entitled to inherit Sheetaldeen. On this point, learned counsel relied on *Rameshwari Devi v. State of Bihar & Ors.* [(2000) 2 SCC 431]. Learned counsel pointed out that in her application Vidhyadhari had specifically mentioned the names of four children as the legal heirs besides herself, while Sukhrana Bai had claimed that she was the only legal heir of Sheetaldeen. Learned counsel tried to urge, relying on a reported decision in *Yamanji H. Jadhav v. Nirmala* [(2002) 2 SCC 637], that in this case the customary divorce should have been held to be proved.

8. As against this, learned counsel appearing for respondent Sukhrana Bai supported the judgment of the High Court and contended that she being the only legal heir of deceased Sheetaldeen, she alone was entitled to the grant of Succession Certificate as ordered by the High Court.

9. There can be no dispute that Vidhyadhari had never pleaded any divorce, much less customary divorce between Sukhrana Bai and Sheetaldeen. There were no pleadings and hence no issue arose on that count. In our opinion, therefore, the High Court was right in holding that marriage between Sukhrana Bai and Sheetaldeen was very much subsisting when Sheetaldeen got married to Vidhyadhari. Learned counsel tried to rely on the reported decision in *Govind Rajus case* (supra). We are afraid the decision is of no help to the respondent as basically the issue in that decision was about the legitimacy of the children born to

a mother whose first marriage was not dissolved and yet she had contracted the second marriage. This is apart from the fact that in the present case there were no pleadings about the existence of custom and alleged divorce thereunder. Therefore, there was no evidence led on that issue. In our opinion the decision in *Govind Rajus case* is not applicable. Even the other decision in *Yamanajis case* is not applicable as the facts are entirely different. In *Yamanjis case* there was a Deed of Divorce executed by the wife. The question was whether there was a customary divorce. There was a custom permitting divorce by executing deed existing in the community to which the parties belonged. Such is not the situation here. There is neither any Divorce Deed nor even the assertion on the part of Vidhyadhari that Sheetaldeen had divorced Sukhrana Bai. We, therefore, accept the finding of the High Court that Sukhrana Bai was the legally wedded wife while Vidhyadhar could not claim that status.

10. However, unfortunately, the High Court stopped there only and did not consider the question as to whether inspite of this factual scenario Vidhyadhari could be rendered the Succession Certificate. The High Court almost presumed that Succession Certificate can be applied for only by the legally wedded wife to the exclusion of anybody else. The High Court completely ignored the admitted situation that this Succession Certificate was for the purposes of collecting the Provident Fund, Life Cover Scheme, Pension and amount of Life Insurance and amount of other dues in the nature of death benefits of Sheetaldeen. That Vidhyadhari was a nominee is not disputed by anyone and is, therefore proved. Vidhyadhari had claimed the Succession Certificate mentioning therein the names of four children whose status as legitimate children of Sheetaldeen could not and cannot be disputed. This Court in a reported decision in *Rameshwari Devis case* (supra) has held that even if a Government Servant had contracted second marriage during the subsistence of his first marriage, children born out of such second marriage would still be legitimate though the second marriage itself would be void. The Court, therefore, went on to hold that such children would be entitled to the pension but not the second wife. It was, therefore, bound to be considered by the High Court as to whether Vidhyadhari being the nominee of Sheetaldeen could legitimately file an application for Succession Certificate and could be granted the same. The law is clear on this issue that a nominee like Vidhyadhari who was claiming the death benefits arising out of the employment can always file an application under Section 372 of the Indian Succession Act as there is nothing in that Section to prevent such a nominee from claiming the certificate on the basis of nomination. The High Court should have realised that Vidhyadhari was not only a nominee but also was the mother of four children of Sheetaldeen who were the legal heirs of Sheetaldeen and whose names were also found in Form A which was the declaration of Sheetaldeen during his life-time. In her application Vidhyadhari candidly pointed out the names of the four children as the legal heirs of Sheetaldeen. No doubt that she herself has claimed to be a legal heir which

status she could not claim but besides that she had the status of a nominee of Sheetaldeen. She continued to stay with Sheetaldeen as his wife for long time and was a person of confidence for Sheetaldeen who had nominated her for his Provident Fund, Life Cover Scheme, Pension and amount of Life Insurance and amount of other dues. Under such circumstances she was always preferable even to the legally wedded wife like Sukhrana Bai who had never stayed with Sheetaldeen as his wife and who had gone to the extent of claiming the Succession Certificate to the exclusion of legal heirs of Sheetaldeen. In the grant of Succession Certificate the court has to use its discretion where the rival claims, as in this case, are made for the Succession Certificate for the properties of the deceased. The High Court should have taken into consideration these crucial circumstances. Merely because Sukhrana Bai was the legally wedded wife that by itself did not entitle her to a Succession Certificate in comparison to Vidhyadhari who all through had stayed as the wife of Sheetaldeen, had born his four children and had claimed a Succession Certificate on behalf children also. In our opinion, the High Court was not justified in granting the claim of Sukhrana Bai to the exclusion not only of the nominee of Sheetaldeen but also to the exclusion of his legitimate legal heirs.

11. Therefore, though we agree with the High Court that Sukhrana Bai was the only legitimate wife yet, we would chose to grant the certificate in favour of Vidhyadhari who was his nominee and the mother of his four children. However, we must balance the equities as Sukhrana Bai is also one of the legal heirs and besides the four children she would have the equal share in Sheetaldeens estate which would be 1/5th. To balance the equities we would, therefore, chose to grant Succession Certificate to Vidhyadhari but with a rider that she would protect the 1/5th share of Sukhrana Bai in Sheetaldeens properties and would hand over the same to her. As the nominee she would hold the 1/5th share of Sukhrana Bai in trust and would be responsible to pay the same to Sukhrana Bai. We direct that for this purpose she would give a security in the Trial Court to the satisfaction of the Trial Court.

13. It should not be understood by the above that we are, in any way, deciding the status of Vidhadhari finally. She may still prosecute her own remedies for establishing her own status independently of these proceedings.

14. In the result the appeal is allowed. In the facts and circumstances of the case, there will be no order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 1581

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice S.H. Kapadia

2 April, 2008*

MAHAKAL AUTOMOBILES (M/s.) & anr. ... Appellants

Vs.

KISHAN SWAROOP SHARMA ... Respondent

Civil Procedure Code (5 of 1908), Order 21 Rules 54, 66 - *Proclamation of Sale by Public Auction* - *Decree for payment of Rs.5,65,000 with interest passed against appellant/Judgment Debtor - No notice given to Judgment Debtor before attaching their property - Property auctioned without any notice to J.D. - Held - At each stage of execution of decree when property is sold, notice should be served upon person whose property is being sold - Any property sold without notice to the person is a nullity - All actions pursuant thereto are liable to be struck down - No valuation of property was carried out - No proclamation of sale was made as per provisions of M.P. Civil Court Rules and Order 21 Rule 66 - There was no publication of sale - Judgment Debtor directed to deposit Rs.15 lacs apart from the amount which he has already deposited for satisfaction of decree - On payment of amount, title to the property shall vest free of all encumbrances on appellant - Appeal allowed.* (Paras 7, 8 & 11)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 54, 66 – लोक नीलाम द्वारा विक्रय की उद्घोषणा – रुपये 5,65,000/– ब्याज सहित भुगतान करने हेतु अपीलार्थी/निर्णीत ऋणी के विरुद्ध डिक्री पारित – निर्णीत ऋणी को उनकी सम्पत्ति कुर्क करने के पूर्व कोई सूचना नहीं दी गई – निर्णीत ऋणी को किसी सूचना के बिना सम्पत्ति नीलाम की गई – अभिनिर्धारित – डिक्री के निष्पादन के प्रत्येक प्रक्रम पर जब सम्पत्ति विक्रय की जाती है तब उस व्यक्ति पर, जिसकी सम्पत्ति विक्रय की जा रही है, सूचनापत्र तामील किया जाना चाहिए – व्यक्ति को सूचनापत्र के बिना बेची गई सम्पत्ति अकृत है – उसके अनुसरण में सभी कार्य अभिखंडित किये जाने योग्य हैं – सम्पत्ति का कोई मूल्यांकन नहीं किया गया था – म.प्र. सिविल न्यायालय नियम एवं आदेश 21 नियम 66 के उपबंधों के अनुसार विक्रय की कोई उद्घोषणा नहीं की गई – विक्रय का कोई प्रकाशन नहीं – निर्णीत ऋणी को उसके द्वारा डिक्री के संतुष्टीकरण के लिए पूर्व में जमा राशि के अलावा 15 लाख रुपये जमा करने के निदेश दिये – राशि के भुगतान पर सम्पत्ति पर हक सभी विल्लंगमों से मुक्त अपीलार्थी पर निहित हो जावेगा – अपील मंजूर।

Cases referred :

(1994) 1 SCC 131, (1987) 4 SCC 717.

JUDGMENT

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. :–Challenge in this appeal is to the judgment of learned Single Judge of the Madhya Pradesh High Court, Indore Bench.

2. Background facts in a nutshell are as follows:

*C.A. No.2598/2005.

Respondent had sold 7200 sq.ft. land with some construction on 15/11/1986 for Rs.7.20 lacs to the JDs/appellants and was paid only Rs.1.60 lacs. He had agreed to accept the remaining amount of Rs.5.60 lacs in 4 installments in 3 years with interest @ 1.50% per month. A charge was created on this property. Respondent had later filed a Civil Suit No. 13-A/89 (New No. 6-A/1991) for recovery of amount of Rs.6,31,750/- by sale of such property.

JDs/appellants in their written statements had admitted liability to pay Rs.5 lacs as principal and Rs.65,000/- as interest and pendentelite interest @ 1% per month. They disputed that Babulal was the partner of M/s Mahakal Automobiles. Thus, the ADJ on 24/9/1 991 gave a judgment and decree under Order XII Rule 6 of the Code, relevant portion of which reads follows:

> "As a result application of plaintiff is partly allowed and it is hereby ordered that defendants Nos. I and 3 shall pay within 6 months from today Rs.5,65,00/- and interest @1% per month on Rs.5 lacs from the date of institution of suit i.e. 16/6/1989, otherwise the plaintiff would be entitled to get a final decree for recovery of his amount by sale of charged property. Order as to cost would be given at the time of disposal of other points. A preliminary decree be framed accordingly. Description of charged property be also given in preliminary decree."

A preliminary decree was accordingly drawn up. However, it was not drawn in prescribed form No.5-A or 7-C of Schedule of Appendix-D to the Code of Civil Procedure, 1908 (in short 'the Code'). Admittedly, no accounts were to be taken. Simple arithmetical calculation of interest would have specified the actual amount payable.

On 28/4/1992 respondent filed an application for execution. Notices to all JDs/ appellants under Order XXI Rule 22 of the Code were issued. On 8/6/1992, JDs/2 appeared through Shri L.P. Bhargava, Advocate while JD/1 appeared through Shri P.K. Modi, advocate. All JDs continued to appear regularly till 16/11/1993. In the meantime two applications; one under Order XXI Rule 58 read with Section 151 of the Code was filed on 8/6/1 992 and the second under order XXI rule 50 read with Section 151 of the Code was filed on 2/11/1992 by the JDs which were disposed of on 16/12/ 1992 and 2/11/1992 respectively. No question as to non-executability of the decree had been raised by the JDs according to the High Court.

On 16/10/1992 the court below directed that name of Babulal Gupta be deleted from the execution application as there had been no decree against him. A question was also raised suo motu by the court whether the decree in its terms being preliminary decree could be executed as it is, or the DH-respondent be directed to obtain a final decree. The executing court granted several adjournments for arguments on this question. On 12/2/1993 the executing court stayed the proceedings of the execution to await the result of proceedings under Order I Rule 10 and Section 151 of the Code before the trial court in the original case which was also pending in the same court.

On 8/3/1994 order of the High Court was received in the original case and the execution proceedings were ordered to be restarted. The execution proceedings as well as the civil suit were transferred from court to court and none appeared for the JDs in the execution case, till 14/7/1997.

The High Court by the impugned order set aside the order of the trial court holding that the I.As. filed by the judgment debtors, respondents in the appeal, before High Court were to be dismissed. Auction sale in favour of the respondent-DH was valid and order of its confirmation was upheld.

3. In support of the appeal learned counsel for the appellant submitted as follows:

(i) Records reveal that no Process Fee was paid by the Decree Holder as per Order dated 4.10.1997.

(ii) Attachment of Warrant was not as per Order 21 Rule 54 (1A) CPC.

(iii) No Notice was given to the appellants when execution proceedings got delinked from the suit and got transferred from one court to another.

(iv) Attachment proceedings were carried out in the absence of the Judgment Debtor.

(v) No notice was given to the appellant under Order 21 Rules 54 and 66(2). The procedure under Order 21 Rule 54 (1A) and 66(2) is mandatory. Hence, the objections taken by way of IA Nos. 1, 2 and 6 should have been accepted

(vi) The Court found total absence of drawing up of the proclamation of sale and its terms by judicial application of mind.

(vii) It was held that the executing court did not follow the mandatory procedure as provided under the Code.

4. It was submitted that the High Court by the impugned order erroneously reversed the judgment on the ground that the appellant could be presumed to have known of the proceeding and it is not a case of complete non issue of service of attachment of warrant and that ratio of the decision in *Deshbandhu Gupta v. N.L. Anand @ Rajinder Singh* [1994(1) SCC 131] does not apply.

5. Learned counsel for the respondent on the other hand submitted that the High Court has analysed the factual position in the background of legal position as set out by this court.

6. When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the Decree, to comply with the following stages before a property is sold in execution of a particular decree:

(a) Attachment of the Immoveable Property:
(b) Proclamation of Sale by Public Auction;

(c) Sale by Public Auction

7. Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order 21 Rule 54 and Order 21 Rule 66. At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold is a nullity, and all actions pursuant thereto are liable to be struck down/quashed.

8. The admitted position that has emerged is that:

(i) There was no notice served upon the Judgment-Debtor under Order 21 Rule 54 (1-A).

(ii) There was no valuation of the property carried out;

(iii) There was no proclamation of sale as per the statutory provisions of the M.P. Civil Court Rules, 1961 read with Order 21 Rule 66.

(iv) There was no publication of the sale.

9. In *Deshbandhu Gupta's case* (supra) it was held as follows:

"The Proclamation should include the estimate, if any, given by either judgment-debtor or decree holder or both the parties. Service of Notice on judgment-debtor under Order 21 Rule 66 (2) unless waive by appellants or remained ex-parte, is a fundamental step in the procedure of the Court in execution, judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verify as accurately and fairly as possible so that the intending bidders are not mislead or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In *Gajadhar Prasad Vs. Babu Bhakta Ratan,* this Court after noticing the conflict of judicial opinion among the High Courts, said that a review of the authorities as well as amendments to Rule 66 (2) (e) make it abundantly clear that the Court, when stating the estimated value of the property to be sold, must not accept the ipse dixit of one side. It is certainly not necessary for it to state its own estimate

But, the essential facts which had a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i.e. the value of the property, that is, after all, the whole object of Order XXI, Rule 66 (2) (e) CPC. The Court has only to decide what are allthese material particular in each case. We think that this is an obligation imposed by Rule 66 (2) (e). In discharging it, the Court normally state the valuation given by both the Decree Holder as well as the Judgment Debtor where they both have valued the property, and it does not appear fantastic."

"The absence of Notice causes irremediable injury to the judgment debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66 (2) are intended so that the prospective bidders would know the value so as to make up their mind to offer the price and to attempt that sale of the property and to secure competitive bidders and fair price to the property sold. Absence of Not to the Judgment Debtor disables him to offer his estimate of the value who better know its value and to publicise on his part, canvassing and bringing the intended bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under Order 21 divests right, title and interest of the judgment debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment debtor or the decree holder. A sale made, therefore, without notice to the judgment debtor is a nullity since it divests the judgment debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a Court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration at time be possible."

10. In *M/s. Shalimar Cinema v. Bhasin Film Corporation and Another* [1987(4) SCC 717] it was held that the court has a duty to ensure that the requirement of order 21 Rule 66 has properly applied. It is incumbent on the court to be scrupulous in the extreme.

11. The records do not reveal that the appellant-judgment debtor was served with a notice as required under Order 21 Rule 54(1)(A) of the Code in the appendix B Forms 23, 24 and 29. It is to be noted that the records reveal that the address of the appellant as contained in the sale deed was different from the address at which the process server purportedly affixed the notice on the door and in open court and at the chorah only. It has also to be noted that under Order 21 Rule 66(2) the service of the notice has to be personally affected on the judgment debtor. That also does not appear to have been done. Interestingly, the valuation of the property as required to be done under the proviso to sub-rule (2) of Rule 66 of Order 21 of the Code has not been done. The same appears to have been valued on the spot at Rs.9,00,000/- and it was not done by the Court. There are admittedly other non-compliance with certain requirements. We do not think it necessary to deal with those aspects in detail in view of the order proposed to be passed. From the records it is revealed that Rs.14,38,893/- and Rs.4,46,926/- have been deposited by the appellant

purportedly for satisfaction of the Execution Court Ujjain and Indore respectively. The appellant shall further deposit a sum of Rs.15,00,000/- within 4 months from today. The respondent No.1 shall be entitled to withdraw the amount deposited in the bank with accrued interest. The appellant shall be responsible for payment of the property tax of the property from the date of execution of sale deed i.e. 5.12.1986 till date and the same shall be paid deposited with the concerned authority within the aforesaid period of four months. On payment of the amounts, the title to the property described in the registered sale deed will vest free of all encumbrances on the appellant.

12. If any property of the respondent No.1 is there in the property in question, the same shall vest to respondent No.1 with liberty to remove them as soon as the payment is made.

13. The appeal is disposed of accordingly. No costs.

Appeal disposed of.

I.L.R. [2008] M. P., 1586
WRIT APPEAL
Before Mr. Justice S. Samvatsar
23 January, 2008*

KAILASHI ... Appellant
Vs.
SMT. BHAROSI BAI & ors. ... Respondents

A. Constitution, Articles 226, 227 - Difference of Opinion - *Scope of Third Judge - Both the Judges of Division Bench came to the conclusion that tendered votes can be opened and there is no divergent opinion on said question - Third Judge cannot go into the question that whether tendered vote can be opened or not.* (Para 9)

क. संविधान, अनुच्छेद 226, 227 – विचारों की भिन्नता – तृतीय न्यायाधीश का विषय क्षेत्र – खण्ड न्यायपीठ के दोनों न्यायाधीश निष्कर्ष पर पहुंचे कि निविदत्त वोट खोले जा सकते हैं एवं इस प्रश्न पर कोई भिन्न मत नहीं है – तृतीय न्यायाधीश इस प्रश्न पर विचार नहीं कर सकते कि क्या निविदत्त वोट खोले जा सकते हैं या नहीं।

B. Panchayat Nirvachan Niyam, M.P., 1995, Rules 12 Proviso, 80(3) - *Recounting of Votes - Every order for recounting must be in writing - Not necessary to examine returning officer by specified officer for that purpose.* (Para 11)

ख. पंचायत निर्वाचन नियम, म.प्र., 1995, नियम 12 परन्तुक, 80(3) – मतों की पुनर्गणना – पुनर्गणना का प्रत्येक आदेश लिखित में होना चाहिए – इस उद्देश्य के लिए विशिष्ट अधिकारी द्वारा निर्वाचन अधिकारी का परीक्षण करने की आवश्यकता नहीं है।

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*W.A. No.136/2006 (Gwalior)

Cases referred :

(1997) 1 SCC 396, 1997 MPLJ 641.

M.P.S. Raghuvanshi with *Gaurav Samadhiya,* for the appellant.

H.D. Gupta with *S.B. Gupta,* for the respondent No.1.

Vivek Khedkar, G.A., for the respondents No.2 & 3.

O P I N I O N

S. SAMVATSAR, J.–This matter was placed before me due to conflicting judgments delivered in the present case by Hon.Shri Justice Abhay Gohil and Hon.Shri Justice P.K.Jaiswal. On account of difference of opinion, the Division Bench has formulated following two questions for opinion by this Court :-

> Whether as per proviso to Rule 12 of the Rules of 1995, without any application and without any prayer either by the parties, directions can be made in the writ appeal for examination of Returning Officer, and to call the Returning Officer in evidence ?
>
> Whether in view of direction made by the Learned single Judge with regard to opening of tendered votes afresh after giving opportunity of leading evidence to the parties and after following the procedure laid down by the Apex Court in the case of *Dr. Wilfred D'Souza vs. Francis Manino Jesus Ferrao,* (1977) 1 SCC 396, any interference is warranted in this writ appeal ?

2. Brief facts of the case are that elections for the post of Sarpanch of Gram Panchayat Zaida Tehsil and District Sheopur were held on 16/1/2005. In the said elections, petitioner Kailashi and private respondents were contesting parties. Counting of the votes took place on 28/1/2005. In the initial counting, both Kailashi and Shrimati Bharosi Bai obtained 244 votes each. Other candidates could get lesser votes. Hence, an application was filed by petitioner Kailashi for recounting of votes for Wards No. 169,170 and 171. Shrimati Bharosi Bai had also filed an application for recounting of entire constituencies. Her application was rejected and therefore, she left the place. Prayer of the petitioner was accepted and votes were recounted for three constituencies and it was found after recounting that there is no different in votes. After this, polling recounting was done and votes of all the constituencies were recounted and it was found that the petitioner secured two votes more than Shrimati Bharosi Bai and was declared vide document annexed with the writ petition as Annexure P/4. This election result was challenged by Shrimati Bharosi Bai on the ground that second recounting was done behind her back and is, therefore, violative of principles of natural justice, by filing an election petition before the Sub Divisional Officer.

3. Sub Division Officer, before whom the election petition was filed framed issues and ultimately came to the conclusion that in the present case, election results be declared on the basis of tendered votes. This order dated 23/3/2006 annexed as Annexure P/1 with the writ petition was challenged by the present

petitioner by filing writ petition. The learned single Judge after hearing both the parties held that opening of tendered votes is permissible in view of the judgment of the Apex Court in the case of *Dr. Wilfred D'Souza vs. Francis Manino Jesus Ferrao*, (1977) 1 SCC 396. The learned single Judge further held that before opening the tendered votes, the procedure prescribed by the Apex Court in the case of Dr. Wilfred D'Souza (supra) be followed. As per the aforesaid judgment of the Apex Court, before opening tendered votes, two points must be proved; viz (a) the court would exclude the vote initially cast by the person other than the genuine voter from the number of votes of the candidates in whose favour it was cast; and (b) that the court would further take into account the tendered ballot paper in favour of the candidate in whose favour it is duly marked. It may also be mentioned that the proper occasion for scrutinising the tendered ballot papers would normally arise only when the difference between the number of votes polled by the candidate declared elected and his nearest rival is so small that there is a possibility of that difference being wiped out and the result of election being thus materially affected if the court takes into account the tendered ballot papers and excludes from consideration the corresponding votes which were cast by persons other than the genuine voters.

4. Thus, it is clear that tendered votes can be opened, if it is established on evidence that the person casting the tendered vote was a genuine voter. As the learned Single Judge found that there is no evidence to that effect, he remanded the matter back to the Sub Divisional Officer and directed to open the tendered vote after taking evidence that the person casting the tendered vote was a genuine voter.

5. This order passed by the learned single Judge was challenged by the petitioner by filing present writ appeal before Division Bench. Division Bench heard the appeal and after hearing the appeal, the Judges delivered their separate judgments and after formulating the aforesaid two questions, the matter was placed before me.

6. First question raised by Shri MPS Raghuvanshi, learned counsel for the appellant is that the tendered vote cannot be opened at all. In support of his argument, he has referred to Rule 64 of the Madhya Pradesh Panchayat Nirvachan Niyam, 1995 (hereinafter, referred to as "Rules"). Rule 64 deals with tendered votes. Sub-rule (5) of Rule 64 provides that separate cover shall be used for keeping the tendered ballot papers for election to the offices of Panch, Sarpanch and Member of Janpad Panchayat and Zila Panchayat. Rule 77 provides for counting of votes and sub-rule (1) provides that every ballot paper which is not rejected under Rule 76 shall be counted provides that no cover containing tender ballot papers shall be opened and no such ballot paper shall be counted. Thus, according to the learned counsel for the appellant, there is a bar for opening the tendered vote and in such circumstances, counting or opening of tendered vote is not permissible.

7. Counsel for the appellant invited attention of this Court to the case of *Dr.*

Wilfred D'Souza (supra) and submitted that the said judgment was pronounced by the Apex Court with the agreement of the parties, hence, it has no binding effect. He invited attention of this Court to para 14 of the judgment to support his argument. Said para reads as under :

> "14. Learned counsel for the parties are, however, agreed that such tendered ballot papers, even though excluded from consideration at the time of counting of votes after the poll, can be taken into account in proceedings to challenge the validity of the election of the returned candidate provided certain conditions are fulfilled. We agree with the learned counsel for the parties in this respect, and find that this position of law is supported by two English decisions, Borough of St. Andrews, 4 Omelly and Hardcastle 32 and the Stepney Division of the Borough of Tower Hamlets, 4 Omelly and Hardcastle 34 as also by two Indian decisions. Kalicharan Singh v. Ramcharitar Rai Yadava, (1953) 5 Ele LR 98 (Ele. Tri.-Pat.) and A. K. Subbaraya Gounder v. G. Palanisami Gounder, (1955) 11 Ele LR 251 (Ele. Tri.-Coimbatore). Before, however, a tendered ballot paper can be taken into account during the proceedings of election petition evidence would have to be led on the following two points: ....."

The Apex Court, though recorded agreement between the parties, but has further stated that this position of law is supported by two English decisions, referred to in the said paragraphs. Thus, it cannot be said in the present case that the law laid down by the Apex Court in the aforesaid decision is totally based on the agreement between the parties and is therefore has no binding effect.

8. Moreover, in the present case, I find that both the learned Judges of the Division Bench have held that the tendered votes can be opened. Hon.Shri Justice P.K.Jaiswal by his judgment has affirmed the judgment of the learned single Judge and dismissed the writ appeal without any interference, while Hon.Shri Justice Abhay Gohil after holding that the tendered votes can be opened has held that before opening the tendered votes, the Specified Officer should examine the Returning Officer; he is fully empowered under *suo motu* power to call for the Returning Officer and after recording his evidence should find out whether he has passed any order of recounting or any recounting was done in pursuance of his order.

9. Thus, both the Judges of the Division Bench have held that tendered vote can be opened and there is no divergent opinion on the said question. In such a situation, in the light of Full Bench decision of this Court in the case of *Ladhuram vs. Krishi Upaj Mandi Samiti, Shivpuri*, 1997 MPLJ 641, this Court cannot go into the question whether tendered vote can be opened or not.

10. The only question which is required to be decided by this Court is whether the Specified Officer should examine the Returning Officer in its suo motu powers to find out whether he has passed any order of recounting or not and whether any recounting has been done by him or not.

11. Rule 80 of the Rules provides of recount of votes. Sub-rule (3) of Rule 80 provides that every decision of the Returning Officer or such other officer authorised by him under sub-rule (2) shall be in writing and contain the reasons therefor. Thus, as per this rule, every order passed by the Returning Officer for recounting must be in writing. The Returning Officer, on the basis of recounting, has to declare the results in Forms No. 16,17,18 and 19. Thus, entire action of the Returning Officer is required to be reduced in writing and in the absence of any written order, it cannot be said that he has passed any order for recounting. Thus, the question of examining the Returning Officer for proving whether or not he has passed any order for recounting and has done any recounting in pursuance of the said order can be determined only from the written order passed by him, and therefore, question of examination of Returning Officer is not necessary.

12. In such a situation, in my opinion, the view taken by Hon.Shri Justice Abhay Gohil in directing to examine the Returning Officer by the Specified Officer in *suo motu* powers for deciding whether he has passed any written order or not is not necessary and can be established by filing copy of the order. Hence, I agree with the judgment delivered by Hon.Shri Justice P.K.Jaiswal, J. and hold that the appeal filed by the appellant deserves to be dismissed with costs.

13. Now the appeal be placed before appropriate Bench for pronouncing the judgment in accordance with the aforesaid opinion.

Order accordingly.

I.L.R. [2008] M. P., 1590

WRIT APPEAL

Before Mr. Justice Abhay Gohil & Mr. Justice Sanjay Yadav

31 January 2008*

JWALA PRASAD BATHAM ... Appellant

Vs.

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

Public Works Department Work Charged and Contingency Paid Employees Recruitment and Conditions of Service Rules, M.P. 1976 - Clause 3(A) - Wireman - Age of Superannuation - *Post of Wireman falls within category of Class IV employees and entitled to get benefit of extended period of age from 60 to 62 - Since Petitioner has already attained the age of 62 years, he will not be entitled for arrears of pay for the period he remained out of employment, however, will be entitled to all pensionary benefits.* (Para 4)

लोक निर्माण विभाग कार्यभारित तथा आकस्मिकता निधि कर्मचारी के भर्ती तथा सेवा शर्तें नियम, म.प्र. 1976, खण्ड 3(ए) – वायरमेन – अधिवार्षिकीय आयु – वायरमेन का पद चतुर्थ श्रेणी कर्मचारी वर्ग में आता है और वह आयु की विस्तारित कालावधि 60 वर्ष से 62 वर्ष का लाभ पाने का हकदार है – चूंकि याची ने 62 वर्ष की आयु पहले ही पूरी कर ली है, जब वह नौकरी में नहीं

*W.A. No 267/2006 (Gwalior)

था वह उस कालावधि का बकाया वेतन पाने का हकदार नहीं, तथापि वह पेंशन के सभी लाभ पाने का हकदार है।

S.K. Sharma, for the appellant
Brijesh Sharma, G.A., for the respondents

JUDGMENT

The Judgment of the Court was delivered by ABHAY GOHIL, J. :–Appellant has filed this appeal under Section 2 of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 against the order dated 25.07.2006 passed by the learned Single Judge of this Court in W.P. No.1393/05(S).

2. In nutshell, the case of the appellant before the writ court was that the appellant was working on the post of Wireman and by order dated 4.11.04 on attaining the age of 60 years, he was retired. It was his case that at the time of retirement he was working on the post of Wireman, which is a Class-IV post under the M.P. Public Works Department Work Charged and Contingency Paid Employees Recruitment and Conditions of Service Rules, 1976 (for brevity "Rules of 1976"). Prior to 4.11.04, there was no dispute but thereafter the Government has extended the age of retirement of Class-IV employees from 60 years to 62 years. The appellant filed the petition challenging the aforesaid order of premature retirement. The learned writ court considering the provisions of M.P. Work Charged Contingency Paid Employees Revision of Pay Rules, 1984 (for brevity "Rules of 1984") found that the pay-scale of the post of Wireman was Rs.400-525/- and such a pay-scale is classified under Class-III post, therefore, it was held that he was holding the Class-III post and not Class-IV post, therefore, the appellant is not entitled to get the benefit of retirement on attaining the age of 62 years and thus, dismissed the petition. Aggrieved thereof, the appellant has filed this appeal.

3. It is submitted that the learned Writ Court has not properly considered the status of an employee under Service Rules and scope of pay-scale Rules of 1984. Even if the pay-scale is changed or enhanced, the status of employee from Class-IV to Class-III will not be changed simply on the basis of Pay-scale or Revision of Pay-scale.

4. We have considered both the Rules of 1976 and 1984. In these Rules, the post of wireman has been categorised as Class-IV. In the Rules of 1984, on which emphasis has been laid by the learned Single Judge, but under the Rules of 1976 there are two separate sets of the posts. Under Clause 3 (A) category Assistant Mechanic and Wireman are class IV employees and under Clause 4 (A) Mechanic is Class-III employee. From this categorisation, it is clear that the Assistant Manager / Wireman Grade-I is within the category of Class-IV and Mechanic is in the category of Class-III employees. Therefore, prima-facie, it appears that the Rules were not properly considered and on the anvil of normal interpretation of Rules, the post of Wireman will fall within the category of Class-IV employee

and thus, the appellant is entitled to get the benefit of extended period of age of retirement.

5. It was further submitted that on 4.11.06, the appellant had attained the age of 62 years and he remained out of employment for two years. In such a situation, it would not be appropriate for this court to direct the respondents to pay the arrears of salary for the period, in which the appellant remained out of employment and had not worked but certainly we hold that the appellant will be entitled to all other pensionary benefit and pay fixation according to the aforesaid direction. The respondents are directed to re-fix the pension of the appellant on the notional basis, treating the appellant to have been on duty for these two years. It is made clear that the appellant shall not be entitled to salary for the extended period of two years, however, if any excess amount is paid to the appellant, the same shall be adjusted on the basis of notional pay fixation.

6. With the aforesaid direction, the appeal is partly allowed.

Appeal partly allowed.

I.L.R. [2008] M.P., 1592

WRIT APPEAL

Before Mr. Justice Subhash Samvatsar & Mr. Justice P.K. Jaiswal

18 June, 2008*

SANJAY VERMA ... Appellant

Vs.

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

Irrigation Engineering Services (Gazetted) Recruitment Rules, M.P., 1968, Rule 15(1) - ***Eligibility for Promotion - Petitioner appointed as Sub-Engineer on 19.10.1984 - Completed B.E. degree in the year 1991 - Not considered for promotion after completion of 8 years of service - Learned Single Judge dismissed the petition that petitioner did not complete 8 years of service after completing B.E. Degree - Held - As per rule 15(1) the seniority for promotion has to be counted from the date of appointment and not from the date of acquiring the required qualification - Case for promotion is to be considered after completion of 8 years of qualifying service as Sub-Engineer.*** (Paras 14 & 15)

सिंचाई अभियांत्रिकी सेवा (राजपत्रित) भर्ती नियम, म.प्र., 1968, नियम 15(1) – पदोन्नति के लिये पात्रता – याची 19.10.1984 को उप–अभियंता के रूप में नियुक्त हुआ – बी.ई. डिग्री 1991 में पूर्ण की – सेवा के 8 वर्ष पूर्ण होने पर पदोन्नति के लिये विचार नहीं किया गया – विद्वान एकल न्यायाधीश ने याचिका निरस्त की कि याची ने बी.ई. डिग्री पूर्ण करने के पश्चात् सेवा के 8 वर्ष पूरे नहीं किये – अभिनिर्धारित – नियम 15(1) के तहत पदोन्नति के लिये वरिष्ठता की गणना भर्ती दिनांक से की जावेगी न कि अपेक्षित योग्यता प्राप्ति दिनांक से – उप–अभियंता के रूप में अर्हक सेवा के 8 वर्ष पूर्ण करने पर पदोन्नति के मामले पर विचार करना था।

*W.A. No.430/06 (Gwalior)

Cases referred :

AIR 1993 SC 267, Case of Ramesh Kumar Choudha decided on 20.09.1996 by the Apex Court.

D.K. Katare with *Alok Katare*, for the appellant.

Vivek Khedkar, G.A., for the respondents.

JUDGMENT

The Judgment of the Court was delivered by **P.K. JAISWAL, J.** :–This intra-Court appeal is filed under Section 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 challenging the order dated 6.9.2006 passed in W.P.No.5527/03, whereby the writ petition of the appellant was dismissed on the ground that the appellant had obtained B.E. Degree in the year 1991 and he had not completed 8 years of service after passing the B.E. Degree and therefore he has rightly not been considered by the review DPC held on 21.12.1992 for promotion to the post of Assistant Engineer because he did not have completed the prescribed minimum years of service as on 1st January 1992 and order dated 24.12.98 passed by the respondent no.2 vide Annexure A/12 is just and proper.

2. Brief facts of the case are that the appellant-petitioner was appointed as Sub-Engineer w.e.f. 19.10.84. He had completed his Part Time B.E. Degree Course at Madhav Institute of Science & Technology, Gwalior in the year 1991. The service of the appellant is governed by the provisions of M.P. Irrigation Engineering Services (Gazetted) Recruitment Rules, 1968 issued by the Governor in exercise of the power conferred under Proviso to Article 309 of the Constitution of India. Rule 15 deals with the condition of eligibility for promotion, which reads as under :-

"Rule 15. *Condition of eligibility for promotion* :-

(1) Subject to the provisions of sub-rule (2), the committee consider the cases of all persons who on the 1st day of January of that year had completed the prescribed years of service (whether officiating or substantive) on the post/service mentioned in column 2 of Schedule IV or any other post or posts declared equivalent thereto be the Government as under and are within the zone of consideration as per sub-rule (2):-

(i) Sub-Engineers, Head Draftsman/Draftsman to the post of Assistant Engineers minimum service of 12 years as Sub-Engineers, Head Draftsman/Draftsman.

Provided that a Sub-Engineer, Head Draftsman/Draftsman who considered a minimum of 8 years service and possessed degree in Civil/Electrical/ Mechanical Engineering from recoginsed University or qualifications declared equivalent thereto by the State Government will also be eligible for promotion to the post of Assistant Engineer and will be considered each

time, just after the zone of consideration and the final selection list shall be made from both the groups on the basis of merits, for example, if ten posts are vacant in the cadre of Assistant Engineer to be filled by promotion of sub-Engineers then 10 x 5-50 diploma holders sub-Engineers from working list be considered first and thereafter the eligible graduate sub-Engineers be considered in the order of their seniority for promotion.

(ii) Junior Engineers to the post of Assistant Engineers minimum service of 2 years as Junior Engineers (iii) Research Assistants to the post of Assistant Research Officers-Minimum Service of 8 years as Research Assistant.

(iii) Embankment Inspectors/Silt Analysts to the post of Assistant Research Officers- Minimum Service of 8 years as Embankment Inspector/Silt Analyst.

(iv) Assistant Engineers promoted from Sub-Engineers Head Draftsman/Draftsman cadres to the post of E.E. Minimum 18 years of total service out of which at least 6 years should be as Assistant Engineers.

(v) Assistant Engineers to the post of Executive Engineers minimum 6 years as Assistant Engineer.

(vi) Superintending Engineers to the post of Chief Engineers-Minimum service 6 years as Superintendent Engineers.

(2) The fields of selection shall ordinarily be limited to five times the number of officers to be included in the select list, provided that if the required number of suitable officers are not available in the field so determined the field may be enlarged to the extent considered necessary by the Committee by mentioning the reasons in writing."

From the perusal of the above Rules, it is clear and specific that the eligibility is considered as on 1st January of that year. The incumbent must have completed the prescribed years of service, namely, 8 years of service for the Graduation Engineers and 12 years of service for the Sub-Engineers. It is not in dispute that the appellant as on 1st January 1992 had acquired the graduation qualification but had not completed 8 years of service. When the DPC met on 21.12.92 for filling up of the vacancies for the year 1992, the claim of the appellant did not come up consideration. So, the appellant filed O.A. No.354/97. The Tribunal vide order dated 21.1.98 (Annexure A/9) disposed of O.A. with the directions that the respondents shall constitute a review DPC within a period of six months for considering the case of the appellant for his promotion from December 1992. The order passed by the Tribunal on 21.1.98 is relevant, which reads as under :-

"As per the return, the respondents have admitted the claims of the applicant and have submitted that the petitioner's name would now be placed before

Departmental Promotion Committee for consideration of his promotion and for granting him promotion since December 1992. The respondents have, however, not mentioned the time where they will have to place the matter of the applicant for his promotion from 1992 before the review DPC. So it would be proper to fix the time.

In the result, the petition be and is hereby disposed of with the directions that respondents shall constitute a review DPC within a period of six months from the date of this order for considering the applicant's case or his promotion from December 1992.

However, there will be no order as to costs."

3. In pursuance to the order of the Tribunal, a review DPC was held in the month of November 1998 and he was not found fit to be promoted on the post of Assistant Engineer as on 1.1.92. This was communicated to the appellant by the respondent no.2vide communication dated 24.12.98 (Annexure A/12).

4. The appellant challenged the said order dated 24.12.98 by filing O.A.No.2224/2000. After abolition of the Tribunal, the case was transferred to the Gwalior Bench of the High Court of M.P. and registered as WP No.5527/03.

5. As per the appellant, there is 10% quota prescribed for promotion on the post of Assistant Engineer from Sub-Engineer Degree Holder. As per Rule 15 of 1968 Rules, the qualifying service for promotion on the post of Assistant Engineer is 8 years of service.

6. Learned counsel for the appellant drew my attention to Annexure A/5 dated 11.7.89 and submitted that relaxation has been granted by the State Government by issuing instructions to the effect that those who possess B.E. Degree and have 8 years of qualifying service on the date of consideration by DPC are eligible to be considered for promotion. He submitted that in view of the instructions issued by the State Government on 11.7.89 vide Annexure A/5, the respondent no.2 wrongly rejected his case for promotion on the post of Assistant Engineer as on 1.1.92.

7. As per Rule 15 of the 1968 Rules, the Diploma Holders should have minimum 12 years of qualifying service for eligibility to be considered for promotion as Assistant Engineers. If a Diploma Holder acquires graduation, he should complete minimum of 8 years of service then only he becomes eligible for consideration for promotion as Assistant Engineer. He should hold the post as Sub-Engineer in a substation or continuous officiating capacity as prescribed. But the cut off date for eligibility is 1st January of that year, in which the eligibility was to be considered. The appellant passed the B.E. in the year 1991 and completed 8 years of service as Sub-Engineer on 19.10.92 and therefore he has required qualification on 19.10.92 and therefore in the year 1993 as on 1st. January 1993, he became eligible for consideration for promotion. Consequently, the direction issued by the Tribunal on 21.1.98 (Annexure A/9) is dehors to the Rules of 1968.

8. The appellant was duly considered by the review DPC for promotion to the post of Assistant Engineer under 10% quota of Graduate (BE Degree-Holder) Sub-Engineers strictly in accordance with the provisions contained in the Rules of 1968. The review DPC rightly found that only such incumbents holding the post of Sub-Engineer in the Department, were entitled to be considered for promotion to the post of Assistant Engineer under 10% quota of Graduate Sub-Engineer in the position of 1.1.1992, who, upto the said cut-off date had completed 8 years qualifying service on the post of Sub-Engineer and were alone possessing the degree of B.E. Course. In the case of the appellant, although he was fulfilling one of the condition regarding possessing of the degree of B.E. Course on the said cut-off date i.e. 1.1.92, but other mandatory requirement as contemplated under the Rules referred to hereinabove regarding his having completed 8 years qualifying services upto the said cut-off date 1.1.92, was not being fulfilled by the appellant. Thus, there is no illegality either in the decision taken by the review DPC vide Annexure A/13 or in the consequential intimation given vide Annexure A/12.

9. The issue involved in this appeal was considered by the Apex Court in the case of *Ramesh Kumar Choudha & Ors. v. State of M.P. & Ors.* Decided on 20.9.1996 (Annexure R/1), it was held :-

> "The case of the appellants is that though the respondents had completed the eligibility criteria as on January 1 of the year 1992, a fact that the graduation qualifications acquired subsequent to that date but before the DPC had considered their cases are not entitled to be promoted. The approach adopted by the Tribunal is illegal and contrary to Rules 15 and 16 of the Rules referred to hereinbefore. We find force in the contention. As seen Rule 15 is a clear mandate as to the eligibility criteria. Firstly, the diploma-holders should have minimum of 12 years qualifying service for eligibility to be considered for promotion as Assistant Engineers. If a diploma holder acquires graduation, he should complete minimum of eight years of service then only he becomes eligible for consideration for promotion as Assistant Engineer. He should hold the post as sub-Engineer in a substation or continuous officiating capacity as prescribed. But the cut off date for eligibility is 1st January of the year in which the eligibility was to be considered. Since the respondents acquired the qualifications in October 1992, they did not become eligible for consideration for promotion for the year 1992 though the DPC had met in December 1992. Consequently, the direction issued by the Tribunal and the appointments of the respondents made pursuant to the contempt orders are clearly illegal. We are informed that they have been already promoted. Therefore, their promotions should be treated to be ad hoc and de horse the rules. Though as per the orders of the Tribunal, they came to be promoted, such promotions do not confer any right to seniority over any other eligible candidates who acquired the qualifications as on January 1, 1992 Therefore, the DPC is directed to sit every year either in

the month of February or March for consideration of respective claims of the candidates provided if any vacancy exists or anticipated. As regards this years is concerned, they should sit in the this year to consider the vacancies that had arisen between 1st January 1992 to 1st. January 1996. The DPC should get identified the vacancies arisen in each year. Consider the basis of respective eligible candidates diploma-holders as well as Engineers who have completed 12 years of service by the Diploma holders on the Diploma holders who acquire graduation before first day of January of the year and consider their cases for promotion in accordance with rules. Such of the candidates found fit and recommended fit be given them regular promotion provided they are substantive or substantively in officiating capacity in the lower ranking. It would appear that some of the candidates have approached the Government taking advantage of the orders of the Tribunal and got promoted, they also came to be considered and were promoted. All appointments are also to be treated as ad hoc."

10. A statutory rule, it is trite, cannot be supplemented by an executive instructions and would not prevail over statutory provisions contained in the Rules of 1968. On perusal of Annexure A/5 issued by the respondent no.1 on 11.7.89, we are of the considered view that the same will not in any way help the appellant, or appellant will get any benefit from the same.

11. The appellant vide application dated 25.6.08 (I.A.No.14532/06) pointed out to this Court that he was found fit for promotion and promoted on the post of Assistant Engineer vide order dated 19.5.03 (Annexure P/15). On 21.9.05 vide Annexure P/16, the appellant made a representation for considering his case for promotion on the post of Assistant Engineer in 1993 as he had completed 8 years of service as Sub-Engineer on 19.10.92.

12. In the case of *N. Suresh Nathan and another v. Union of India & Ors*, AIR 1992 SC 564, it was held by the Apex Court that as per Rule 11 of Recruitment Rules for post of Assistant Engineer in PWD, Diploma-holders Junior Engineers who obtained the Degree during service, the period of three years service in the grade for eligibility for promotion as Degree-holder commenced from the date of obtaining the Degree and the earlier period of service as a Diploma-holders was not counted for this purpose. In the case in hand before us, the scheme of the 1968 Rules is entirely different and therefore the decision of *N. Suresh Nathan's case* (Supra) is distinguishable.

13. In the case of *M.B. Joshi & others v. Satish Kumar Pandey & others*, AIR 1993 SC 267, the Apex Court had held that the seniority is to be counted from the date of appointment and not from the date of acquiring the required qualification. Paras 11 and 12 are relevant which read as under:-

"11. In the cases before us 50 per cent of the posts of Assistant Engineers has to be filled by direct recruitment of persons having degree of graduation

in engineering. The remaining 50 per cent of the vacant posts are to be filled by promotion from the lower cadre of Sub-Engineer and Draftsman. Out of this 50 per cent, 35 per cent quota is fixed for diploma-holders who have completed 12 years of service on the post of Sub-Engineer, 5 per cent quota for Draftsman who have completed 12 years of service and the remaining 10 per cent with which we are concerned has been kept for such Sub-Engineers who during the continuation of their service obtained a degree of graduation or equivalent in engineering and in that case the period of service is reduced from 12 years to 8 years. The Rules in our case do not contemplate any equivalence of any period of service with the qualification of acquiring degree of graduation of engineering as was provided in express terms of *N. Suresh Nathan's case* (AIR 1992 SC 564) making three years service in the grade equivalent to degree in engineering. In our opinion, in the Rules applicable in the cases before us clearly provide that the diploma-holders having obtained a degree of engineering while continuing in service as Sub-Engineers shall be eligible for promotion to the post of Assistant Engineer in 8 years of service and quota of 10 per cent posts has been earmarked for such category of persons.

12. If we accept the contention of Mr. Ashok Sen, it would defeat the very scheme and the purpose of giving incentive of adding educational qualification by diploma-holders while continuing in service in case the period of 8 years' is counted from the date of obtaining graduate degree in engineering. It may be noted that no such argument was raised even from the side of the respondents before the Tribunal. If such interpretation as now sought to be advanced by Mr. Ashok Sen, learned senior counsel is accepted, no relief could have been granted to the respondent Satish Kumar Pandey. We would illustrate the above position on admitted facts that Shri Satish Kumar Pandey had joined as Sub-Engineer on 23.8.1980, but had acquired the degree of engineering in May, 1987. In that situation, Mr. Satish Kumar becomes eligible only in May 1995 and he could not be considered as eligible in December 1989 when these Sub-Engineers were considered for promotion as Assistant Engineers. Even otherwise, if this period of 8 years is counted from the date of acquiring degree then this incentive of adding the qualification during the continuation of service and getting the advantage of acceleration in promotion in 8 years would for all practical purposes become nugatory and of no benefit."

14. The DPC has to consider the case of the appellant for promotion on the post of Assistant Engineer in the year 1993 because the appellant had acquired the qualification as on 1st January 1993. In case if it is found that the appellant's case was not considered in the year 1993 and his case was not considered for promotion on the post of Assistant Engineer in the DPC held in the year 1993, the respondents are directed that they shall constitute a review DPC within a period of six months from the date of this order for considering the case of the appellant for his promotion on the post of Assistant Engineer.

15. In these circumstances mentioned above, we are clearly of the view that the learned Single Judge was wrong in holding that the appellant has to complete 8 years of service as Sub-Engineer after passing B.E. Degree as per Rule 15 (1) of 1968 Recruitment Rules.

16. In the result, we allow the appeal partly by directing the respondents to reconsider the case of the appellant as per Para 14 of this order for promotion to the post of Assistant Engineer as on 1.1.93 as he had completed 8 years qualifying service upto the said cut-off date. The whole exercise be completed within as period of six months from the date of this order. No costs.

Appeal partly allowed.

I.L.R. [2008] M. P., 1599

WRIT APPEAL

Before Mr. Justice R.S. Garg & Mr. Justice R.K. Gupta

10 July, 2008*

Dr. HARI SINGH GAUR VISHWAVIDYALAYA SAGAR (M.P.) & anr. ... Appellants

Vs.

RAJESHWAR YADAV ... Respondent

A. **M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (14 of 2006), Section 2(2) Explanation** - *Explanation cannot be understood to limit the scope of words 'sufficient cause' as used in proviso to sub-section (2) - But, it provides the additional support to the dominant object of the Act for giving a meaningful purpose and also to avoid the creation of any obstacle to the statutory right of an appellant.* (Para 9)

क. म.प्र. उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, 2005 (2006 का 14), धारा 2(2) स्पष्टीकरण – स्पष्टीकरण को शब्द 'पर्याप्त कारण', जैसा कि उपधारा (2) के परन्तुक में प्रयुक्त किया गया है, के विषय क्षेत्र को सीमित करने वाला नहीं समझा जा सकता । – बल्कि यह अधिनियम के मुख्य उद्देश्य को अर्थपूर्ण प्रयोजन प्रदान करनें के लिए और अपीलार्थी के कानूनी अधिकार में किसी बाधा के सृजन को टालने को भी अतिरिक्त समर्थन प्रदान करता है।

B. **M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (14 of 2006), Section 2(2) Explanation** - *The word 'petitioner' used in the Explanation does not mean that petitioner who files a writ petition, but to understood as a party who files the Writ Appeal.* (Para 10)

ख. म.प्र. उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, 2005 (2006 का 14), धारा 2(2) स्पष्टीकरण – स्पष्टीकरण में प्रयुक्त शब्द 'याची' का अर्थ यह नहीं होता है कि याची जो रिट याचिका पेश करता है, बल्कि अभिप्राय उस पक्षकार से है जो रिट अपील पेश करता है।

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*W.A. No. 1292/2007 (Jabalpur)

Cases referred :

AIR 1985 SC 582, (2003) 7 SCC 66

Vibudhendra Mishra, for the appellants.

Sharad Verma, for the respondent No.1.

ORDER

The Order of the Court was delivered by R.K. GUPTA, J.:–During course of hearing on I.A. No. 9190/2007, which is an application for condonation of delay, a question crept in about the scope of the explanation appended to Sub-Section (2) of Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Ahiniyam, 2005. The provisions as contained in Section 2 of the Act are reproduced as under:-

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

2. The explanation appended to the proviso of Sub Section 2 as aforesaid is pari-materia to the explanation appended to Section 5 of the Limitation Act, 1963.

3. On the request of the Bench, learned senior counsels Shri R.P. Agrawal with Shri Sanjay Agrawal, Shri Rajendra Tiwari with Shri T.K. Khadka, Shri V.S. Shroti with Shri Ashish Shroti and Shri T.S. Ruprah, Additional Advocate General with Shri Rahul Jain, Deputy Govt. Advocate addressed this Court on the aforesaid question.

4. The question, which crept in was whether the explanation attached to the proviso of Sub-Section (2) of Section 2 of the aforesaid Act clears the vagueness of the provision attached to Section 2 as aforesaid, or the same is in addition to the main provision.

5. Learned senior counsels, as aforesaid, submitted that the Apex Court in

AIR 1985 SC 582 *(S.Sundaram Pillai etc Vs. V.R. Pattabiraman)* has explained the different meanings of the explanation appended to the main provision. The following prepositions have been mentioned to explain the purpose and the role of the Explanation appended to the Section, Sub-Section or to the proviso. Paragraph 52 from the said judgment is reproduced as under:-

> 52. "Thus from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is :-
>
> (a) to explain the meaning and intendment of the Act itself.
>
> (b) Where there is any obscurity or vagueness in the main enactment, to clarify the same to as to make it consistent with the dominant object which it seems to subserve.
>
> (c) To provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.
>
> (d) An Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment and
>
> (e) It cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in interpretation of the same.

6. The aforesaid judgment has also been referred in 2003(7) SCC 66 *(Dipak Chandra Ruhidas Vs. Chandan Kumar Sarkar).*

7. On basis of the same, learned senior counsels submitted that in absence of any vagueness in the main Section the ambit of the explanation cannot be understood to mean that the same is in the clarificatory nature so as to make it inconsistent with the dominant object which it seems to be and it is submitted that when in the main section the word "sufficient cause" has been used then the explanation would not control or restrict the meaning of the phrase 'sufficient cause' as used in the main provision. All the learned senior counsel further submitted that the appended explanation is only to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful. They also contended that an explanation cannot, however, take away a statutory right with which any person under statue has been clothed nor can set at naught working of an Act by causing hindrance by its interpretation.

8. On basis of the aforesaid prepositions learned senior counsels submitted that the explanation attached to the main Section wherein it is stated the fact that the petitioner was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this Sub Section, would only mean that it is an additional support to

the dominant object of the Act in order to make it meaningful and purposeful and the explanation as such cannot, however, take away the statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same. On that basis it is submitted that there is no vagueness in the main part of the Section with reference to any matter and in absence of any vagueness in the main part of the Section the explanation attached to clarify the same so as to make it consistent with the dominant object which it seems to subserve and on basis of the judgment of the Apex Court rendered in *S.Sundaram Pillai etc* (supra) the preposition C and D which are referred in paragraph-52 thereof shall have full application in the present case as the word "sufficient cause" has to be provided an additional support to the dominant object of the word sufficient cause in the Act so that a meaningful purpose of the same could be added, therefore in addition to the word "sufficient cause" in the explanation it is stated that the fact that the petitioner was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of Sub Section shall have to be understood as an additional support so that the statutory right of appeal of any person may not be affected because of the explanation attached to the main Section.

9. The submissions so made by the learned senior counsels who appeared to assist this Court at the request, deserve to be accepted in the light of the judgments rendered by the Apex Court in *(S.Sundaram Pillai etc* (supra) and *Dipak Chandra Ruhidas* (supra) and we hold that in the case on hands the explanation, which has been attached has to be understood to provide the additional support to the dominant object of the Act for giving a meaningful purpose and also to avoid the creation of any obstacle to the statutory right of an appellant given under the statue.

9. In view of the aforesaid we find that the explanation attached to proviso of Sub Section 2 as aforesaid cannot be understood limit the scope of the words "sufficient cause" as used in the proviso to Sub Section 2.

10. The explanation though states the fact that petitioner was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause is not happily worded in the said explanation. The word "petitioner" though is used in the explanation but it does not mean that petitioner who files a writ petition infact the word "petitioner" is to be understood with reference to the context of Sub-Section (2) of Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Ahiniyam, 2005 to mean and to be understood as a party who files the Writ Appeal and not the Original Petition.

11. Before we part with the judgment we express our thanks and gratitude to all the learned senior counsels who appeared and argued the case to clear the doubts. The matter may now be placed before the Bench to consider the application for condonation of delay. *Order accordingly.*

I.L.R. [2008] M. P., 1603

WRIT PETITION

Before Mr. Justice Viney Mittal

7 December, 2007*

MAHAVIR GRIH NIRMAN SAHKARI SANSTHA MARYADIT ... Petitioner

Vs.

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

A. **Constitution, Article 226, Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1973, Section 50** - *Intention to prepare scheme -- After finalization of draft scheme, final scheme published in Govt. Gazette on 28.03.2003 - It was stipulated that scheme would come into operation w.e.f. date of publication in Gazette - Held - Scheme would be treated as come into existence on 28.03.2003.* (Para 26)

क. संविधान, अनुच्छेद 226, नगर तथा ग्राम निवेश अधिनियम, म.प्र., 1973, धारा 50 – स्कीम तैयार करने का आशय – स्कीम के प्रारूप को अंतिम रूप देने के उपरांत अंतिम स्कीम सरकारी राजपत्र में 28.03.2003 को प्रकाशित – यह नियत किया गया कि स्कीम राजपत्र में प्रकाशन की तिथि से लागू होगी – अभिनिर्धारित – स्कीम का 28.03.2003 को अस्तित्व में आना माना जाएगा।

B. **Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 73** - *Power of State Government to give direction - Housing Policy issued in September 1995 - Directions are binding on authorities and officers appointed under Section 3 of Act - Held - Petitioner entitled for allotment of 20% of developed plots out of land acquired as per housing policy.* (Para 27)

ख. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 73 – निदेश देने की राज्य सरकार की शक्ति – आवासीय नीति सितम्बर 1995 में जारी हुई – अधिनियम की धारा 3 के अधीन नियुक्त प्राधिकारियों और अधिकारियों पर निदेश बंधनकारी – अभिनिर्धारित – याची आवासीय नीति के अनुसार अर्जित भूमि में से 20% विकसित भूखण्डों के आबंटन का हकदार।

C. **Doctrine of Election** - *As per housing policy 20% of developed plots out of land acquired or in alternative monetary compensation to be offered to land owner - A valid and precise offer of option is prerequisite for invoking doctrine - Since no offer had ever been put by Development Authority - Adverse inference against land owners for non-exercise of option would be contrary to norms of equity, good conscious and fair play.* (Para 32)

ग. निर्वाचन का सिद्धांत – आवासीय नीति के अनुसार अर्जित भूमि में से विकसित भूखण्डों का 20% या विकल्प में धन के रूप में प्रतिकर का प्रस्ताव भूमिस्वामी को देना होगा – सिद्धांत का प्रयोग करने के लिये वैध और सुस्पष्ट वैकल्पिक प्रस्ताव पूर्वापेक्षित है – चूंकि विकास प्राधिकारी द्वारा कभी भी कोई प्रस्ताव नहीं रखा गया – भूमिस्वामियों ने अपने विकल्प का प्रयोग नहीं किया, उनके विरुद्ध ऐसा प्रतिकूल निष्कर्ष निकालना साम्य के मानदण्ड, शुद्ध अंतःकरण और निष्पक्ष व्यवहार के विरुद्ध होगा।

*W.P. No.1464/2007 (Indore)

V.K. Jain, for the petitioner.
A.S. Kutumbale with *Sudarshan Joshi & S.D. Bohra,* for the respondent IDA.

ORDER

VINEY MITTAL, J.:–This order shall dispose of six writ petitions being W.P. No. 701/2005, W.P. No. 1027/2005, W.P. No. 1028/2005, W.P. No. 1463/2007, W.P. No. 1464/2007 and W.P. No. 1504/2007. Whereas earlier five writ petitions raise a claim with regard to scheme No. 136, in Writ Petition No. 1504/2007 an identical claim has been raised with regard to scheme No. 134. For the sake of convenience, the facts are borrowed from W.P. No. 1464/2007.

2. Indore Development Authority, Indore (hereinafter referred as IDA), respondent No. 4, is a "Town and Country Development Authority" within the meaning of Section 38 of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (hereinafter referred to as Act). IDA proposed a town development scheme and in terms of Section 50 of the Act, passed a resolution No. 235 dated October 8, 1993, resolving to declare its intention to prepare a scheme No. 136 in the city of Indore. A copy of the resolution passed by IDA under Section 50(1) of the Act on October 8, 1993 has been appended as Annexure P-3 with the present petition. A gazette notification issued under Section 50(2) of the Act on December 17, 1993 has been annexed as Annexure P-4.

3. It appears from the record that the petitioner Mahavir Grih Nirman Sahkari Sanstha Maryadit (hereinafter referred to as petitioner-society), which is a residential housing cooperative society under the provisions of Madhya Pradesh Cooperative Societies Act, submitted a representation/application on December 10, 1993 to IDA requesting that since the land belonging to the petitioner-society was sought to be included in the aforesaid development scheme, therefore, the members of the petitioner-society be allotted the residential developed plots out of the said scheme on preferential basis. A copy of the said representation/ application has been appended as Annexure P-5 with the petition. On December 28, 1993, a resolution No. 321 was passed by IDA, whereby the aforesaid request made by the petitioner-society was favourably considered and it was decided to allot the developed plots to the members of the petitioner-society on payment of the development cost, along with the land acquisition charges, besides 12% supervision charges along with any other charges, as per law. A copy of the resolution dated December 28, 1993 has been appended as
Annexure P-6 with the present petition.

4. It further appears from the record that in terms of Section 50(3) of the Act, a draft of the aforesaid Town Development Scheme No. 136 was prepared on April 28, 1995 and published in the government gazette on May 26, 1995, whereby objections were also invited with respect to the said draft development scheme. A copy of the said gazette notification dated May 26, 1995 has been appended as Annexure P-7 with the present petition. Objections were filed by various land

owners, including all the writ petitioners in various writ petitions. Framing of the said scheme was challenged on various technical grounds. It was claimed by the aforesaid objectors that due procedure had not been followed. However, all the aforesaid objections were rejected by IDA by passing a detailed order, dated September 2, 2002, under Section 50(4) of the Act. A copy of the order dated September 2, 2002 has been appended as Annexure P-8 with the present petition. While dealing with the objections raised by the petitioner-society, IDA also observed that since the application/representation filed by the petitioner-society on December 10, 1993 was premature, having been filed even before the scheme had been finalized under Section 50(4) of the Act, and therefore, even the resolution dated December 28, 1993 (Annexure P-6) passed by IDA was considered to be premature and therefore, while rejecting the objections filed by the petitioner-society, the resolution dated December 28, 1993 was also cancelled being premature.

5. After the objections raised by various persons, including the present petitioners, were rejected by IDA, the said scheme was ordered to be published in the government gazette as required under Section 50(7) of the Act, vide a decision taken on March 5, 2003. The aforesaid scheme was actually published in the government gazette on March 28, 2003. A copy of the said notification dated March 28, 2003 has been appended as Annexure P-9 with the present petition. A perusal of the said notification Annexure P-9 reflects that the scheme was to come into force w.e.f. the date of publication in the government gazette. Thus, the said scheme having been published in the government gazette on March 28, 2003. In terms of the provisions of Section 50(7) of the Act and also as per the directions issued by IDA while issuing the final scheme, the scheme became operative w.e.f. March 28, 2003.

6. On finalization of the scheme, as noticed above, and on account of the rejection of their objections under Section 50(4) of the Act, various land owners, including the present petitioners,filed revision petitions under Section 51 of the Act, challenging the order dated September 2, 2002 (Annexure P-8), whereby their objections had been rejected and also raising a challenge to the final scheme Annexure P-9. The revision petition filed by the petitioner-society was rejected by the revisional authority, respondent No. 3, vide an order dated March 29, 2004. It was held by the revisional authority that no irregularities had been committed by IDA in framing/finalization of the scheme and therefore, as a matter of consequence, the order Annexure P-8 passed by the IDA was also upheld. The revisional authority also noticed that the requisite sanction having been granted to the scheme by the State Government on November 1, 2002 only and as per gazette notification, the scheme had become operative w.e.f. March 5, 2003. However, while rejecting the revision petition filed by the petitioner-society, it was also observed by the revisional authority that although the developed plots under the scheme would be allotted to the general public by IDA but there had been a policy of the IDA to allot the developed plots to the members of the society, from whom

the land had been acquired, on preferential basis. It was further observed that the petitioner-society would also be at liberty to take the benefit under the Aawas Neeti (Housing Policy). A copy of the revisional order dated March 29, 2004 passed by respondent No. 3, has been appended as Annexure P-11 with the present petition.

7. It further appears from the record that after the revision petitions filed by the land owners had been dismissed by the revisional authority and the scheme in question had been upheld, a communication dated September 6, 2003 was issued by IDA to the Collector, Indore to acquire the land covered under the scheme, under the provisions of Land Acquisition Act, 1894. The aforesaid communication dated September 6, 2003 has been appended as Annexure R-11 with the reply filed by IDA.

8. In pursuance to the request made by IDA, a notification under Section 4 of the Land Acquisition Act, 1894, was issued on October 17, 2003, proposing to acquire the land covered under the scheme, which included the land belonging to the writ petitioners also. Objections were invited under Section 5-A of the Land Acquisition Act and were even preferred by various land owners. The said objections were rejected and a declaration under Section 6 of the Land Acquisition Act was issued on October 15, 2004. The notification under Section 4 of the Act has been appended as Annexure P-24 with the present petition, whereas the declaration under Section 6 has been annexed as Annexure P-29.

9. It is, in these circumstances that the writ petitioners have approached this Court through the present writ petitions challenging the order passed by IDA Annexure P-8, whereby objections of the land owners were rejected; notification Annexure P-9 issued under Section 50(7) of the Act; challenging the order dated March 29, 2004 (Annexure P-11) passed by the revisional authority; and challenging the notifications of acquisition Annexures P-24 and P-29. Additionally, a prayer has been made by the petitioner-society that in case, the scheme in question and land acquisition proceedings are held to be legal, in such a situation, IDA be directed to comply with the Aawas Neeti and its own resolution and to extend the benefit thereof to the petitioner-society.

10. The claim of the petitioner-society has been contested by IDA. A detailed reply has been filed. It has been maintained that due procedure had been followed while framing and finalizing the scheme No. 136. The rejection of the objections raised by the petitioner-society vide order dated September 2, 2002, Annexure P-8, has also been defended and even the revisional order passed by the revisional authority (Annexure P-11) has also been supported. The validity of the notifications of acquisition, Annexures P-24 and P-29, has also been reiterated. With regard to the alternative claim made by the petitioner-society, it has been maintained by IDA that the aforesaid Aawas Neeti (Housing Policy) had been framed in the year 1995 and as such had come into force w.e.f. September,

1995. IDA has claimed that since scheme No. 136 was framed in the year 1993 i.e. prior to coming into force of the housing policy in the year 1995, therefore, the petitioner-society cannot claim any benefit of the aforesaid housing policy. Additionally, the aforesaid respondent No. 4 has maintained that after proceedings for land acquisition under the provisions of Land Acquisition Act had been finalized, no benefit of any of the provisions of the Housing Policy can be claimed, in as much as, the aforesaid policy had been framed with a view to avoid the lengthy process of land acquisition.

11. At this stage, it may be noticed that besides the present writ petitions which are being taken up for joint disposal through the present order, various other land owners have also approached this Court challenging the scheme. First writ petition appears to have been filed in the year 2005. In some of the cases, this Court had issued an interim order, whereby the parties were directed to maintain status-quo regarding possession.

12. In the five writ petitions, pertaining to Scheme No. 136, separate I.As. have been filed by the writ petitioners. In W.P. No. 1464/2007, the aforesaid IA has been numbered as I.A. No. 11025/2007. In the aforesaid application, the petitioner-society has averred that in the main writ petition, an alternative relief has been claimed by the petitioner-society to the effect that according to the Housing Policy and practice of IDA, 20% area out of the acquired land was to be allotted to the land owners after the development. On that basis, it has been claimed that if the petitioner-society is allotted 20% of the developed plots in lieu of compensation then the petitioner-society would be satisfied and would withdraw the writ petition on such allotment, thereby ending the entire dispute. In the said I.A., consequentially, directions have been sought against IDA to allot 20% of the developed plots to the society in lieu of the compensation for land acquisition payable to the petitioner-society. It has been specifically pleaded that the compensation for the acquired land has not been withdrawn at all by the petitioner-society. Along with the aforesaid I.A., a communication dated November 20/22, 2006 issued by the Revenue Department to the Collector, Indore has been appended. From a perusal of the aforesaid communication , it appears that a similar claim had been made by the petitioner-society before the State Government for issuance of the directions to IDA to follow the Aawas Neeti and make requisite allotment. On the basis of the aforesaid claim, the State Government appears to have issued a communication to the Collector to follow the Aawas Neeti in case of the petitioners, as per law. Another communication dated December 20, 2006 has also been appended with the said I.A. This communication has been issued from the office of Commissioner, Indore Division, Indore and has been addressed to the Chief Executive Officer, IDA. In the aforesaid communication, directions have been issued to IDA that since a decision for acquisition for the land for the scheme No. 136 had been finalized on September 2, 2002, therefore, as per the Housing Policy the petitioner-society was entitled to 20% of the developed plots

on the basis of their acquired land, as per para 6.6 of the said policy and IDA was directed to examine the claim of the petitioner-society as per law.

13. Writ Petition no. 1504/2007 has been filed by the petitioners with regard to a similar claim for allotment of 20% developed plots in Scheme No. 134, without, however raising any challenge to the Scheme or acquisition proceedings.

14. I have heard Shri V.K. Jain, learned counsel for the petitioner-society and Shri A.S. Kutumbale, learned Senior counsel appearing for IDA and with their assistance, have also gone through record of the case.

15. Learned counsel for the petitioner-society at the outset has stated that the petitioner-society is confining its claim in the present writ petitions only to the alternative relief claimed by it in the main petition and specifically asserted in IA No. 11025/2007 and similar other IAs. filed in the connected matters. Shri Jain states that in view of the alternative relief claimed by the petitioner-society, it is giving up its other challenge raised in the writ petition with regard to the irregularities in the scheme and the acquisition of the land for the said scheme.

16. Learned counsel for the petitioner-society, while pressing the aforesaid alternative claim, has vehemently argued that under the provisions of Section 50 of the Act, various steps were required to be followed by IDA before scheme could be taken to be finalized. Shri Jain has referred to the provisions of Section 50 of the Act to elaborate the aforesaid contention and has also pointed out to the resolution dated October 8, 1993, Annexure P-3 passed by IDA. It has been contended that the aforesaid resolution was merely a declaration of intention by IDA to prepare a Town Development Scheme, as required under Section 50(1) of the Act and by any stretch of imagination, could not be taken to be a finally prepared scheme. Shri Jain has also referred to subsections (2),(3),(4) and (7) of Section 50 of the Act to support his contention that it was only after consideration of the objections under subsection (4) that the draft scheme, as published under subsection (3), could be decided to be approved by IDA and it was only after such approval, a scheme was required to be published under subsection (7). Shri Jain has pointed out that it was only a finalized scheme, as published in the government gazette under subsection(7), which could be taken to have come into operation from such date as was prescribed. The learned counsel has also referred to the notification, Annexure P-9, to point out that the said notification dated March 5, 2003 was in fact published in the government gazette on March 28, 2003 and therefore, when the said notification itself described that the scheme was to come into operation w.e.f. the date of its publication in the government gazette, then the said scheme No. 136 could only be treated to have come into operation w.e.f. March 28, 2003 and not on any earlier date. Learned counsel has also referred to the revisional order, Annexure P-11, passed by respondent No. 3, whereby although the said revision petition filed by the petitioner-society was dismissed by holding that there were no procedural irregularities in framing/

finalizing of the scheme, but even the revisional authority had noticed that the requisite sanction had been granted to the scheme by the State Government only on November 1, 2002. According to the learned counsel, although the revisional authority had wrongly described that the said scheme had come into operation w.e.f. March 5, 2003 but as a matter of fact, as per the decision taken by IDA, and also as per the provisions of Section 50(7) of the Act, the scheme had in fact actually come into operation w.e.f. March 28, 2003.

17. In view of the aforesaid facts, Shri Jain has maintained that the Housing Policy, concededly had been framed by the State Government in the year 1995 and even as per the respondent, IDA, the same had come into operation w.e.f. September 1995. Shri Jain has referred to para 6.6. of the aforesaid Housing Policy, a copy whereof has been appended as Annexure P-18 with the petition, to contend that the respondent-IDA was bound in law to give effect to the said Housing Policy and could not have rejected the claim of the petitioner-society for allotment of 20% of the developed plots from the acquired land on the ground that the scheme had been framed in the year 1993.

18. To elaborate the aforesaid claim, the learned counsel for the petitioner-society has also referred to a general order dated December 1, 1995, Annexure P-19, issued by the State Government to M.P. Housing Board and to all the Development Authorities in the State, whereby in pursuance to para 6.6 of the Housing Policy, a detailed procedure had been visualized which was required to be followed by a Development Authority, in case of framing of a development scheme. Learned counsel maintains that at no stage, the said procedure had ever been followed by IDA and at no point of time, any option had ever been offered to the petitioner-society, requiring it to accept 20% of the developed plots out of its acquired land or to opt for monetary compensation.

19. The aforesaid contentions have been refuted by Shri A.S. Kutumbale, learned Senior counsel appearing for IDA. Shri Kutumbale has reiterated the stand taken by IDA in written statement and has contended that the housing policy, Annexure P-18, had been issued by the State Government in the year 1995 and could not be treated to be retrospective in nature. According to the learned Senior counsel, since the scheme in question had been framed in the year 1993, therefore, the said housing policy issued in the year 1995 was not applicable with regard to the scheme No. 136 and as such no benefit under the said housing policy could be claimed by the petitioner-society. Shri Kutumbale, has also argued that para 6.6 of the housing policy and the general order dated December 1, 1995, issued by the State Government for implementation thereof, clearly envisaged that the said policy was operative only in a case where a land owner, whose land was included in a development scheme, had voluntarily agreed to hand over the possession of his land to IDA (or any other such Development Authorities), free of any compensation so that the lengthy procedure under the Land Acquisition Act was avoided but was not attracted to a situation where the procedure under the Land Acquisition

Act had been resorted to and the land had been duly acquired. According to the learned Senior counsel, after the scheme had been finalized, the land in question was duly acquired under the provisions of Land Acquisition Act, through two notifications issued under Sections 4 and 6, Annexures P-24 and P-29, respectively, and therefore, in such a situation, para 6.6 of the Hosing Policy was not attracted at all for grant of any benefit to any land owner, such as the petitioner.

20. I have duly considered the aforesaid rival contentions raised by the learned counsel for the parties.

21. The following questions arise for consideration to adjudicate the aforesaid controversy between the parties:

(i) Which is the date on which the scheme No. 136 can be said to have been finalized and become operative?

(ii) Whether, the Housing Policy, having become operative w.e.f. September 1995, the claim made by the petitioners for allotment of 20% of the developed plots out of their acquired land in scheme No. 136 can result in retrospective operation of the said Housing Policy?

(iii) Whether, the IDA had followed the procedure envisaged under the general order dated December 1, 1995, Annexure P-19, issued by the State Government for implementation of the Housing Policy, in as much as, whether any notices offering the 20% plots had ever been issued and served upon the land owners after the framing of the scheme?

(iv) If any such notices, as envisaged in the general order/circular, Annexure P-19, had never been served upon the land owners, and the land in question had been acquired under the provisions of Land Acquisition Act, still the benefit of para 6.6 of the Housing Policy could be claimed by a land owner?

22. At this stage, it would be relevant to extract certain relevant provisions of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 as follows:

"**Section 50.** Preparation of town development schemes.-(1) The Town and Country Development Authority may, at any time, declare its intention to prepare a town development scheme.

(2) Not later than thirty days from the date of such declaration of intention to make a scheme, the Town and Country Development Authority shall publish the declaration in the Gazette and in such other manner as may be prescribed.

(3) Not later than two years from the date of publication of the declaration under sub-section (2) the Town and Country Development Authority shall prepare a town development scheme in draft form and publish it in such form and manner as may be prescribed together with a notice inviting objections and suggestions from any person with respect to the said draft development scheme before such date as may be specified therein, such

date being not earlier than thirty days from the date of publication of such notice.

(4) The Town and Country Development Authority shall consider all the objections and suggestions as may be received within the period specified in the notice under sub-section (3) and shall, after giving a reasonable opportunity to such persons affected thereby as are desirous of being heard, or after considering the report of the committee constituted under sub-section (5) approve the draft scheme as published or make such modifications therein as it may deed fit.

x x x x x
x x x x x
x x x x x

(7) Immediately after the town development scheme is approved under sub-section (4) with or without modifications the Town and Country Development Authority shall publish in the Gazette and in such other manner as may be prescribed a final town development scheme and specify the date on which it shall come into operation.

Section 51. Revision.- The Director may, at any time, but not later than two years from the date of publication of the final town development scheme, under section 50 on his own motion or on an application filed within thirty days of such publication of the final scheme by any person aggrieved by the final scheme, call for and examine the record of any scheme for the purpose of satisfying himself as to the correctness of the order passed by the Town and Country Development Authority, or as to the regularity of any proceedings of such Authority and when, calling such record direct that the execution of the scheme be suspended. The Director may, after examining the record, pass such order as he thinks fit and his order shall be final:

Provided that no order shall be passed unless the person affected thereby and the Town and Country Development Authority have been given a reasonable opportunity of being heard.

Section 73. Power of State Government to give directions.- (1) In the discharge of their duties the officers appointed under section 3 and the authorities constituted under this Act shall be bound by such directions on matters of policy as may be given to them by the State Government.

(2) If any dispute arises between the State Government and any authority, as to whether a question is or is not a question of policy, the decision of the State Government shall be final".

23. At this stage, it may also be relevant to notice Para 6.6 of the Housing Policy and the relevant portion of the General Order December 1, 1995 (Annexure P-19) as under:

"6.6 शहरो में आवासीय विकास हेतु भुमि के मालिको, जिनमें प्रायः अधिकांश कृषक होते हैं, को आवासीय विकास योजना में भागीदार बनाकर उनकी सहमति से भूमि प्राप्त करने पर जोर दिया जावेगा। इस प्रकार विकास संस्थाओं को कृषकों की निजी भूमि एक ओर सुलभता से उपलब्ध हो सकेगी, दूसरी ओर,कृषको को भी भूमि के उपयोग परिवर्तन के फलस्वरूप होने वाले आर्थिक लाभ का उचित हिस्सा मिल सकेगा । इस व्यवस्था से भू–अधिग्रहण अधिनियम, 1894 के अंतर्गत की जाने वाली लम्बी प्रकिया से बचा जा सकेगा। भूमि के मालिकों,जिनसे भूमि ली जायेगी को यह विकल्प दिया जायेगा कि वे उनकी भूमि के मूल्य के बदले या तो 20% विकसित भूखण्ड ले अथवा भू–अर्जन की जो भी कीमत निर्धारित हो वह कीमत लें। इस संबंध में विस्तृत नियम बनाये जावेगें। इस प्रकिया को सभी विकास संस्थाओं के लिए लागू किया जोवगा।"

Relevant extract of General Order dated December 1, 1995.

"3.3 जिस निजी भूमि का अर्जन किया जाना है उसके संबंध में विकास संस्था पूरा विवरण राजस्व अधिकारियों से प्राप्त करेगी, जिसमें भूमि का खसरा कृमांक, रकबा, उसका वास्तविक स्वामी, वर्तमान आधिपत्यधारी आदि का विवरण हो। इस बात को सुनिश्चित किया जायेगा कि निजी भूमि के वास्तविक मालिक को सही जानकारी और सही रकबा आदि संकलित हो।

3.4 उक्त जानकारी संकलित किये जाने के बाद संबंधित भूमि मालिकों को, विकास संस्था द्वारा प्रस्तावित आवासीय योजना का संक्षिप्त विवरण देते हुए न्यूनतम 15 दिनों की पूर्व सूचना भेजी जायेगी, जिसमें उस भूमि मालिक को संबंधित भूमि का अर्जन प्रस्तावित हो। अर्जित की जाने वाली भूमि का विवरण और नक्शा आदि सूचना पत्र के साथ संलग्न किया जायेगा सूचना प्राप्ति की अभिस्वीकृति के दिनांक से 15 दिनों की अवधि की गणना की जावेगी, इस सूचना पत्र में निम्नलिखित बातों का उल्लेख रहेगा –

3.4.1 संबंधित कलेक्टर अथवा उसके द्वारा प्राधिकृत अधिकारी, भू–अर्जन अधिनियम 1894 के अंर्तगत निर्धारित प्रकिया के आधार पर उपर्युक्तानुसार अर्जित की जाने वाली भूमि के निर्धारित मूल्य का उल्लेख रहेगा।

3.4.2 विकल्प के रूप में, सूचना पत्र में यह भी प्रस्ताव रहेगा कि संबंधित भूमि के मूल्य के बदले में प्रस्तावित योजना में किस आकार के कितने विकसित भूखण्ड, भू–स्वामी को विकास संस्था द्वारा उपलब्ध कराये जायेंगे।

3.4.3 सूचना पत्र तामील होने के दिनांक से कम से कम 15 दिन के बाद की तिथि पर विकास संस्था द्वारा नियत स्थान पर आयोजित होने वाली बैठक को उस तिथि एवं समय का भी उल्लेख रहेगा, जिस तिथि को संबंधित भूमि स्वामी वहां एकत्रित होकर, लिखित में अथवा मौखिक रूप से विकास संस्था के प्रस्ताव पर सहमति अथवा असहमति दे सकेंगे।

3.4.4 उपर्युक्तानुसार सूचना पत्र तामील होने के बाद सूचना पत्र में नियत दिनांक एवं समय को बैठक आयोजित की जायेगी, जिसमें संबंधित भूमि स्वामीयों को आमंत्रित किया जायेगा। यदि विकास संस्था मध्यप्रदेश गृह निर्माण मण्डल है तो उस स्थिति में इस बैठक में मंडल के उपायुक्त, म.प्र. गृह निर्माण मण्डल के स्तर का अधिकारी और अन्य विकास संस्थाओं की स्थिति में उस संस्था के मुख्य कार्यपालन

अधिकारी द्वारा भूमि स्वामी से चर्चा की जायेगी तथा उनकी सहमति, असहमति एवं विकल्प के बारे में उनसे लिखित में प्रस्ताव प्राप्त किये जायेंगे। जो भूमि स्वामी विकास संस्था द्वारा दिये गये विकल्पों से सहमत नहीं होते हैं, तो ऐसे भूमि स्वामियों को भूमि अधिगृहण की कार्यवाई विकास संस्था, कलेक्टर के माध्यम से करा सकेगी। जो भूमि स्वामी विकास संस्था द्वारा दिये विकल्पों में से कोई एक विकल्प चुनकर भूमि देने को तैयार होंते हैं, तो ऐसी भूमि, विकास संस्था संबंधित भूमि स्वामी से अनुबंधित शर्तों के अधीन प्राप्त कर सकेगी। यदि संबंधित भूमि स्वामी मुआवजे के रूप में नकद राशि लेना चाहता है तो, ऐसी राशि के भुगतान के बाद विकास संस्था भूमि का आधिपत्य ले सकेगी। यदि भूमि स्वामी यानी भूमि के बदले में विकसित भूखण्ड चाहता है, तो उस संबंध में विकास संस्था और संबंधित भूमि स्वामी के बीच तदाशय का एक अनुबंध सम्पन्न होगा और उसके बाद विकास संस्था भूमि का अधिपत्य ले सकेगी । यह स्थिति भी हो सकती है कि कोई भूमि स्वामी यानि भूमि के एक हिस्से के लिए नगद मुआवजा ले और शेष हिस्से के लिए विकसित भूखण्ड मांगे, अगर ऐसा प्रस्ताव आता है, तो उसे भी विकास संस्था स्वीकार कर सकेगी। "

24. From the perusal of the provisions of Section 50 of the Act, it is apparent that once a town development scheme, as envisaged under Section 49 of the Act, is proposed by a Town and Country Development Authority (such as IDA), then in terms of subsection (1), the said authority has to declare its intention to prepare a town development scheme. Under sub-section (2), not later than 30 days from the date of such declaration of intention, the said declaration has to be published in the government gazette and in such other manner as may be prescribed. After publication of the declaration under subsection (2), under the provisions of sub-section(3), the said authority has to prepare a draft of the town development scheme and publish the same and invite objections/suggestions. The objections/ suggestions received by such an Authority would require to be considered in terms of subsection (4), after giving a reasonable opportunity to such persons, who may desire to be heard, and thereafter to take a decision to approve the draft scheme, either as originally framed or with such modifications as may be deemed fit. Under sub-section(7), after the draft scheme is approved, under subsection(4), with or without modifications, the said Authority is required to publish in the gazette and in such other manner, as may be prescribed, a final town development scheme and is also required to specify the date on which the scheme is to come into operation.

25. It is thus, clear that unless and until, the objections received against the draft scheme have been considered and adjudicated by a Development Authority and the draft scheme, as originally prepared or modified, is ordered to be published under subsection(7), the scheme cannot be treated to have been finalized. However, even such a final scheme can only become operative from a date which is so specified by the Development Authority.

26. In the present case, a declaration of intention was resolved through resolution

No. 235 passed on October 8, 1993, when Scheme No. 136 was proposed by IDA. The said resolution was in fact, in conformity with the requirements of Section 50(1) of the Act. A gazette notification, in terms of Section 50(2) followed on December 17, 1993 (Annexure P-4). The draft scheme was prepared on April 20, 1995 and was published in the government gazette on May 26, 1995, in terms of Section 50(3) (Annexure P-7). Objections were invited from various persons. Such objections were filed. The objections raised by various persons, including present petitioners, were adjudicated by IDA and were rejected vide order dated September 2, 2002 (Annexure P-8). The said decision taken by IDA was in terms of Section 50(4) of the Act. After finalization of the draft scheme, the final scheme was issued on March 5, 2003 and was published in the government gazette on March 28, 2003, (Annexure P-9). In the said notification, it was specifically stipulated that the scheme would come into operation w.e.f. the date of its publication in the gazette. In these circumstances, there cannot be any dispute raised by IDA that before publication of the scheme No. 136 in the official gazette on March 28, 2003, the said scheme had not come into existence nor could be treated to be operative. The argument raised on behalf of IDA that the scheme in question had been framed in the year 1993 is factually incorrect and even legally unsustainable. Thus, point (i) has to be answered infavour of the petitioner-society and against IDA. For all practical purposes, the scheme in question could be treated to have come into existence only on March 28, 2003.

27. Once, it is inferred that the scheme in question had come into operation w.e.f. March 28, 2003 and not on any date prior thereto, then obviously, it cannot be suggested on behalf of IDA that the claim made by the petitioner-society, based upon the Housing Policy issued in September 1995, would actually result in giving the said Housing Policy a retrospective operation. In my considered view, the aforesaid plea raised by IDA is in fact based upon a misinterpretation of provisions of Section 50 of the Act. It has been conceded by IDA itself in its return that the aforesaid Housing Policy had come into operation w.e.f. September 1995, therefore, when scheme No. 136 had itself come into existence and become operative w.e.f. March 28, 2003, then by any stretch of imagination, it cannot be suggested that to grant requisite benefit of the said Housing Policy to the petitioner-society would in any manner mean giving a retrospective operation to the said Housing Policy. In my considered view, the aforesaid plea has been raised by IDA, in its reply, on the basis of a fallacious assumption. The aforesaid assumption raised by IDA cannot be subscribed to by this Court. Thus, even point (ii) has to be answered in favour of the writ petitioners.

28. At this stage, it may also be noticed that during the course of arguments, the learned counsel for IDA has placed reliance upon a communication dated August 14, 1996, whereby the State Government has clarified that para 6.6 of the Housing Policy was only applicable to such matters, which had arisen after issuing of the said Housing Policy in September 1995 and had no application to the matters

which had arisen prior to that date. The petitioner-society's claim in the present petition does not have any quarrel with the said directions issued by the State Government. However, in view of the conclusion drawn above that the scheme itself had been finalized in the year 2003, the said clarification has no application.

29. Before adverting to point (iii), there are certain more facts which require to be noticed, with regard to the point (ii). Against the rejection of the objections by IDA, the petitioner-society had approached the revisional authority by filing a revision petition. It had also challenged the issuance of the final scheme under Section 50(7) of the Act. The revisional authority, while exercising its revisional powers, under Section 51 of the Act, rejected the claim made by the land owners that due procedure had not been followed while framing and finalizing the scheme. However, the revisional authority in para 6 of the revisional order dated March 29, 2004, Annexure P-11, has itself observed that after the development of the land, the developed plots are to be allotted to general public but there has been a policy of IDA to allot the developed plots to the members of the society on preferential basis. It has also been observed that the petitioner-society would be free to take benefit under Housing Policy. It was also observed by the revisional authority that the requisite sanction had been granted by the State Government to scheme No. 136 on November 1, 2002 and the scheme was to come into operation w.e.f. March 5, 2003 and implementation was to commence within a period of two years from the aforesaid date and was to be completed within a period of five years. It is not in dispute that the order passed by the revisional authority has not been challenged by IDA in any manner and in terms of Section 51 of the Act, the order passed by the revisional authority is to be treated as final. In these circumstances, in view of the specific observations made by the revisional authority, and also in view of the specific liberty granted to the petitioner-society to avail of the benefit of Housing Policy, it is not open to IDA at this stage to contend that the benefit of para 6.6 of the Housing Policy was not available to the petitioner-society with regard to the scheme No. 136. As a matter of fact, the aforesaid controversy has almost been concluded by the revisional authority while passing the revisional order. After the publication of the final scheme on March 28, 2003, IDA itself issued a communication to the Collector, Indore, on September 6, 2003, (Annexure R-11), requiring the acquisition of the land for the said scheme under the provisions of Land Acquisition Act, 1894. A notification under Section 4 of the Land Acquisition Act was issued on October 17, 2003 (Annexure P-24) and a declaration under Section 6 of the said Act was issued on October 15, 2004 (Annexure P-29).Thus, when the acquisition in question of the land of the land owners had been finalized on October 15, 2004, then it cannot be suggested at all by IDA that para 6.6 of the Housing Policy, which had been issued in the year 1995, was not applicable to the claim of the petitioners.

30. The aforesaid additional facts, noticed above, also support the inference drawn by this Court with regard to the conclusion of point (ii) in favour of the land owners.

31. The next question which arises for determination before this Court is as to whether the land having been acquired under the provisions of Land Acquisition Act, the benefit of Para 6.6 was still available to a land owner. It has been argued on behalf of IDA that para 6.6 of the Housing Policy and the general order issued by the State Government on December 1, 1995 (Annexure P-19) had clearly envisaged that the aforesaid concession under the policy was to be made available to a land owner only with a view to avoid the lengthy procedure of land acquisition, but in a case where the said procedure had in fact been resorted to, the Housing Policy was not relevant. In my considered view, even the aforesaid argument raised on behalf of IDA cannot be accepted by this Court.

32. Para 6.6 of the Housing Policy has already been reproduced above. A perusal of the said paragraph clearly reflects that intention of the State in framing the said policy was not only with a view to avoid the lengthy procedure/ disputes qua the land acquisition, but the aforesaid policy had been framed as a welfare measure to allow the participation of the land owners in housing development schemes. It was keeping in view the interest of the aforesaid land owners that the State Government had directed to offer an option to a land owner that he could opt for 20% of the developed plots out of his acquired land or in alternative could ask for monetary compensation. The aforesaid intention of the State Government is further reflected, when for the implementation of the aforesaid Housing Policy, a General order dated December 1, 1995, Annexure P-19, was issued by the State Government to all the concerned Authorities, including the Housing Board etc. A detailed procedure was envisaged. A perusal of General Order dated December 1, 1995, Annexure P-19 (also reproduced above) shows that in case some land was proposed to be acquired for a development scheme then a written notice, at least of 15 days was required to be issued to a land owner, intimating him the details of the land which were proposed to be acquired along with the maps etc and also indicating the monetary compensation, which he was likely to get under the provisions of Land Acquisition Act and requiring the land owner to exercise his option, either to accept the aforesaid monetary compensation or to accept developed plots, the details whereof, including the number of plots and area of the developed plots etc. were also required to be mentioned in the said notice. A hearing was to be fixed of all such land owners and it was in the aforesaid hearing/meeting that a land owner was required to exercise his option. No material, whatsoever, has been brought before the Court to show that such a procedure had ever been followed by IDA, as directed by the State Government, vide General Order dated December 1, 1995, Annexure P-19. If no such option had ever been offered to the land owners, including the petitioner-society, then the question, that no request had been made by the land owners, including petitioner-society, to take benefit of para 6.6 of the Housing Policy, before the land had been acquired under the provisions of Land Acquisition Act, cannot obviously arise. The General Order, Annexure P-19, in fact, reflects the Doctrine of Election, when two options were to be

offered to a land owner. Both the aforesaid options were required to be definite and precise. The monetary compensation, which a land owner was likely to get was required to be indicated in a notice issued to the land owner. As an alternative, the said notice was to contain an offer for the developed plots, including number of plots, area of plots etc. If the aforesaid offer had not been made, then obviously, the election (option) could not be exercised by the land owner. A valid and precise offer of option is the prerequisite for invoking the Doctrine of Election. Since there is no material available before the Court that such an offer/option had ever been put by IDA to the land owners, therefore, to draw an adverse inference against the land-owners for their non-exercise of option would be wholly too much and contrary to all the norms of Equity, Good Conscious and Fair Play.

33. In view of the aforesaid conclusion, points (iii) and (iv) have also to be jointly answered in favour of the petitioner-society.

34. Although, there is no dispute with regard to the binding nature of the Housing Policy, Annexure P-18 and the General Order, Annexure P-19, issued by the State Government, it would be relevant to advert to the provisions of Section 73 of the Act, which have already been reproduced above. Under Section 73 of the Act, the State Government has powers to issue directions on matters of policy to the Authorities and the Officers appointed under Section 3 of the Act. Such directions being binding, have to be carried out in letter and spirit by the Development Authorities/Officers under the Act. The Housing Policy, Annexure P-18, including para 6.6 thereof, and the General Order dated December 1, 1995, Annexure P-19, are such policy decisions, which had been taken by the State Government and directions issued to various Development Authorities in the State and the Director, appointed under Section 3 of the Act, to carry out the said policy decisions. Thus, it is not open to IDA to question the said policy decision, nor such a suggestion has even been made on behalf of IDA. In these circumstances, when the aforesaid Housing Policy and the General Order are binding upon IDA, then there is no escape for it except to implement those in letter and spirit.

35. At this stage, it may be noticed that a vain attempt has been made by IDA to challenge the ownership of the petitioner-society. It has been claimed that there is no proof of ownership of the acquired land furnished by the petitioner-society and the land in question, at the time of acquisition of land was not owned by it. On that basis, it has been maintained that the petitioner-society cannot claim the allotment of 20% of land out of its acquired land.

36. Although, I find that no such stand was taken by IDA, when it dealt with the objections filed by the petitioner-society, while passing Annexure P-8, dated September 2, 2002, nor any objections were ever raised before the revisional authority, when even the revision petition filed by the petitioner-society was entertained and adjudicated on merits, still, since the aforesaid question is a question of fact, it would be appropriate to direct the petitioner-society to furnish the requisite

title documents before the IDA showing its ownership of the acquired land or furnish such other documents/authority from the recorded land owners, which may authorize the petitioner-society to raise the claim for allotment of the developed plots, for and on behalf of the recorded owners.

37. Before parting with this order, it would not be out of place to take a judicial notice of certain unfortunate incidents which had happened in some other States of the country. The acquisition of the land for industrialization and for such other purposes had given rise to a serious unrest in certain parts of the country. Almost a uniform protest is being raised by the land owners all over the country against compulsory acquisition and it is being complained that their valuable land is being taken away, depriving them of their all resources of livelihood and subsistence and without offering them any right to participate in the development projects. Land acquisition may not have been the real cause of the ugly situation that had developed in certain parts of the country. However, what the aforesaid tragic incidents highlight is a set of contentious issues that can flareup whenever the acquisition of farm land for industry and infrastructure, with the State exercising its eminent domain, comes on the agenda. A greater commitment to transparency would always help. What makes land acquisition a prescription for trouble is, first, the element of compulsion that comes with the exercise of eminent domain by the State, and, secondly, flawed system of paying compensation for farm land. Clearly the policy relating to land acquisition for Special Economic Zones and other industrial, developmental and infrastructural projects needs to be given a deeper thought. In my considered view, the Housing Policy, framed by the State Government of Madhya Pradesh in the year 1995, was in fact a step in right direction and had clearly envisaged the hardships of the land owners. In these circumstances, all instrumentalities of the State, including IDA, should only submit to the said welfare measure adopted by the State Government.

38. In view of the aforesaid discussion, the present petitions are allowed. The IDA, respondent No. 4 is directed to allot 20% of the developed plots as per Housing Policy of 1995, to the petitioner-society, out of the acquired land, in the scheme in question. On allotment of the said developed plots, the rest of 75% of the acquired land shall vest in IDA free of any charges/compensation and the land owner/s shall have no claim/title qua the aforesaid remaining land. Since the remaining challenge by the petitioner-society has been specifically given up while filing IA No. 11025/2007, the writ petition qua remaining challenge raised by the petitioner-society is disposed of as not pressed. The requisite process for allotment of the developed plots shall be completed by IDA within a period of three months from the date a certified copy of this order is received.

C.c. as per rules.

Petition allowed.

I.L.R. [2008] M. P., 1619

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha

9 January, 2008*

UNION OF INDIA & ors. ... Petitioners

Vs.

C. SAMUEL ... Respondent

Constitution, Article 309 - Recovery - *Respondent worked as Stenographer (Ordinary Grade) till 28.03.95 in Income Tax department - Subsequently appointed as L.D.C. and regularized on the said post - Respondent given pay protection for the post of Stenographer as pay of Stenographer was higher -Subsequently order of pay protection withdrawn and recovery directed to be made from the salary of the respondent - Held - No recovery can be made from the salary as respondent did not misrepresent and actually worked on the post of Stenographer till 28.03.95 - Petition disposed of.* (Paras 5 & 8)

संविधान, अनुच्छेद 309 – वसूली – प्रत्यर्थी ने आयकर विभाग में आशुलिपिक (साधारण ग्रेड) के रूप में 28.03.95 तक कार्य किया – तत्पश्चात् नि.श्रे.लि. के रूप में नियुक्त हुआ और उस पद पर नियमित हुआ – प्रत्यर्थी को आशुलिपिक पद के वेतन का संरक्षण दिया गया चूंकि आशुलिपिक का वेतन अधिक था – तत्पश्चात् वेतन संरक्षण का आदेश वापस लिया और प्रत्यर्थी के वेतन से वसूली करने के निदेश दिये गये – अभिनिर्धारित – वेतन से कोई वसूली नहीं की जा सकती क्योंकि प्रत्यर्थी ने दुर्व्यपदेशन नहीं किया और आशुलिपिक के पद पर 28.03.95 तक वास्तविक रूप में कार्य किया – याचिका निपटाई गई।

Rohit Arya, for the petitioners.

Sujoy Paul, for the respondent.

ORDER

The Order of the Court was delivered by

R.S. JHA, J.:–Being aggrieved by order dated 10-1-2004 passed in O.A.No.796/2003 the Union of India and its authorities have filed this petition before this Court on the ground that the Tribunal, while allowing the petition filed by the respondent, has wrongly granted relief of quashment of the order directing recovery of the amount wrongly paid to the respondent.

2. The facts, in brief, necessary for adjudication of the present petition are that the respondent initially joined the Income Tax Department as a stenographer (Ordinary Grade) on 26-5-1979. Subsequent thereto, he participated in a qualifying examination in which he qualified only for appointment to the post of L.D.C. and was thereafter appointed as L.D.C. specifically on the basis of the willingness and consent given by him on 11-4-1986 for appointment as L.D.C. He was subsequently regularized on this post with effect from 8-4-1986. On 1-3-1985 the petitioner-authorities directed the respondent to submit the joining report as L.D.C.

*W.P. (S) No.1026/2006 (Jabalpur)

which was submitted by the respondent on 28-3-1985 under protest as his representation for regularisation on the post of stenographer was pending before the authorities. Thereafter, the authorities passed an order dated 5-10-2000 appointing the respondent as an L.D.C. on regular basis. Vide order dated 15-3-2002 the petitioner-authorities granted pay protection to the respondent as the salary being paid to him as a stenographer was more than the pay for the post of L.D.C. However, in view of an audit objection dated 24-9-2002 the order of pay protection was set at naught and it has been directed to fix the pay of the respondent on the post of L.D.C. with effect from 8-4-1986 in the minimum of the pay-scale i.e. Rs.950-1500 and recover the balance amount which had been paid as per pay fixation order dated 15-3-2002. Being aggrieved by the said audit note the respondent had filed a petition before the Central Administrative Tribunal to protect the pay drawn by him in the cadre of stenographer (O.G.) till he reaches the same grade of pay by earning increments or promotion and had also prayed for quashing the audit note. As the petition has been allowed by the Tribunal by the impugned order, the respondent-authorities have filed the present petition before this Court.

3. The short issue raised by the petitioners before this Court is as to whether the Tribunal has erred in law in prohibiting the petitioner-authorities from recovering the excess amount paid to the respondent by treating him to be a stenographer although he was only entitled to the pay of an L.D.C. and whether in the facts and circumstances of the case, the Tribunal was right in protecting the pay of the respondent as stenographer even in future.

4. As is clear from the facts available on record the respondent initially joined services in the income tax department as a stenographer and he continued to work on this post uninterruptedly up to 28-3-1995 on which date he joined services on the post of L.D.C. It is also apparent that though the pay-scale for the post of L.D.C. is less than the pay-scale of the post of stenographer, the authorities, vide order dated 15-3-2002 protected the pay of the respondent even on the post of L.D.C. This order of pay-protection was subsequently withdrawn by the order dated 25-5-2002 directing recovery of the excess pay given to him.

5. In view of the aforesaid facts it is apparent that the respondent was given pay in the pay-scale admissible to the post of stenographer not on account of any mistake or misrepresentation but on account of a conscious decision by the petitioner-authorities keeping in view the fact that the respondent initially joined the income tax department as stenographer and continued to work on that post up to 28-3-1995 and, therefore, as the present case is not one where the excess pay was paid to the respondent on account of any mistake by the petitioner-authorities or misrepresentation by the respondent but was paid on account of the fact that the respondent had worked on the post and performed the duties, of a stenographer during this period and, therefore, we do not find any fault in the order of the Tribunal as far as it relates to quashing the impugned order dated 24-9-2002

regarding recovery of the excess amount paid to the respondent for the period up to 28-3-95.

6. From the record of the case it is also discernable that subsequent to the petitioner joining the post of L.D.C. on 28-3-1995 the issue regarding his pay fixation was pending before the authorities which was ultimately decided vide order dated 24-9-2002 by which the previous order of pay-fixation dated 15-3-2002 was withdrawn. In such circumstances, as the matter regarding pay-fixation of the respondent was already pending before the authorities and the respondent, during the intervening period and as an interim measure was given the pay admissible to a stenographer, no right, legal or otherwise has accrued to the respondent to claim that the excess paid to him during this period be not recovered as the respondent is only entitled to pay and all other benefits as admissible to an L.D.C.

7. We are also of the considered opinion that as the respondent has been regularly appointed on the post of L.D.C., on the basis of an unequivocal willingness in writing submitted by him and, therefore, he is only entitled to the pay and other benefits as admissible to an L.D.C. and he cannot be permitted to claim pay-protection to the extent that he should be continued to be granted pay and benefits as admissible to a stenographer in the circumstances of the present case.

8. In view of the above, the impugned order of the Tribunal whereby the entire recovery of the excess amount paid to the respondent has been quashed and it has been directed that the pay drawn by the respondent in the cadre of stenographer shall continue to remain protected in spite of the fact that he is working only on the post of an L.D.C. and was neither appointed or confirmed on the post of a stenographer in accordance with rules deserves to be and is hereby set aside, except that part of the order which relates to the recovery of the excess paid for the period up to 28-3-95 which is hereby upheld and the recovery for the said period is quashed.

9. We may hasten to add that in case any amount has to be recovered from the respondent on account of excess payment made to him for the period 28-3-1995 onwards i.e. during the period he was working as an L.D.C. and the matter regarding fixation of pay was pending before the authorities, the said be recovered only by way of easy instalments in a phased manner so that it does not cause any financial hardship to him.

10. With the aforesaid observations, the petition filed by the petitioner is partly allowed and the petition is disposed of with the aforesaid observations.

Petition partly allowed.

I.L.R. [2008] M. P., 1622
WRIT PETITION
Before Mr. Justice R.K. Gupta
18 January, 2008*

M.P. DWIVEDI ... Petitioner
Vs.
M.P. VIDHAN SABHA SECRETARIATE, BHOPAL & anr. ... Respondents

A. **Vidhan Sabha (Regulation and Condition of Service) Rules, M.P., 1990, Rules 7, 13 & 18** - *Absorption and repatriation - Petitioner working as Front Office Assistant in M.P. Tourism Cooperation - He was send on deputation to Vidhan Sabha Secretariat - Petitioner thereafter absorbed on the post of Assistant Protocal Officer which was five grade above his substantive post of Front Office Assistant - Respondents cancelled the order of absorption and repatriated petitioner to his parent department - Held - No scheme for absorption was made in accordance with Rule 18(2) and thus Speaker could not have absorbed the services of petitioner without deliberation, upon the recommendation of Special Committee of the Legislative Assembly - Petition dismissed.* (Para 23)

क. विधान सभा (विनियम और सेवा की शर्तें) नियम, म.प्र., 1990, नियम 7, 13 एवं 18 – संविलयन और प्रत्यावर्तन – याची म.प्र. पर्यटन निगम में फ्रंट कार्यालय सहायक के पद पर कार्यरत – उसे प्रतिनियुक्ति पर विधान सभा सचिवालय में भेजा गया – उसके बाद उसे सहायक प्रोटोकॉल अधिकारी के पद पर संविलयन किया गया जो उसके फ्रंट कार्यालय सहायक के मूल पद से पाँच ग्रेड उच्च था – प्रत्यर्थी ने संविलयन के आदेश को निरस्त किया और याची को उसके मूल विभाग में प्रत्यावर्तित किया – अभिनिर्धारित – कोई स्कीम नियम 18(2) के अनुसार बनायी गई और इसलिए विधान सभा की विशेष समिति से विचार विमर्श और उसकी अनुशंसा के बिना अध्यक्ष याची की सेवा का संविलयन नहीं कर सकते थे – याचिका खारिज।

B. **Vidhan Sabha (Regulation and Condition of Service) Rules, M.P., 1990, Rule 7** - ***Effect of amendment in the rules*** - *If a power is exercised by an authority who at the time of exercising such power had the power to do so and if subsequently the power is retrospectively withdrawn - Held - A person holding lawful office under the colour of lawful authority, even if person is not fully qualified to hold office, order passed by him in his official capacity cannot be challenged on the ground of lack of jurisdictional competence.* (Paras 15 & 17)

ख. विधान सभा (विनियम और सेवा की शर्तें) नियम, म.प्र., 1990, नियम 7 – नियम में संशोधन का प्रभाव – यदि कोई प्राधिकारी शक्ति का प्रयोग कर रहा है और ऐसी शक्ति का प्रयोग करते समय उसके पास ऐसी शक्ति थी और तत्पश्चात् ऐसी शक्ति को भूतलक्षी प्रभाव से वापस ले लिया जाता है – अभिनिर्धारित – व्यक्ति विधिपूर्ण प्राधिकार के पदाभास से विधिपूर्ण पद को धारण करता है, यदि व्यक्ति पद को धारण करने की पूर्ण अर्हता नहीं रखता तो भी उसके द्वारा अपनी अधिकारिक हैसियत से पारित आदेशों को इस आधार पर चुनौती नहीं दी जा सकती कि अधिकारिता सामर्थ्य की कमी है।

*W.P. (S) No 18473/2006 Jabalpur.

C. **Words & Phrases** - *Malafides - Change in Government - Effect - Merely because there has been changed in the political scenario in the State, the action cannot be said to be bad in law when the absorption itself was contrary to the rules.* (Para 36)

ग. शब्द और वाक्यांश – दुर्भावना – सरकार में परिवर्तन – प्रभाव – केवल राज्य में राजनैतिक दृश्यलेख में परिवर्तन आने पर, कार्यवाही को विधि विरुद्ध नहीं कहा जा सकता, जबकि संविलयन स्वतः नियम के विरुद्ध था।

Case referred :

2006(8)SCC 129, 2006(4) SCC 1, 1997(3) SCC 693, 1987(3) SCC 397, AIR 1969 SC 258, AIR 1969 SC 215.

Sanjay K. Agrawal, for the petitioner.
Sharad Verma, for the respondent No.1 & 2.
Anoop Nair, for the respondent No.3.

ORDER

R.K. Gupta, J. :– They are heard.

The present petition is filed by the petitioner challenging the order dated 12.12.06 which is Annexure P/33 to the petition. By this order the respondents have cancelled the absorption of the petitioner and also directed for his repatriation to his parent department. The petitioner has also challenged the order dated 20.12.06 passed by the respondents which is Annexure P/32 whereby the respondents have refused to accept the joining of the petitioner and directed the petitioner to report for duty to his parent department.

2. In the present case this Court passed an order on 15.12.06 to maintain the status-quo and according to the respondents the absorption of the petitioner was already cancelled before passing of the said order.

3. The facts leading to the present case are that petitioner was working as Front Office Assistant in M.P. State Tourism Development Corporation Ltd., Bhopal. The petitioner got his posting for reception and management of various Hotels of the Corporation. A letter was issued on 17.3.99 to the corporation by the respondent No.1 for sending the petitioner on deputation of the petitioner. The same was accepted and the petitioner by an order Annexure P/2 dated 22.3.99 was attached in the Vidhan Sabha Secretariat. The petitioner joined his services on 24.3.99 with the Respondent No.1. Subsequently again on behalf of respondent no.1, a request was made to parent employer of the petitioner i.e. Corporation to extend the services of the petitioner in Vidhan Sabha Secretariat. By an order dated 18.8.2000 (Annexure P/6), the petitioner was appointed on deputation on the post of Assistant Protocol Officer with the Respondent No.1 in the pay scale of Rs.5000-9000/-. According to the petitioner, the post of Assistant Protocol Officer with the respondent no.1 was sanctioned with the permission of the State Govt. and the necessary permission was also sought from the Tourism Development

Department Corporation to absorb the petitioner with the respondent no.1 and the said Corporation gave 'No Objection Certificate'. Respondents thereafter passed an order on 08.10.02 (Annexure P/10) whereby the petitioner was absorbed as Assistant Protocol Officer. On his absorption the name of the petitioner was included in the seniority list.

4. Subsequently, a letter was issued on 05.10.06 (Annexure P/12) whereby certain information pertaining to service record of the petitioner was required along with the details relating to appointments, qualifications etc. The petitioner took time to file its reply and again the petitioner was issued two letters on 09.11.06 which are Annexure P/16 and P/17. The petitioner submitted reply to the same on 14.11.06 (Annexure P/18). After considering the reply of the petitioner, the respondents came to the conclusion that absorption of the petitioner was arbitrary and was illegal, therefore, a decision was taken by the respondents by passing the impugned order Annexure P/33 to cancel the absorption of the petitioner and also to repatriate him to his parent Corporation.

5. On the basis of the aforesaid facts learned counsel for the petitioner submitted that the order impugned Annexure P/33 is malafide exercise of powers as because of the changed political scenario in the State of M.P., the action has been taken to repatriate the petitioner after canceling his absorption and the order impugned Annexure P/33 is without any jurisdiction and authority as the same has not been passed with the approval of the Speaker.

6. It is contended that the order impugned Annexure P/33 since has been passed by the Under Secretary, therefore, in view of the amendment of the Rules regulating the recruitment which has been amended by way of notification dated 6th March, 2007 with effect from 11th November, 2002 is without jurisdiction and authority.

7. Respondent No.1 has filed its return and in the return, it is stated that absorption of the petitioner was not in accordance with the rules. It was contended that petitioner was arbitrarily absorbed. It was the case of the respondent no.1 that the petitioner's initial appointment was on Lower Division Clerk with the Corporation and after his absorption, he has been given undue benefit by absorbing him five grades above than his original post of appointment. It is also contended by the respondent no.1 that there is no provision for absorption under the rules/ regulations of the recruitment, on the post.

8. The recruitment on the post in the Secretariat of Respondent no.1 is governed by the M.P. Vidhan Sabha Secretariat (Recruitment and Condition of services) Rules, 1990, which were brought into force with effect from 8th May, 1981. It is also contended that the post of Assistant Protocol Officer was created de hors to the rules so as the absorption.

9. Before considering the submissions so made by learned counsel for the petitioner it will be appropriate to refer to the relevant recruitment rules. Rule 7,

13 and 18 which are relevant and reproduced as under:-

"7. Control and Discipline- (1) All officers and employees shall remain under the control and superintendence of the Speaker.(2) Under the authority of the Speaker, the Secretary, Under Secretary or Special Secretary may exercise all or any such power of the Head of the Department in the administrative and financial matters of the Secretariat, as may be entrusted into them by the Speaker, from time to time by general or special order."

"13. Appointing Authority-

(a) Powers of recruitment and promotion on all Gazetted Posts shall vest in speaker.

(b) Powers of recruitment and promotion on all other posts shall vest in Secretary subject to the Authority of the Speaker.

(c) Power to hold disciplinary control and imposition of punishment on the persons appointed on the Gazetted Posts shall vest in Speaker and power to hold disciplinary control and imposition of punishment on the persons appointed on other posts shall vest in Secretary subject to the authority of the Speaker.

Note :-The word Principal Secretary was substituted in Rule 7 and 13, by way of amendment dtd 06/03/2007 w.e.f 11/12/2002.

"18. Powers of the Speaker to issue orders-(A) The Speaker, from time to time by general or special order, may frame such scheme or schemes whereby recruitment/promotion, absorption or any post or class of posts may be made and there shall also be required qualification for appointment or posting on such categories of posts, which shall be determined by the Speaker from time to time.

(B) General or Special Order as mentioned in the previous Para shall be issued by the Secretary, after deliberation, upon the recommendation of the Special Committee of the Legislative Assembly constituted for this."

10. To appreciate the contentions with reference to the relevant rules it is seen that the power of Control was vested with the Speaker by virtue of Rule 7 of the aforesaid rules and the Secretary, Under Secretary as well as Special Secretary were empowered to take an action under the control and supervision of the Speaker. It also includes the administrative as well as financial control. Rule 7 and 13 were amended by way of a notification dated 6th March 2007, Accordingly, a Principle Secretary shall exercise the powers of control and supervision under the control of Speaker. The effect of such amendment has been that the Secretary, Under Secretary and Special Secretary were not entitled to exercise any powers.

Similar is the position with reference to Rule 13 which was also amended and in the said rule the word 'Secretary' has been substituted by the word 'Principle Secretary' and accordingly the Principle Secretary shall take action subject to approval by the Speaker.

11. On the basis of the same, learned counsel for the petitioner submitted that since the order impugned Annexure P/33 was passed on 12.12.06 and the rules were amended on 6.3.07 with effect from 11th of November, 2002, therefore, according to the learned counsel for the petitioner, the Under Secretary was not empowered to take an action but the power to take action was vested with the Principal Secretary subject to approval by the Speaker. In the present case since the order has been passed by the Under Secretary, therefore, the order impugned is without any jurisdiction.

12. To appreciate the aforesaid submission so made by learned counsel for the petitioner, the counsel appearing on behalf of the respondents submitted a note sheet to this Court and in the note sheet, approval of the Speaker has been recorded. A proposal was submitted on 11.12.06 and the same was approved by the Speaker. On the basis of the note-sheet it is clear that the order has been passed with the approval of the Speaker, therefore, in this reference it cannot be said that there had been no approval by the Speaker to cancel the absorption of the petitioner and also to repatriate him. The note sheet is taken on record.

13. The further submission which the learned counsel for the petitioner submitted that since the amendment in the recruitment rules were brought into force with effect from 11th November, 2002 by way of notification dated 6th March 2007, therefore, according to the learned counsel for the petitioner since the amendment has come into force with effect from 11th of November, 2002, therefore, the effect of the notification dated 6th March 2007 is that the powers could not have been exercised by the Under Secretary with the approval of the Speaker. The powers could be only exercised by the Principle Secretary with the approval of the Secretary. In the instance case under the Secretary has exercised the powers and approval has been granted by the Speaker, therefore, the action is not in accordance with Rule 7 and 13.

14. In the present case Rule 13 has no application because the Rule 13 only defines the powers of recruitment and promotion for the Gazetted posts are vested with the Speaker and for the other posts which the power as such could be exercised by Secretary under the control of Speaker. Rule 13 (c) after the amendment provides with respect to the Discipline, Control and to impose the penalty. According to sub-rule (2) of Rule 13, the power is vested with the Secretary subject to control of Speaker. Thus, according to the same, the said rule will have no application in the present case. In this reference Rule 7 would be relevant which has the application in the present case wherein it is stated that all Govt. Officers and employees shall remain under the control and supervision of the Speaker. Sub -

Rule 2 of Rule 7 before amendment prescribed that in all administrative and financial matters, the Secretary, Under Secretary or Special Secretary shall have power but the said rule has been amended with effect from 11th of November, 2002 by way of a notification dated 6th of March, 2007, therefore, in view of the said amendment, the question is whether on the date when the order impugned Annexure P/33 dated 12.12.06 was passed, the Under Secretary whether was having the administrative and financial control subject to approval of the Speaker.

15 There was no amendment in the said rule on the date when the action was taken. The said rule has been amended subsequently by way of notification dated 6th March 2007 with effect from 11th of November, 2002 then in the instant case de-facto doctrine would have the application because on that date when the Secretary has exercised its power he has having lawful authority with him under unamended rules and also under Rule 13 even assuming that Rule 13 will have the application. Thus, the Under Secretary holding the lawful authority on the date when the action was taken, the action taken by him shall be valid even though the rule has been amended subsequently with effect from the date which is prior to the taking of the action by Under Secretary.

16. In this reference, it will be appropriate to refer to the judgment passed by the Apex Court which is reported in the case of *M/s Beopar Sahayak (P) Ltd. and Others Vs. Vishwa Nath and Others* 1987(3) SCC 693 and also in 1987(3) SCC 397 *(M/s Beopar Sahayak (P) Ltd. Vs. Vishwa Nath and others)* wherein law has been laid down by the Apex Court that a person holding lawful office under the colour of lawful authority, even if such person is not fully qualified to hold the office, orders passed by him in his official capacity cannot be challenged on ground of lack of his jurisdictional competence.

17. In view of the De-facto doctrine, on the date when the action against the petitioner was taken by the Under Secretary, he was having a lawful authority unamended under Rule 7 as well as under Rule 13 with reference to administrative control subject to approval by the Speaker. Thus the subsequent notification according to me shall not have the effect to invalid action taken by the Under Secretary particularly on the date when he was having a lawful authority under the statutory rules. Under these circumstances it cannot be said that merely because Rules 7 and 13 were amended subsequently would have any effect to nullify the action already taken by the Under Secretary on the date when this amendment was there.

18. The next question which arises in the present case keeping in view the nature of order that in the order impugned it has been stated that petitioner's absorption was not in accordance with law and the petitioner was given a back door entry.

19 The respondents have filed a letter issued from the Joint Director, Treasury and Accounts dated 14.01.05 which is Annexure R/1 wherein various objections

have been taken by the Finance Department with reference to the absorption and regulation of the petitioner. It is stated that initial appointment of the petitioner with the Tourism Department had been without any qualification and the petitioner was in the pay scale of Rs.1150-1800/-. Subsequently the petitioner was brought on deputation in a higher pay scale of Rs.5500-9000/- which is five grade higher than the post which the petitioner was holding. It is also stated that no qualification was prescribed for appointment to the post of Assistant Protocol Officer so on that the pay scale after absorption was given to the petitioner of Rs.5500-9000/-.

20 On this basis, the service book of the petitioner was called for its verification and the petitioner was also issued a letter, to clarify his position, on 5.10.06 which is Annexure P/12 to the petition. The petitioner submitted comments on 9.11.06 and also filed his reply on 14.11.06 which is Annexure P/18 and thereafter the same was forwarded to the Speaker along with the note sheet for an appropriate decision. Ultimately a decision was taken against the petitioner to cancel his absorption.

21 Learned counsel appearing on behalf of respondent no.1 and 2 submitted that absorption for the reasons stated in the order impugned was de hors to the rules as the petitioner was given undue advantage by way of his absorption. It is submitted that under rule 18 of 1990 rules, the Speaker has power time to time by general or special order to frame a scheme or schemes with reference to recruitment/promotion/absorption on any post or class of posts which may be made and there shall also be required qualification for appointment or posting on such categories of posts, which shall be determined by the Speaker from time to time. Sub rule 2 also prescribes for the exercise of the powers vested with the Speaker under sub rule 1 that it could only be exercised after deliberation, upon the recommendation of the Special Committee of the Legislative Assembly appointed for the purpose.

22 On the basis of the same, it is clear that Rule 18 is only a enabling provision for the purpose of framing the scheme or schemes with reference to recruitment, promotion and absorption which may also include qualification with reference to the categories of posts in which the promotion, absorption or recruitment has to be made. According to the mandate of sub rule 2, the power as such could be exercised by the Secretary after due deliberation upon the recommendation of the Special Committee of the Legislative Assembly. It is only an enabling power with the Speaker to frame rules. This rule does not give power to the Speaker to absorb or to promote or to recommend any person for absorption but cannot be exercised without framing any scheme made under sub rule 2 of Rule 18 and that too after due deliberation upon also by recommendation of the Special Committee of the Legislative Assembly.

23. Learned counsel appearing on behalf of the petitioner fairly submitted that neither any Committee was constituted nor there had been any deliberation nor any scheme or schemes were framed for absorption.

24 Rules of 1990 as aforesaid do not provide a mode for absorption but only provides a mode for recruitment. Now the question is that if recruitment rules does not provide a mode for absorption and rule 18 provides for framing of a scheme by the Speaker after due deliberation and also after recommendations of the Special Committee and if any scheme or schemes is ever framed for absorption as there was no special Committee appointed by the Legislative Assembly for absorption, whether petitioner's absorption is without following the procedure as contemplated under Rule 18 could be a valid exercise of powers. As I have already discussed that the counsels for both the parties have not stated that there had been any scheme ever framed for absorption, now the question is in the absence of any scheme for absorption how the petitioner's absorption can be said to be a valid exercise of power particularly in the light of Rule 18. Rules of 1990 do not prescribe for absorption but only prescribes mode of recruitment. Framing of scheme was necessary for absorption under Rule 18. It was necessary to prescribe the qualification and also to identify the post or class of posts on which the absorption could be made. The said power could be exercised after deliberation and also after recommendation of the Special Committee then while accepting the recommendations of the Special Committee, the Speaker may exercise such powers. Since the procedure of framing a scheme under Rule 18 was not at all followed, therefore, it is very difficult to come to a conclusion that on what basis before absorption the post of Assistant Protocol Officer was identified for the absorption. There is nothing on record to justify that the petitioner who was working as Lower Division Clerk could be absorbed 5 grades above to his original post of appointment. In the absence of any exercise as such it is very difficult to hold that absorption of the petitioner had been in accordance with the rules.

25 In this reference the judgments passed by the Apex Court in the case of *Indu Shekhar Singh and Others Vs. State of U.P. and Others* 2006(8) SCC 129 is relevant wherein the Apex Court was considering the difference between transfer and deputation and after considering the same it is held in para 39 of the said judgment that a difference between transfer and deputation would be immaterial where an appointment by transfer is permissible, where personnel are drawn from different sources by way of deputation. It is one thing to say that a deputationist may be regarded as having been appointed on transfer when the deputation is from one department of the Government to another department, but it would be another thing to say that employees are recruited by different statutory authorities in terms of different statutory rules.

26 Since in the present case it is an appointment by way of transfer on deputation bringing a person on deputation from one department to another which is not permissible, therefore, this situation shall make a material difference in the present case.

27 The Apex Court again in para 42 considered that where a provision for appointment by way of absorption on deputation exists then the situation shall be

entirely different. The Apex Court was considering this question with reference to grant of seniority to a person. The Apex Court held that if the recruitment rules permits absorption of a person who is on deputation then he may have a right for seniority.

28 The Apex Court in the case of *Secretary, State of Karnataka and Others Vs. Uma Devi and Others* 2006(4) SCC 1 has further held that the appointments could only be made by adopting various modes as permissible under the rules, may be by way of absorption, regularization or permanent continuance of temporary, contractual, casual or other employees. If the absorption is not permissible as a mode under the rules then that will have the effect of creating another mode of appointment which is not permissible under the rules. As I have already held earlier that the only permissible mode of recruitment under the rule is appointment and promotion and not by way of absorption. Rule 18 only provides for framing of scheme. The absorption could only be made after framing of scheme in the manner as prescribed under the said rules.

29 On the basis of the aforesaid decisions which are referred hereinabove, it is to be seen that under the rule, once no power is vested with the authority under the recruitment rules then in the absence of power for absorption, how an authority can direct for the absorption of a person who was brought on deputation and particularly when the authority as such has absorbed the petitioner five grades above to the grade which he was holding. Even assuming that the power is prescribed to absorb then the power under Rule 18 has to be exercised in the manner as prescribed under Rule 18. I have already held earlier that it has no power for absorption but is only an enabling clause and that enabling power has to be exercised in the manner as provided under the rule.

30 Admittedly, in the present case there is no deliberation, no recommendation of the Special Committee or Legislative Assembly, nor their identification of the post, no qualification for the post then under the circumstances the power of absorption cannot be said to be a valid exercise of power and thus the absorption of the petitioner was contrary to the rules. The objection was taken by the Finance Department in the present case.

31 On the basis of the overall discussion as aforesaid, I am of the view that in the present case there had been no absorption of the petitioner in accordance with law and absorption of the petitioner is de hors to the rules.

32 The next question which arises for consideration is that after when the order of petitioner's appointment on the post of Assistant Protocol Officer in passed, then there is correspondence on record from the M.P. State Tourism Development Corporation which is annexure R/1 dated 17.1.07. The said Corporation has expressed its desire to continue the lien services of the petitioner in his parent department subject to joining of his services in the parent corporation. Thus it is not a case where lien of the petitioner from the parent department is lost. The

parent corporation has also expressed his willingness to accept the services of the petitioner after his repatriation. Thus, under the circumstances I do not find that the judgment passed by the Apex Court in 2006 (10) SCC 214 *(Surendra Singh VS. State of M.P.)* applies to the present case.

33. Learned counsel for the petitioner also made a submission that because of the change in the political scenario in the State of M.P., action has been taken, therefore, it is malafide exercise of power. This submission is considered. Once the allegation with reference to malafide was made then the petitioner ought to have impleaded the person who has acted malafidely to take action against him. No person as such has been impleaded by name by him who has acted malafidely. Merely because there had been a change in the political scenario, that by itself would not be sufficient to hold the action malafide. The pleadings does not establish the fact with regard to malafide and, therefore, the pleadings as such are vague. Thus, the submission so made by learned counsel for the petitioner that because of the change in political scenario in the State of M.P., the action has been taken against the petitioner cannot be accepted and also for the reasons that I have held the action valid.

34. In this reference it has to be seen whether merely because there had been a change in political scenario whether the action against the petitioner is malafide. The question in this regard has been considered by the Apex Court firstly in AIR 1969 SC 215 *(P.V. Jagannath Rao and others Vs. State of Orissa and others)* and in paragraph 7 & 8 the following law has been laid down which is reproduced as under:-

> "We pass on to consider the next question arising in these appeals, namely whether the power was exercised by the State Government for a purpose alien to the statute. It was contended by Mr. Asoke Sen that there was a bitter political rivalry between the appellants on the one hand and Shri Pabitra Mohan Pradhan, Shri Harekrushna Mahtab, Shri Sigh Deo and the other persons who are at present in charge of the Orissa administration. Reference was made by Mr. Asoke Sen to the political history of the State of Orissa from 1947 up to the General Elections, 1967 and in particular to the rivalry between Shri Biju Patnaik and Shri Singh Deo who was the leader of Opposition in the previous Government and also to the internal rivalry between the two political groups in the Congress Legislative Party, one led by Shri Harekrushna Mahtab and the other led by Shri Biju Patnaik and Shri Biren Mitra. It was urged that the Commission was set up by the present Orissa Government not in the public interest but for a collateral purpose, namely, for getting rid of Shri Biju Patnaik and Shri Biren Mitra and driving them out of the political life of Orissa. Mr. Asoke Sen said that the object of the enquiry was character assassination of Shri Patnaik and Shri Biren Mitra and so the Commission was set up for a collateral purpose and the notification must be struck down as illegal and ultra vires. It is not

possible, in our opinion, to accept this argument as correct. It is admitted that there is political rivalry in Orissa between the appellants and the present Chief Minister of Orissa Shri R. N. Singh Deo and also as between the appellants and the group of Congress dissidents led by Shri Harekrushna Mahtab, Shri Nabakrushna Choudhury, Shri Pabitra Mohan Pradhan, Shri Santanu Kumar Das and Shri Surendranath Patnaik. But we do not think that the existence of political rivalry is in itself sufficient to hold that the appointment of the Commission of Inquiry is illegal. Having perused the affidavits of the appellants and also those filed by the respondents in this case we are of opinion that the appointment of the Commission of Inquiry was not due merely to the existence of political rivalry of the parties but was impelled by the desire to set up and maintain high standards of moral conduct in the political administration of the State. As we have already pointed out, the object of appointing the Commission is stated in the notification itself as "the rectification and prevention of recurrence of such lapses and securing the ends of justice and establishing a moral public order in future". In the affidavit of Shri Pabitra Mohan Pradhan it is stated that the appointment of the Commission of Inquiry was one of the items of the common programme on which the Jana Congress and the Swatantra Party contested the General Elections of 1967. As a result of the popular mandate the Swatantra Party and the Jana Congress coalition took charge of the reins of Government and in accordance with the solemn promise made by those parties to the people of Orissa the Government decided to appoint a Commission of Inquiry in order to investigate the widespread corruption practised by the persons named in the Schedule to the impugned notification. The decision to appoint a Commission was also announced in the first address of the Governor to the Orissa Legislative Assembly after the 1967 General Elections. In paragraph 17 of the affidavit, Shri Pabitra Mohan Pradhan has further said that the object of the Jana Congress and the Swatantra Party was "to set up a clean administration, so that the State's resources should not go into the pockets of the corrupt group led by Shri Biju Patnaik and Shri Biren Mitra but should be used for giving a better life to the people of the State". In para 6 of the affidavit Shri Pabitra Mohan Pradhan further states: "I have always believed and still believe that politics is not for the purpose of serving the selfish ends and to satisfy the greed of any politician or any person or any group of persons. Politics is for the service of the people and involves sacrificing one's life and comforts for raising the living standard of the overwhelming poverty-stricken people of our State and our country so that they may enjoy a good life and hold up their heads with pride." In para 5 he has denied that there was any intention on his part to carry on character assassination of Shri Biju Patnaik, Shri Bireu Mitra and their group. It is true that the appointment of the Commission of Inquiry may have been made partly on account of the political rivalry between the

parties but having perused the affidavits filed by the appellants and the respondents in this case, we are satisfied that the main object of the appointment of the Commission Inquiry was not to satisfy the political rivalry of the politicians at present in power in Orissa but to promote measures or maintaining purity and integrity of the administration in future in the Orissa State. We are accordingly of the opinion that Mr. Asoke Sen is unable to make good his argument that the impugned notification is a mala fide exercise of the statutory power and it should be struck down as illegal.

8. It is well settled that if a statutory authority exercises its power for a purpose not authorised by the law the action of the statutory authority is ultra vires and without jurisdiction. In other words, it is a mala fide exercise of power in the eye of law, i.e., an exercise of power by a statutory authority for a purpose other than that which the Legislature intended (See The King v. Minister of Health, 1929-1 KB 619). But the question arises as to what is the legal position if an administrative authority acts both for an authorised purpose and for an unauthorised purpose. In such a case where there is a mixture of authorised and unauthorised purpose, what should be the test to be applied to determine the legal validity of the administrative act ? The proper test to be applied in such a case is as to what is the dominant purpose for which the administrative power is exercised. To put it differently, if the administrative authority pursues two or more purposes of which one is authorised and the other unauthorised the legality of the administrative act should be determined by reference to the dominant purpose. This principle was applied in *Rex v. Brighton Corporation; ex parte Shoosmith,* (1907) 96 LT 762. A Borough Corporation expended a large sum of money upon altering and paving a road, which was thereby permanently improved, but they decided to do the work at the particular time when it was done in order to induce the Automobile Club to hold motor trials and motor races upon it. The Court of Appeal (reversing the decision of the Divisional Court), refused to intervene, and it was observed by Fletcher-Moulton, L. J. at page 764 as follows:-

"It cannot be denied that the physical act of changing the surface of a road when the corporation thought fit and proper so to do was within their statutory powers and there is no case proved by the evidence which shows either that they wastefully used the public money or that they did so with improper motives. The case would be quite different if one came to the conclusion that under the guise of improvement of a road, certain moneys had been used really for diminishing the expenses of the Automobile Club or anything of that sort and that there had been a turning aside of public moneys to illicit purposes".

The principle was applied by Denning, L. J. in *Earl Fitzwilliam's Wentworth Estate Co. Ltd. v. Minister of Town and Country Planning,* I951-2 KB

284. It was a case concerning the validity of a compulsory purchase made by the Central land Board, and confirmed by the Minister, under the provisions of the Town and Country Planning Act, 1947, in respect of a plot of land, ripe for development, which the owner was not prepared to sell at the existing use value. The landowner applied to have the order quashed, as not having been made for any purpose connected with the Board's function under the Act, but for the purpose of enforcing the Board's policy of sales at existing use values. The majority (consisting of Somerwell and Singleton, L. J.) held that, though the main purpose of the Board may well have been to induce landowners in general and the company, in particular, to adopt one of the methods of sale favoured by the Board, it was nevertheless in connection with their function as the authority operating the development charge scheme, and at any rate, "the case was not one in which it could be said that powers were exercised for a purpose different from those specified in the statute". Denning, L. J. disagreed with the majority and held that the dominant purpose of the Board was not to assist in their proper function of collecting the development charge, but to enforce their policy of sales at existing use value only. The dominant purpose being unlawful, the order was invalid, and could not be cured by saying that there was also some other purpose which was lawful. The Board and the Minister had misunderstood the extent of their compulsory powers and their affidavits showed that they had overlooked that their ultimate purpose in exercising their powers should be connected with the performance of the Board's functions under the Act. At page 307 of the Report Denning L. J. observed as follows:-

"What is the legal position when the board have more than one purpose in mind ? In the ordinary way, of course, the courts do not have regard to the 'purpose' or 'motive' or 'reason' of an act but. only to its intrinsic validity. For instance, an employer who dismisses a servant for a bad reason may justify it for a good one, so long as he finds it at any time before the trial. But sometimes the validity of an act does depend on the purpose with which it is done-as in the case of a conspiracy-and in such a case, when there is more than one purpose, the law always has regard to the dominant purpose. If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be cured by saying that they had some other purpose in mind and which was lawful see what Lord Simon, Lord Maugham and Lord Wright said in *Crofter Hand Woven Harris Tweed Co. v Veitch*, (1942 AC 435, 445, 452-3, 469, 475).

So also the validity of government action often depends on the purpose with which it is done. There, too, the same principle applies. If Parliament grants a power to a government department to be used for an authorized purpose, then the power is only validly exercised when it is used by the department

genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinate to some other purpose which is not authorized by law, then the department exceeds its powers and the action is invalid."

35. The aforesaid judgment has been considered by the Apex Court in AIR 1969 SC 258 *(Krishna Ballabh Sahay and others Vs. Commission of Inquiry and others)* and in paragraph 8 it is held as under:-

"8. This brings us to the main question. As we pointed out above the first argument consists of two limbs. We shall examine them separately. The contention that the power cannot be exercised by the succeeding ministry has been answered already by this Court in two cases. The earlier of the two has been referred to by the High Court already. The more recent case is *P. V. Jagannath Rao v. State of Orissa,* (Civil Appeals Nos. 1148-1150 of 1968, D/- 30-4-1968)=(AIR 1969 SC 215). It hardly needs any authority to state that the inquiry will be ordered not by the Minister against himself but by some one else. When a Ministry goes out of office, its successor may consider any glaring charges and may, if justified, order an inquiry. Otherwise, each Ministry will become a law unto itself and the corrupt conduct of its Ministers will remain beyond scrutiny. The High Court has adequately dealt with this point and we see no error."

36. On the basis of the aforesaid law laid down by the Apex Court merely because there had been a change in the political scenario in the State of M.P., the action taken by the respondents against the petitioner cannot be held to be bad particularly when I have already held that the absorption of the petitioner was contrary to the rules and was unauthorized.

37 In the present case the petitioner was issued notices to file the reply and also to explain the circumstances. These are Annexure-12 dtd 05/10/2006. Thereafter the time was also given to him to supply the necessary information while accepting the request of the petitioner. The petitioner ultimately filed him reply (Annexure-P-12). Thus it is that case that the petitioner was given full opportunity. The learned counsel for the petitioner also has not addressed as to how no opportunity was given to the petitioner.

38 Counsel for the petitioner also cited the judgment dtd 18/05/2007 passed by me in W.P. No. 3863/2006(S) *(Harish Chandra Agrawal Vs. State of M.P. and others)*, but could not show as to how the said judgment applied to the petitioner's case.

39 For the reasons stated hereinabove, I do not find any case on merits. Petition is dismissed. No order as to the costs

Petition dismissed.

I.L.R. [2008] M. P., 1636

WRIT PETITION

Before Mr. Justice R.S. Jha

31 January, 2008*

ANIL SONI ... Petitioner

Vs.

STATE OF M.P. & anr. ... Respondents

A. Police Regulations, M.P., Regulation No.221, 228 & 270 - *Power of review - Petitioner inflicted with minor penalty of withholding of one increment for a period of one year - Subsequently new Superintendent of Police cancelled the order of minor penalty and issued a charge-sheet on the identical charges and the same incident and reopened the matter - After departmental enquiry petitioner dismissed from service and appellate authority also rejected the appeal - Held - Regulation No.220 does not repose any power of review in disciplinary authority and also does not vest any power to the disciplinary authority to exercise suo motu power of revision or to reopen the order passed by his predecessor who is equal in rank - Order of dismissal quashed and order of minor penalty restored - Petition allowed.* (Para 6)

क. पुलिस विनियम, म.प्र., विनियम क्र. 221, 228, 270 – पुनर्विलोकन की शक्ति – याची को एक वर्ष के लिए वेतन वृद्धि रोकने की लघु शास्ती दी गई – तत्पश्चात् नये पुलिस अधीक्षक ने लघु शास्ती के आदेश को निरस्त कर दिया और समान आरोपों और समान घटना पर आरोप–पत्र जारी करते हुए मामले को पुनर्जीवित कर दिया – विभागीय जाँच के उपरांत याची को सेवा से पदच्युत किया गया और अपील प्राधिकारी ने भी अपील खारिज कर दी – अभिनिर्धारित – विनियम क्रमांक 220 अनुशासनात्मक प्राधिकारी में पुनर्विलोकन का अधिकार नहीं रखती और अनुशासनात्मक प्राधिकारी में ऐसी शक्तियां निहित नहीं करती कि वह स्वविवेक पुनरीक्षण की शक्ति का प्रयोग करे या उसके पूर्वाधिकारी जो समान पद का हो द्वारा पारित आदेशों को पुनर्जीवित कर सके – पदच्युत का आदेश अपास्त और लघु शास्ती का आदेश पुनः स्थापित/बहाल – याचिका मंजूर।

B. Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 29 - *Rule 29 confers the power of review and clearly stipulates that the said power can be exercised only by the authority superior to the authority making the order.* (Paras 7, 8 & 9)

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र.,1966, नियम 29– नियम 29 पुनर्विलोकन की शक्ति प्रदान करता है और स्पष्टतः यह निहित करता है कि ऐसी शक्ति का प्रयोग सिर्फ ऐसा अधिकारी कर सकता है जो आदेश करने वाले अधिकारी से वरिष्ठ हो।

Cases referred :

AIR 1961 SC 1245, (2006)5 SCC 88, (1993)2 SCC 703, (2006)3 SCC 251.

A.D. Mishra, for the petitioner.

G.P. Singh, G.A., for the respondents.

*W.P. No.23627/2003 (Jabalpur)

ORDER

R.S. JHA, J. :–The petitioner has filed this petition being aggrieved by order dated 24-12-1993 by which he has been dismissed from service and order dated 11-3-1994 by which the appeal filed by him against the order of his dismissal has been rejected.

2. The facts, necessary for adjudication of this petition, are that the petitioner, who at the relevant time was working as a constable in the Police Department, was initially subjected to an enquiry on a complaint regarding having an illicit relationship with one Shobha. After enquiry, the Superintendent of Police, who was the competent authority, imposed a minor punishment of withholding of one annual increment for a period of one year vide order dated 2-2-1993. Subsequently, on the new Superintendent of Police joining the post, the order of minor penalty was cancelled by him vide order dated 21-5-1993 and a fresh charge-sheet, levelling the same charge of having an illicit relationship with Shobha and consequential charges of conduct unbecoming that of a Police Officer was served upon him on 28-6-1993. After conducting a full fledged departmental enquiry, the Superintendent of Police, vide the impugned order dated 24-12-1993, imposed a punishment of dismissal from service on the petitioner. Being aggrieved, the petitioner filed an appeal before the appellate authority which was also rejected vide order dated 11-3-1994, hence this petition.

3. The issue raised by the learned counsel for the petitioner in the present petition is as to whether the Superintendent of Police had the power or authority to reopen the concluded disciplinary proceeding, cancel the previous order of punishment passed by his predecessor dated 2-2-93 imposing a minor penalty and to re-initiate a fresh departmental proceeding and impose a punishment of dismissal in respect of the same charges. It is submitted by the learned counsel for the petitioner that there is no power vested in the Superintendent of Police to review or recall an earlier order of punishment or to reopen departmental proceedings which had been finally concluded and impose the extreme punishment of dismissal.

4. Per contra, the learned Government Advocate, appearing on behalf of the State, submits that the Superintendent of Police has power under Regulation 221 and 270 of the M.P. Police Regulations to review the order of punishment. It is further submitted that as a full fledged departmental enquiry was required to be held as per Regulation 228, therefore, the Superintendent of Police in bonafide exercise of powers recalled the previous order of punishment as it was imposed without holding a full fledged detailed departmental enquiry and instituted a fresh regular departmental enquiry with a view to give due opportunity to the petitioner to defend himself and, therefore, no fault can be found in the impugned exercise of powers by the Superintendent of Police.

5. I have heard the learned counsel for the parties at length. Admittedly as a minor punishment of withholding one increment for a period of one year was

imposed upon the petitioner by order dated 2-2-1993 on the charge of having an illicit relationship with one Shobha, it is to be examined whether the same disciplinary authority has the power to recall the punishment, reopen and re-initiate the enquiry on the same charge and thereafter impose a punishment of dismissal from service.

6. To properly appreciate the contention of the parties, it is necessary to consider the provisions of Regulation 221, 228 and 270 of the M.P. Police Regulations, which read as under:

" 221. Power of S.P. - An Assistant Inspector-General or a Superintendent exercises the following powers of punishment:-

(a) Power to inflict any of the punishments specified in Regulations 214 to 217 on head constables and constables.

(b) Power to inflict on Sub-Inspectors and Assistant Sub-Inspectors, the penalties specified in Regulation 214 (i) and (iv) or in Regulation 215 (a) and (b) or to withhold the increment of a Sub-Inspector and an Assistant Sub-Inspector for a period of one year from the date on which it falls due.

(c) Power to reduce the pay of Sub-Inspector and an Assistant Sub-Inspector.

(c-1) Power to inflict the punishment of censure on Inspectors.

(d) Power to suspend any non-gazetted office of police pending inquiry into his conduct.

228. D.E. - When and how held. - In every case of removal, compulsory retirement from service, reduction in rank, grade or pay or withholding of increment for a period in excess of one year a formal proceedings must be recorded by the Superintendent in the prescribed form,- setting forth.

(a) the charge;

(b) the evidence on which the charge is based;

(c) the defence of the accused;

(d) the statement of his witnesses (if any);

(e) the finding of the Superintendent, with the reasons on which it is based;

(f) the Superintendent's final order or recommendation, as the case may be:

Provided that it shall not be necessary to record a formal proceeding, if, due to exigencies of service and not by reason of any misconduct or fault on his part, a Police Officer is transferred from a post carrying a special or specialist pay in the Special Armed Forces, Motor Transport or Radio Telegraphy sections to a post not carrying such pay and reduction in his pay is caused by reason of such transfer.

... ...

270. (1) Every order of punishment of exoneration, whether original or appellate shall be liable to revision suo-motu by any authority superior to the authority making the order.

(2) Every appellate order by a final appellate authority shall be liable to revision by such final appellate authority, on application made in that behalf by the person against whom the order has been passed.

Explanation.- For the purposes of this clause, the expression "final appellate authority" means the final authority empowered to hear an appeal under Police Regulation 262.

(3) The provisions of Regulations 266, 267, 268 and 271 shall, as nearly as may be, apply to an application for revision.

(4) The revising authority may for reasons to be recorded in writing exonerate or may remit, vary or enhance the punishment imposed or may order a fresh enquiry or the taking of further evidence in the case:

Provided that it shall not vary or reverse any order unless notice has been served on the parties interested and opportunity given to them for being heard.

On a perusal of Regulation 221 of the M.P. Police Regulations, it is clear that the said regulation only enumerates the power of the Superintendent of Police which do not include the power to reopen and initiate departmental proceedings on the same charge or to review an order of punishment imposed by his predecessor or equal in rank. Regulation 228 prescribes the procedure that is required to be followed in a departmental enquiry in cases of removal, compulsory retirement from service, reduction in rank, grade or pay or withholding of increment for a period in excess of one year. Admittedly, in the present case, the first order dated 2-2-93 by which a minor punishment of stoppage of one increment for one year was imposed does not fall within the scope and ambit of Regulation 228 necessitating the holding of a full fledged enquiry. Regulation 270 confers suo motu power of revision on any authority superior to the authority making the order. As is manifest, this regulation does not repose any power of review in the disciplinary authority and also does not vest any power in an authority to exercise suo motu power of revision or to reopen an order passed by his predecessor and equal in rank.

7. Even if the provisions of the M.P. Civil Services (Classification, Control & Appeal) Rules, 1966 are taken aid of by the respondents, they are also to the same effect. Provisions of rule 14(3) read with rule 16 of these Rules provide that an order of minor penalty can be imposed after giving a show cause notice to the concerned employee and obtaining his reply without holding a full fledged departmental enquiry. Rule 29 of the Rules 1966, which confers the power of review, clearly stipulates that the said power can be exercised only by an authority superior to the authority making the order. Apparently, there is no rule which has been pointed out by the learned Government Advocate appearing for the State

which empowers the authorities of equal status to reopen, recall, cancel or review an order imposing a minor penalty after conclusion of disciplinary proceedings passed by his predecessor and equal in rank and re-initiate an enquiry on the same charges. It is submitted by the learned counsel for the petitioner and rightly so that an order imposing a minor penalty is not purely an administrative order which could be reviewed by the authority to rectify an apparent mistake.

8. It is pertinent to take into consideration the fact that the nature of power exercised by a disciplinary authority during a department enquiry is quasi judicial in nature as has been held by the Supreme Court in *Jagannath Prasad v. State of U.P.* AIR 1961 SC 1245, and *M.V. Bijlani v. Union of India* (2006) 5 SCC 88 and therefore the disciplinary authority cannot review, recall or reopen its own order passed on conclusion of a departmental enquiry unless and until such a power is statutorily conferred on the disciplinary authority. It is settled law that the power of review is not inherent in the authority but has to be specifically conferred by statute and for this proposition the judgment in the case of *Dr. Kashinath G. Jalmi v. The Speaker* (1993) 2 SCC 703 can be profitably referred. I am also supported for the view I have taken from the judgment of the Supreme Court rendered in the case of *Canara Bank v. Swapan Kumar Pani* (2006) 3 SCC 251.

9. In view of the aforementioned circumstances, I am of the considered opinion that once the Superintendent of Police (disciplinary authority), after holding a limited enquiry, had imposed a punishment of withholding of one increment for a period of one year vide order dated 2-2-93, the succeeding Superintendent of Police (disciplinary authority) could not have reviewed and cancelled that order by order dated 21-5-1993 and initiated a fresh enquiry on the same charge of illicit relationship with Shobha by issuing a fresh charge sheet on 21-6-93 and nor could he have imposed a major punishment of dismissal from service on the same charge on the pretext of holding a full fledged departmental enquiry. The appellate authority while deciding the petitioner's appeal has also not considered this aspect though it was raised by the petitioner before it and, therefore, the appellate order also suffers from perversity and non-application of mind.

10. In view of the aforesaid circumstances, the impugned order dated 24-12-93 imposing the punishment of dismissal and the appellate order dated 11-3-94 affirming the same are hereby set aside and the initial order of punishment dated 2-2-93 imposing a minor punishment of stoppage of one annual increment for one year is re-affirmed. As a consequence the petitioner shall be reinstated in service with all consequential benefits except back wages which entitlement is restricted to 50% looking to the staleness of the incident and the long pendency of this petition.

11. The petition filed by the petitioner is accordingly allowed in the aforesaid terms. In the peculiar facts and circumstances of the case, there shall be no order as to costs.

Petition allowed

I.L.R. [2008] M. P., 1641

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha

6 February 2008*

PRIYANKA SHRIVASTAVA & ors. ... Petitioners

Vs.

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

Constitution, Articles 19(1)(g), 226 - *Unaided Educational Institution - Fees Structure - Institution demanded bank guarantee and F.D.Rs for certain sum - Demand was made on the ground that Fee Structure by Committee is subject to judicial review - Held - No allegation that students can leave the college in mid-stream - Judicial Review cannot be a ground or basis requiring petitioners (students) to furnish bank guarantees/F.D.Rs - Demand of bank guarantee or F.D.R. quashed - Petition allowed.* (Paras 10 & 14)

संविधान, अनुच्छेद 19(1)(जी), 226 – गैर अनुदान प्राप्त शैक्षणिक संस्थान – शुल्क संरचना – संस्था द्वारा कुछ राशि की बैंक गारंटी और एफ.डी.आर. की मांग की गई – मांग इस आधार पर की गई कि कमेटी द्वारा शुल्क संरचना न्यायिक पुर्नविलोकन के अधीन है – अभिनिर्धारित – ऐसा अभिकथन नहीं है कि विद्यार्थी मध्य सत्र में महाविद्यालय छोड़ सकते हैं – याचिओं से बैंक गारंटी या एफ.डी.आर. की अपेक्षा इस आधार पर नहीं की जा सकती है कि न्यायिक पुर्नविलोकन होना है – बैंक गारंटी की मांग या एफ.डी.आर. की मांग अभिखण्डित – याचिका मंजूर।

Cases referred :

2007(4) MPLJ 386, (2005) 6 SCC 537, AIR 2005 Bombay 18, (2003) 6 SCC 697.

P.K. Mishra, for the petitioners

Deepak Awasthy, G.A., for the respondents/State

Ashok Lalwani, for the respondents/Institution.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J.:– Regard being had to the similitude of the grievance agitated in this batch of the writ petitions, it was heard analogously and is disposed of by this singular order. For the sake of clarity and convenience, the facts in Writ Petition No. 13397/07 are adumbrated herein.

2. The petitioners have prayed for issue of a writ of certiorari for quashment of the demand notices as contained in Annexures P-4 and P-5 issued by the respondent No.3, Modern Dental College & Research Centre, Indore whereby the said institution has directed the petitioners to furnish bank guarantees and F.D.Rs. with a further prayer to command the respondent college not to cancel the admission and allow them to attend regular classes on deposit of the tuition

*W.P. No. 13397/2007 (Jabalpur)

and admission fees in the State quota without insisting for fulfillment of the conditions incorporated in the demand notices.

3. It is not disputed that the petitioners took admission in the college of the third respondent in B.D.S. course in the academic session 2004-05. It is not controverted that they are prosecuting their studies in the said college. It is admitted at the Bar that the Admission and Fees Regulatory Committee (hereinafter referred to as 'the Committee') was constituted for fee fixation and it has fixed the fee for a student at Rs.1,12,000/- per annum as tuition fee. The cavil arose when the college issued the notices for furnishing bank guarantees and F.D.R.s for certain sum as determined by the college as regards the fees in excess of the amount fixed by the Committee.

4. Assaling the correctness of the said notices it is submitted by Mr. P.K. Mishra, learned counsel for the petitioners that the college cannot direct the students to furnish the bank guarantees as the petitioners have no intention to relinquish their studies. It is put forth by him that in the absence of any foundation to the effect that the students would leave the college, there could not have been any demand of this nature. To bolster his submission, he has placed reliance on the decision rendered by a Division Bench of this Court in *Manoj Mod Vs. State of M.P. and Others,* 2007 (4) MPLJ 386.

5. Mr. Deepak Awasthy, learned Government Advocate for the State submitted that the demand notices issued by the College deserve to be quashed inasmuch as the petitioners are prosecuting their studies on payment of fee determined by the Committee.

6. Mr. Ashok Lalwani, learned counsel appearing for the respondent-institution submitted that the determination of fee structure by the Committee is subject to judicial review as per the decision rendered in *P.A. Inamdar and Others Vs. State of Maharashtra and Others,* (2005) 6 SCC 537 and, therefore, the college is justified in making a demand. Learned counsel further contended that the petitioners are at the verge of completion of the course and they would be leaving the college and in that eventuate the college would not be able to realise the differential amount from the students. Mr. Lalwani to buttress his submission has commended us to the decision rendered by the Bombay High Court in *N.K.P. Salve Institute of Medical Sciences and Research Centre and etc Vs. State of Maharashtra and Others,* AIR 2005 Bombay 18.

7. To appreciate the submissions raised at the Bar, it is apposite to refer to paragraph 150 of the decision rendered in *P.A. Inamdar* (supra). It reads as under:

> "150. We make it clear that in case of any individual institution, if any of the Committee is found to have exceeded its powers by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review."

8. At this juncture it is apposite to refer to paragraph 8 of *Islamic Academy of Education and Another Vs. State of Karnataka and Others*, (2003) 6 SCC 697. In the said paragraph the Constitution Bench has expressed the opinion as under:

> "8. It must be mentioned that during arguments it was pointed out to us that some educational institutions are collecting, in advance, the fees for the entire course i.e. for all the years. It was submitted that this was done because the institute was not sure whether the student would leave the institute midstream. It was submitted that if the student left the course in midstream then for the remaining years the seat would lie vacant and the institute would suffer. In our view an educational institution can only charge prescribed fees for one semester/year. If an institution feels that any particular student may leave in midstream then, at the highest, it may require that student to give a bond/bank guarantee that the balance fees for the whole course would be received by the institute even if the student left in midstream. If any educational institution has collected fees in advance, only the fees of that semester/year can be used by the institution. The balance fees must be kept invested in fixed deposits in a nationalised bank. As and when fees fall due for a semester/year only the fees falling due for that semester/year can be withdrawn by the institution. The rest must continue to remain deposited till such time that they fall due. At the end of the course the interest earned on these deposits must be paid to the student from whom the fees were collected in advance." (Emphasis supplied)

9. On a perusal of the aforesaid enunciation of law we fail to fathom how the college can make a demand by way of bank guarantee and also F.D.Rs. from the students on the basis that the fee fixed by the Committee is subject to judicial review. Nothing like that has been stated in *Islamic Academy of Education* (supra). What has been pronounced therein is that if a student is likely to leave the course in the mid-stream, the educational institution can ask them to furnish a bond/bank guarantee.

10. In the case at hand, there is no allegation that the students are going to leave the college in the mid-stream. Possibly there could not have been such an allegation as the students are on the verge of completion of their course. The colossal complaint that they would leave the institution is without any base. Eventual judicial review cannot be a ground or the basis requiring the petitioners to furnish the bank guarantees/bonds.

11. In this context, we may refer with profit to the decision rendered in *Manoj Modi* (supra) wherein this Court relying on *Islamic Academy of Education* (supra) has expressed the view in paragraphs 5 to 7 as under:

> "5. Mr. Aditya Sanghi, learned counsel for the petitioner submitted that in the present case, bank guarantee was insisted upon from the petitioner by respondent No.4/college without any assessment that the petitioner

may leave the course, to which he has been admitted, in midstream and, therefore, the demand of bank guarantee by respondent No.4/College from the petitioner was not in accordance with the judgment of Supreme Court in *Islamic Academy of Education and Another Vs. State of Karnataka and Others* (supra).

6. Mr. Satish Sharma appearing for respondent Nos. 3 and 4, submitted that in the brochure published by the Association of Private Dental and Medical Colleges of Madhya Pradesh for admissions in the year 2006, it is mentioned that the College will have the authority to ask a candidate to deposit the bank guarantee if a college feels that certain candidate may leave the course in midstream.

7. The provision in the brochure is in accord with the judgment of the Supreme Court in *Islamic Academy of Education and Another Vs. State of Karnataka and Others* (supra) but the demand by the respondent No.4/College from the petitioner to furnish the bank guarantee at the time of admission without an assessment whether the petitioner would leave the course midstream is contrary to the judgment of the Supreme Court in *Islamic Academy of Education and Another Vs. State of Karnataka and Others* (supra) and the brochure published by the Association of Private Dental and Medical Colleges of Madhya Pradesh, respondent No.3."

12. The aforesaid decision protects the petitioners inasmuch as there has been no assessment and there could not have been so as the petitioners are prosecuting their studies and in fact, on the verge of completing the same. The only ground that has been urged urged is that there may be a hike in fee structure by the process of judicial review. What would be the scope of judicial review need not be delved into and dwelled upon but it can be stated with certitude and indubitableness that in anticipation of a futuristic scenario a bond/guarantee cannot be demanded from the students. That is not the law laid down in *P.A. Inamdar* (supra) and *Islamic Academy of Foundation* (supra).

13. We would be failing in our duty if we do not take note of the decision rendered in *N.K.P. Salve Institute of Medical Sciences and Research Centre* (supra) by the Bombay High Court wherein it has been expressed as under:

"16. The Academic Year 2004-05 is to commence shortly. Admissions have to be completed immediately. The institutions hae urged before us that they may be permitted to charge for the forthcoming Academic Year the same ad hoc fee of 60% of the fee demanded by them, that being a direction which was issued by the Division Bench of this Court on 8th September, 2003 for the previous Academic Year 2003-04. We are of the view, that such a course would not be proper at this stage. An exercise has been carried out by the Committee appointed in pursuance of the judgment of the Supreme Court in Islamic Academy of Education. On 8th September

2003, when this Court issued directions allowing the institutions to charge 60% of the fees demanded by them, subject to adjustment, the exercise was still to be carried out by the Committee. That exercise has been carried out. We have allowed the institutions to bring the attention of the Committee their objections. We request the Committee to consider those objections and render its decision expeditiously, at any rate within a period of three months."

14. Submission of Mr. Lalwani is that since the fee fixed by the Committee is not final and subject to judicial review the view expressed by the High Court of Bombay deserves to be followed. On a scrutiny of the judgment delivered by the Division Bench of the Bombay High Court it is perceivable that it has been laid down therein that the college can take an undertaking from each student that in the event of fee, that has been paid by him is enhanced by the Committee, the difference shall be paid by him. Thus, the facts in the said case are totally different and, therefore, the Bench has expressed the view on said terms. So is not the fact situation here. In the case at hand the students are prosecuting their studies on the basis of the fee fixed by the Committee. We may also proceed to state that there is no allegation that the students have not paid any amount of fee that has been fixed by the Committee.

15. In view of the aforesaid analysis, the action by the respondent-institution in asking the petitioners for furnishing the bank-guarantees/F.D.Rs/bonds is absolutely untenable and accordingly the notices in question issued in each case are hereby quashed.

16. In the result, the writ petitions are allowed. There shall be no order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 1645

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha

6 February, 2008*

SIDDHI VINAYAK COLLEGE, BHIND ... Petitioner

Vs.

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

Constitution, Article 226 - *Affiliation of Institution* - *Petitioner applied for grant of recognition for D.Ed. Courses to NCTE - During pendency of application Union of India directed NCTE not to proceed with the matter - High Court by interim order permitted petitioner to admit students at their own risk subject to decision of petition - Finally Writ Petition dismissed - Subsequently recognition granted by NCTE in December, 2007 - Thereafter on the basis of recognition*

*W.P. No. 1558/2008 (Jabalpur)

petitioner applied for grant of affiliation to Board of Secondary Education for the year 2007-08 - The application was rejected by the Board on the ground that petitioner had not completed 180 days of imparting training - Held - Petitioner without recognition cannot nurture idea to admit students - When in final order relief was denied, petitioner cannot claim any benefit on the basis of interim relief - Affiliation rightly rejected - Petition dismissed. (Para 11)

संविधान, अनुच्छेद 226 – संस्थान को सम्बद्ध करना – याची ने डी.एड. पाठ्यक्रम की मान्यता प्रदान करने के लिए राष्ट्रीय अध्यापक शिक्षा परिषद् (एनसीटीई) को आवेदन दिया – आवेदन के लम्बित रहने के दौरान भारत संघ ने एनसीटीई को निदेश दिया कि इस मामले की कार्यवाही आगे जारी न रखें – उच्च न्यायालय ने अंतरिम आदेश द्वारा याची को विद्यार्थियों को उनके स्वयं के जोखिम पर याचिका के निर्णय के अधीन दाखिला देने की अनुमति दी – अंततः रिट याचिका खारिज – तत्पश्चात् दिसम्बर 2007 में एनसीटीई द्वारा मान्यता प्रदान की गई – उसके बाद मान्यता के आधार पर याची ने वर्ष 2007–2008 के लिए संस्थान को सम्बद्ध करने के लिए माध्यमिक शिक्षा मण्डल को आवेदन दिया – आवेदन बोर्ड द्वारा इस आधार पर निरस्त कर दिया कि याची ने 180 दिन का प्रशिक्षण पूर्ण नहीं करवाया – अभिनिर्धारित – याची मान्यता के बिना विद्यार्थियों को प्रवेश देने के विचार को प्रोत्साहित नहीं कर सकता – जब अंतिम आदेश में अनुतोष इंकार कर दिया, याची अंतरिम आदेश के आधार पर कोई लाभ का दावा नहीं कर सकता – सम्बद्ध करना उचित रूप से निरस्त – याचिका खारिज।

Dinesh Upadhyay, for the petitioner.

Deepak Awasthi, G.A., for the respondents No. 1 & 2.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J.:–By this writ petition preferred under Article 226 of the Constitution of India the petitioner has prayed for issue of a writ of certiorari for quashing the order dated 29-01-2008 passed by the Board of Secondary Education, M.P., the respondent No.2 herein, whereby the said authority has declined to grant affiliation to the petitioner-college for D.Ed. Course for the year 2007-2008, and further to issue a writ of mandamus to the said respondent to grant affiliation in respect of the course in question.

2. Shorn of unnecessary details the facts which are essential to be stated are that the petitioner-institution had applied for grant of recognition for D.Ed. Course in the year 2006 to the National Council for Teachers Education, Western Regional Committee, the third respondent herein. On receipt of the said application the NCTE directed inspection of the College as per the provisions contained under the National Council for Teacher Education Act, 1993 [for brevity `the Act']. During the pendency of the application the Union of India issued certain instructions to the Western Regional Committee not to proceed with the matter relating to grant of recognition. Being aggrieved by the said decision of the Union of India the petitioner preferred W.P. No.12720/07.

3. In the said writ petition a prayer was made to decide the application for recognition and grant interim relief regarding admission of students in D.Ed. Course

inasmuch as the Board of Secondary Education had fixed the cut-off date as 30-9-2007. The learned Single Judge on 11-9-2007 passed the following order:

> "Let Union of India, Barkatullah University and concerning University as well as State Government be arrayed as respondents, if not already impleaded.
>
> Learned counsel for the parties are heard on interim relief.
>
> Looking to the facts and circumstances, the petitioner-institution is hereby directed to admit the students for D.Ed. Course subject to decision of this petition as its own risk. The fees may not be accepted from the students by the petitioner."

4. On the basis of the aforesaid interim order, as pleaded, the petitioner admitted 50 students in the College and classes were held continuously.

5. As number of writ petitions were filed at the Principal Seat at Jabalpur and also at the Benches at Gwalior and Indore by the order of Hon'ble the Chief Justice matters were transferred and directed to be heard by a Division Bench. The Division Bench upheld the action of the Union of India and also dealt with the concept of legitimate expectation and interest. The Division Bench while deciding the batch of matters which included the writ petition filed by the present petitioner expressed the opinion as under:

> "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."

6. It is worth-noting that after the disposal of the writ petition, as set forth, the NCTE has granted recognition in favour of the institution as per Annexure-P/7, dated 28-12-2007/11-01-2008. After receipt of the order of recognition the petitioner-institution submitted an application to the respondent No.2 for grant of affiliation on the ground that the petitioner had already been conducting classes from the month of October, 2007 and received recognition from the NCTE. Despite the aforesaid stand put forth before the respondent No.2 the said authority vide Annexure-P/1, dated 29-01-2008 rejected the application for grant of affiliation on the ground that the petitioner-institution had not completed 180 days of imparting training.

7. We have heard Mr. Dinesh Upadhyay, learned counsel for the petitioner and Mr. Deepak Awasthi, learned Govt. Advocate for the respondents/State.

8. It is submitted by Mr. Dinesh Upadhyay, learned counsel for the petitioner that when the petitioner-college had admitted students on the basis of interim order passed by the learned Single Judge and later on the NCTE, the highest body has granted the recognition it relates back to the date of admission that took place by virtue of the order of the learned Single Judge and the respondent No.2 should have been well advised to extend the benefit and not rejected the order of affiliation. It is his further submission that the Board has committed gross illegality by ascribing reason that the examination for the students will be held in May-June, 2008 by which date the petitioner-institution would not be in a position to complete 180 days of training course. It is also contended by him that Rajya Shiksha Kendra which is a wing of the respondent No.1, directly controlled by the respondent No.2 has issued a letter dated 17-01-2008 to all the Principals directing to fill the seats for D.Ed. Course within three days and that would show that 180 days imparting of training would not be applicable to the State Government colleges.

9. Mr. Deepak Awasthi, learned Govt. Advocate for the State submitted that the writ petition is absolutely misconceived inasmuch as in the earlier round of

litigation this Court had in clear-cut terms opined that without recognition no admission could have been granted. It is propounded by him that once the said view has been expressed admission to the Course can take place only after the recognition and the respondent No.2 has rightly refused to grant permission to the students of the petitioner-institution to appear in the examination on the ground that 180 days in imparting of training is not complete. The learned counsel submitted that the Government colleges have the recognition and affiliation and, in any case, the petitioner cannot take any benefit from Annexure-A/8 in view of the previous decision of this Court.

10. To appreciate the submissions raised at the Bar, we have carefully scrutinised the assertions made in the writ petition. We have also scrutinised the order passed by the NCTE granting recognition. The same is dated 28-12-2007/11-01-2008. On the basis of the said recognition an application was submitted by the petitioner-institution for grant of affiliation for the year 2007-2008. On a perusal of the order of refusal by the respondent No.2 it is clearly discernible that for the year 2007 the last date of admission was 30-11-2007. There is reference to the directions issued by the NCTE that the students who are to take admission have to be given training for a period of 180 days. As the examination is going to be held in May-June, 2008 they cannot be extended the benefit to appear in the D.Ed. Examination in the year 2008. In this background affiliation for the year 2007-2008 has been rejected.

11. The submissions of Mr. Dinesh Upadhyay, learned counsel appearing for the petitioner are basically based on the order passed by the learned Single Judge. It is vehemently contended by him that because of the interim order of this Court the institution has admitted the students. The Division Bench of this Court had already dealt with the said facet. When in the final order the relief was denied the petitioner cannot claim any benefit on the basis of the interim order and moreso, when this Court has expressed the opinion that it was inconceivable how an institution without recognition can nurture the idea to admit students. The imperative guidelines for imparting of training for 180 days is not disputed before us. The examination is scheduled to be held in May-June, 2008 Recognition has been granted on 28-12-2007/11-01-2008. By the principle of sheer arithmetics 180 days training is not possible and hence, the order passed by the respondent No.2 cannot be fauulted.

12. Ordinarily so saying, we would have dismissed the writ petition but, a significant and unavoidable one, the educational institution which is expected to understand the norms, guidelines, circulars, regulations and the Act governing the field of education in proper perspective, made an adroit attempt to move an application before the Board to obtain permission for appearing in the Examination to be conducted in May-June, 2008 solely and singularly on the basis that it had admitted students on the basis of an interim order passed by this Court. When interim order merged with the final order this Court unequivocally expressed the view that it was inconceivable how an institution without recognition could foster

the idea to admit students. This Court had also observed that a daydreamer can build a castle in the air or for that matter castle in Spain, but it is absolutely inapposite on the part of the 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 to have been admitted in such institutions in such courses. This Court had also observed that an educational-institution has to conduct itself in an apple pie order and has to maintain the sacredness of the concept behind imparting education. This Court had also expressed the opinion that the perception of the institutions had been blinded as a result of which a cataclysm had been unwarrantably invited. Despite the aforesaid observations a superstructure is sought to be built again to have the permission from the Board to appear in the examination knowing fully well that admission can take place only after grant of recognition. Anything that had been done prior to grant of recognition, as held by this Court, has no existence in the eyes of law.

13. In the aforesaid premises, we direct dismissal of the writ petition with costs which is determined at Rs.10,000/- (rupees ten thousand).

Petition dismissed.

I.L.R. [2008] M. P., 1650

WRIT PETITION

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

19 February, 2008*

JEEVAN SINGH ... Petitioner

Vs.

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

A. **Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Sections 38 & 50, Nagar Tatha Gram Nivesh Vikasit Bhumiyon, Grihon, Bhavano Tatha Anya Sanrachnao Ka Vyayan Niyam, 1975, Rules 19 & 20 -** ***Allotment of land at concessional rates - Land allotted to newspaper on concessional rates for it being an educational institution - The said allotment challenged - Hon'ble High Court held it to be void against rule 19 and 20 - Petitioner apprehending termination of their allotment and challenging it before the High Court - Held - The issue that newspapers are educational institution has already been held the Division Bench in Compact Printers Pvt. Limited vs. Indore Development Authority in Misc. Petition No.1197/1989, the said decision not brought to knowledge of the Division Bench while deciding the Vijay Kumar Tiwari's case - As the matter was already covered by the decision of the Division Bench that newspapers are educational institutions and are entitled for allotment at concessional rates - Respondents directed to consider the applications of the petitioner's afresh and decide in accordance with law laid down in K.K. Bhalla's case - Petitions disposed of.*** (Paras 6 & 13)

*W.P. No.4806/2007 (Indore)

क. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 38 एवं 50, नगर तथा ग्राम निवेश विकसित भूमियों, ग्रहों, भवनों तथा अन्य संरचनाओं का व्ययन नियम, 1975, नियम 19 व 20 – रियायती दरों पर भूमि का आबंटन – समाचार पत्र शिक्षण संस्था होने से भूमि रियायती दर पर आबंटित – उस आबंटन को चुनौती दी गई – माननीय उच्च न्यायालय ने उसे नियम 19 व 20 के विरुद्ध होने से शून्य अभिनिर्धारित किया – याची को उनकी भूमि के आबंटन का पर्यवसान होने की आशंका और उच्च न्यायालय के समक्ष चुनौती – अभिनिर्धारित – यह विषय कि समाचार पत्र शिक्षण संस्था है खण्ड न्यायपीठ द्वारा पहले ही कॉम्पेक्ट प्रिंटर्स प्रायवेट लिमिटेड बनाम् इंदौर डेवलपमेंट अथॉरिटी में अभिनिर्धारित किया जा चुका है, वह निर्णय खण्ड न्यायपीठ की जानकारी में नहीं लाया गया जब विजय कुमार तिवारी के मामले का निर्णय/निर्णायक हो रहा था – चूंकि मामला पहले ही से खण्ड न्यायपीठ के निर्णय से आवृत्त/आच्छादित है कि समाचार पत्र शिक्षण संस्था है और भूमि रियायती दर पर पाने के हकदार है – याची के आवेदन पर पुनः विचार करने का निदेश और उसे के. के. मल्ला में प्रतिपादित विधि के अनुसार निर्णय लिया जावे – याचिका निपटायी गई।

B. **Master Plan Development Scheme** - *The scheme is required to adhere to the designated use of the land in the master plan and scheme is prepared for consistent with the designated use contained in the master plan. Any deviation from the master plan not permitted.* (Para 6)

ख. महायोजना विकास स्कीम – स्कीम में यह अपेक्षित होता है कि भूमि का महायोजना में मनोनीत प्रयोग का पालन किया जाए और स्कीम को महायोजना में मनोनीत प्रयोग से सुसंगत होते हुए तैयार किया जाता है – महायोजना से कोई परिवर्तन को अनुमति नहीं।

Cases referred :

W.P.1873/1991 decided on 24.09.1992, AIR 2006 SC 898.

Akash Sharma, for the petitioner.
None, for the respondents no. 1,2 & 4.
Z.A. Khan with *Sudarshan Joshi,* for the respondent No.3.
Vijay Asudani, for the Intervener.

ORDER

The Order of the Court was delivered by **S.K. KULSHRESTHA, J.**:–Apprehending the determination/termination of the lease granted to the petitioner Newspapers in view of Judgment of this Court in *Vijay Kumar Tiwari Vs. State of Madhya Pradesh* vide order dated 9.12.2005 directing that the leases granted by Development Authorities constituted under Section 38 of the *Madhya Pradesh Nagar Tatha Gram Nivesh, Adhiniyam,* 1973(here-in-after referred to as the Adhiniyam of 1973) at concessional rates to the newspapers against Rules 19 and 20 are void and are quashed, the petitioners have rushed to this Court to seek a direction to the respondent(Indore Development Authority) not to proceed to determine the lease in the light of the said judgment of this Court.

2. These cases relate to the allotment of land to the Newspapers on the hypothesis that the Newspapers were entitled to such allotment being Educational

Institution and the land was designated in the Master Plan for the educational purposes. One Vijay Kumar Tiwari filed the said petition(W.P. No.3518/92) assailing the sanctity, validity, legality and propriety of the action of the Development Authority in yielding to the pressure of the State Government and making allotment contrary to the provisions of the Adhiniyam of 1973. It was particularly stressed that Newspapers were not 'Charitable Institution' for which land could be allotted on concessional rates. It was in this background that this Court after considering the import, meaning and impact of Rules 19 and 20 of the *Madhya Pradesh Nagar Tatha Gram Nivesh Vikasit Bhoomiyo, Griho, Bhavano Tatha Anya Sanrachanao Ka Vyayan Niyam, 1975(here-in-after referred to as, "the Niyam")* came to the conclusion that such allotments were totally outside the scope of the provisions contained in Rules 19 and 20 and directed that all such demise of plots being void, quashed all such concessional leases which traversed outside the scope of Rules 19 and 20.

3. The contention of the learned counsel for the parties is that firstly it is on the dictate of the State that the lands were allotted at concessional rates and even otherwise since the newspapers were rightly held to be subserving educational purposes as held by this Court in the judgment rendered on 30/4/1998 by a Division Bench in *Compac Printers Pvt. Limited and others Vs. Indore Development Authority* Misc. Pet. No.1197/1989, the matter did not remain res-integra and, therefore, there was no impediment in allotment of land designated in the Master Plan as educational.

4. The short question that arises for consideration of this Court is as to whether in the light of the judgment rendered by a Division Bench in Misc. Pet. No.3518/92 on 9/12/2005, the allotment made in favour of the petitioners and the respondent in Public Interest Litigation, W.P. No.4806/2007, can be sustained or the authority under the provisions of Adhiniyam and Rules can determine the lease and obtain the possession from the lessees.

5. Indore Development Authority is constituted under the provisions of Section 38 of the Adhiniyam for implementing the proposal in the development plan, preparing one or more town development schemes and acquisition and development of land for the purpose of expansion or improvement of the area specified in the notification under sub-section (1), subject to the provision of the Act. Section 2(u) defines the Town Development Scheme to be a Scheme prepared for the implementation of the provisions of a development plan by the Town and Country Development Authority and includes "Scheme". Section 49 enumerates the other purposes for which the Development Authority can take steps namely:-

(i) acquisition, development and sale or leasing of land for the purpose of town expansion;

(ii) acquisition, relaying out of, rebuilding, or relocating areas which have been badly laid out or which has developed or degenerated into a slum;

(iii) acquisition and development of land for public purposes such as housing development, development of shopping centres, cultural centres, administrative centres;

(iv) acquisition and development of areas for commercial and industrial purposes;

(v) undertaking of such building or construction

(vi) acquisition of land and its development for the purpose of laying out or remodeling of road and street patterns;

(vii) acquisition and development of land for playground, parks, recreation centres and stadia;

(viii) reconstruction of plots for the purpose of buildings, roads, drains sewage lines and other similar amenities;

(ix) any other work of a nature such as would bring about environmental improvements which may be taken up by the authority with the prior approval of the State Government.

6. Section 50 lays down the procedure to be adopted in preparation of the Scheme. The authority has first to declare its intention to prepare a scheme and invite objections; prepare the draft scheme and by conveying intention to prepare a Scheme inviting objections and prepare the draft scheme and finalise the scheme under sub-section (7) of Section 50. Since the Scheme is required to adhere to the designated use of the land in the Master Plan, it is in keeping with the provisions contained in the Master Plan that the Scheme is prepared consistent with the designated use contained therein. It is not disputed that in the Scheme as prevailed at the time these allotments were made to petitioners and respondent No.4 in W.P. No.4806/2007, filed as a PIL, the designated use of the land allotted was educational. It, therefore, becomes necessary to elicit whether the Indore Development Authority has deviated or digressed from the purpose stated in the Scheme on the Master Plan in making allotment to them. The question, however, cannot be said to have been left open or concluded by the judgment in *Vijay Kumar Tiwari*(supra), as way back in the year 1998, this question was agitated and decided in favour of the Newspapers by a Division Bench of this Court.

7. The controversy before the Division Bench in Misc. Pet. No.1197/89 decided on 30/4/98 was whether Newspapers impart education by publishing various political and economical news, which is available even to ordinary persons. It was held that the newspapers not only impart education by publishing information, for the benefit of public at large, but also increase awareness, which is very important for creating public opinion, and for keeping the people vigilant. It was also observed in paragraph '5' of the decision that the newspapers do impart education to the people at large and create awareness Education imparted by newspapers may not be taken as academic education. but can definitely be accepted

to be an institution which imparts knowledge and education to the public at large. It is, however, not disputed that this decision was not brought to the notice of the subsequent Division Bench in *Vijay Kumar Tiwari*(supra) and the learned Judges, proceeding on their own interpretation of Rules 19 and 20, came to the conclusion that the allotment amounted to distribution of largess .

8. Before adverting to the other facts and the provisions of law, we think it apt to reproduce Rules 19 and 20 of the said rules for a proper understanding of the controversy. The said rules read as follows:-

> **Rule 19:**-The Authority may with the previous approval of the State Government lease out on concessional terms any Authority land to any public institution or body registered under any law for the time being in force.
>
> नियम 19:–प्राधिकारी, राज्य सरकार के पूर्व अनुमोदन से, किसी प्राधिकारी भूमि को तत्समय प्रवृत्त किसी विधि के अधीन रजिस्ट्रीकृत किसी सार्वजनिक संस्था या निकाय को रियायती निबंधनों पर पट्टे पर दे सकेगा ।
>
> **Rule 20:**-Ordinarily, no lease or sale of land on concessional terms shall be allowed for the purposes of other than charitable purposes such as for hospital, educational institutions and orphanages.
>
> नियम 20:– साधारणतया भूमि का रियायती निबन्धनों पर कोई पट्टा या विकय पूर्व प्रयोजनों जैसे अस्पताल शैक्षणिक संस्थाओं तथा अनाथालयों से भिन्न प्रयोजनों के लिये अनुज्ञाननहीं किया जायेगा ।

9. Rule 20 has not been happily worded and it appears that "of" between "purposes" and "other" is redundant for interpreting the said rule. The Hindi version, however, gives the correct picture. However, the exercise of interpretation has become superfluous as the said rule has already been taken into consideration by the Supreme Court in *K.K. Bhalla Vs. State of M.P. & others*(A.I.R. 2006 SC 898). In paragraph 36 of the judgment, their Lordships have referred to the Rules and stated that approval of the State Government is required for transfer of the land on concessional terms and no lease on concessional terms shall be allowed for purposes other than charitable purposes such as hospital, educational institutions and orphanages. Thus, earlier judgment of this Bench to the effect that newspapers are for educational purposes within the expression contained in Rule 20, is fortified by the judgment of Supreme Court in *K.K. Bhalla*(supra).

10. The learned counsel for the petitioners have submitted that notwithstanding that the judgment in *Vijay Kumar Tiwar's case*(supra) and in the case of *K.K. Bhalla*(supra) did not save concessional allotment in favour of the newspapers, in the wake of the fact that the newspapers have spent substantial amount for making construction decades ago, termination shall cause avoidable hardship to them. In *Vijay Kumar Tiwari's case*(supra), it was stated that the private respondents will be at liberty to negotiate with the development authority in terms

of the order dated 24/9/92, passed by the Indore Bench of the Hight Court in W.P. No.1873/91 *Kranti Kumar Shukla Vs. State of M.P. and another.*

11. We may now advert to the judgment of the Supreme Court in *K.K. Bhalla's case*(supra). In the said judgment, the land was earmarked for commercial purposes in the master plan but it was allotted for industrial use for printing newspapers, thus, it was not a case where the land ear marked for charitable purposes, had been allotted to a newspaper as is the case in hand. Despite having come to the conclusion that the allotment suffered from a basic flaw and illegality, the Supreme Court in the said report in paragraph 75 expressed opinion that the interest of justice would be subserved if the question as regards allotment of land is left open to the Development Authority(in that case Jabalpur Development Authority), and it was directed that the Authority may consider the matter afresh for grant of such allotment in favour of the Private Respondent(newspapers) treating the applications filed by them either before it or before the State Government, as fresh applications.

12. We, therefore, do not perceive any ground to differ from what has been directed by their Lordships in *K.K. Bhalla*(supra). For convenience, we reproduce paragraph 75 of the report hereunder:-

> "For the reasons aforementioned, the impugned judgments of the High Court cannot be sustained, but, having regard to the facts and circumstances of this case, we are of the opinion that the interest of justice would be subserved if the question as regards allotment of land is left to the Jabalpur Development Authority. The Authority may consider the matter afresh for grant of such allotment in favour of the Private Respondents herein treating the applications filed by them either before it or before the State Government as fresh applications. Such applications must be processed strictly in terms of the provisions of the 1973 Act and the Rules framed thereunder as also keeping in view the Master Plan. Such a decision should be taken by the Competent Authority of the JDA at an early date preferably within a period of two months from the date of receipt of the copy of this order. The JDA shall return the amount deposited by the Private Respondents, if any, within four weeks from date."

13. From the narration of the facts above, it is luculent that in-so-far as charitable purpose was concerned, *Chogelal Yadav's case,* clearly concluded the issue by holding that newspapers also served an educational purpose and were, therefore, entitled to be considered for allotment in accordance with Rules. This position became further manifest in the judgment of *K.K. Bhalla* (supra) wherein their Lordships held that no lease on concessional terms shall be allowed for purposes other than charitable purposes such as hospital, educational institutions and orphanages. It appears that this judgment was not brought to the notice of the learned Judges in *Vijay Kumar Tiwari* (supra). It was also not brought to the

notice of the Court that the designated use of the land in the Development Plan was "Educational".

14. Under these circumstances, we are of the view that the course suggested by the Supreme Court in *K.K. Bhalla* (supra) and by this Court in *Vijay Kumar Tiwari's case*(supra) for treating the applications as fresh applications and decision thereon, on the merits of each case should be adopted in the present case also. We make it clear, that Development Authority shall proceed to decide the application consistent with the law laid down as here-in-above referred to.

15. The petition W.P. No.4806/2007 *Jeevan Singh Vs. State of M.P and others* is, accordingly, dismissed and the other petitions are disposed of with the direction to Indore Development Authority to treat the applications filed by these newspapers as fresh applications and consider the matter afresh for grant of such allotment in favour of the applicants consistent with the provisions of law as referred to above. The Indore Development Authority shall endeavour to decide these cases as expeditiously as possible, preferably within a period of four months. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 1656

WRIT PETITION

Before Mr. Justice Viney Mittal

26 February, 2008*

SHRI KAMLA NEHRU BALIKA UCHCHATAR MADHYAMIK VIDYALAYA ... Petitioner

Vs.

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

Ashasakiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Vetano Ka Sandaya) Adhiniyam, M.P. (20 of 1978), Section 5 - *Private aided educational institute getting grant-in-aid - State Govt. issued circular that provident fund with regard to employees of aided institution with effect from 1.8.1982 would be the responsibility of the Management and not of the State Govt. - Circular challenged on the ground that it is ultra vires the provision contained in the Section 5 of Adhiniyam - Held - Denying the liability by the State Government to pay provident fund of the employees is clearly in contravention with the mandatory provisions of Section 5(2) of the Act - Circular declared as ultra vires of the Act and quashed - Petition allowed.* (Para 14)

अशासकीय शिक्षण संस्था (अध्यापकों तथा अन्य कर्मचारियों के वेतनों का संदाय) अधिनियम, म.प्र. (1978 का 20), धारा 5 – अशासकीय सहायता प्राप्त शिक्षण संस्था को सहायता अनुदान मिल रहा – राज्य शासन ने परिपत्र जारी किया कि सहायता प्राप्त संस्थान के कर्मचारियों के

*W.P. No.2212/2001 (Indore)

सम्बन्ध में 1.8.1982 से भविष्य निधि प्रबंधन की जिम्मेदारी होगी न कि राज्य शासन की – परिपत्र को इस आधार पर चुनौती दी गयी कि यह अधिनियम की धारा 5 में अन्तर्विष्ट उपबन्धों के अधिकारातीत है – अभिनिर्धारित – राज्य शासन द्वारा कर्मचारियों की भविष्य निधि देने के दायित्व से इंकार करना स्पष्टतः अधिनियम की धारा 5(2) के आज्ञापक प्रावधानों का उल्लंघन है – परिपत्र अधिनियम के अधिकारातीत घोषित और अभिखण्डित – याचिका मंजूर।

N.K. Dave, for the petitioner.
Umesh Gajankush, G.A., for the respondents No.1, 3 & 4.
S.C. Sharma, for the respondent No.2.

ORDER

VINEY MITTAL, J.(ORAL).

The petitioner before this Court is a society running a private aided educational institution. It has challenged a circular dated July 17, 2000 (Annexure-D), whereby it has been laid down that the provident fund with regard to the employees of aided institutions w.e.f. August 1, 1982, would be the responsibility of the management of the institution itself and not of the State Government.

2. The facts on record depict that the petitioner-society runs a school in the name of Shri Kamla Nehru Balika Uchchatar Madhyamik Vidyalaya, Indore. The school run by the petitioner-society receives grant-in-aid from the State Government. Under the provisions of the then Central Provinces and Berar Education Manual, 1928, there was a scheme for constituting a provident fund for teachers in non-pensionable service. The proportion of contribution to be paid by the teachers was specified. The contribution by the Government and by the management of the school was also detailed. In the year 1978, the Madhya Pradesh Ashasakiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Vetano Ka Sandaya) Adhiniyam, 1978 (hereinafter referred to as Act) was promulgated. The aforesaid enactment was enacted for regulating the payment of salaries to the teachers and other employees of non- government institutions receiving grant-in-aid from the State Government and non-government educational institutions for higher education receiving grants from the Madhya Pradesh Uchcha Shiksha Anudan Ayog and other matters ancillary thereto. Under the provisions of Section 5 of the Act, an institutional fund was constituted for payment of salary to the teachers. Section 5(2) of the Act provided for the State Government or Ayog to place to the credit of the institution fund, in advance, such sums as may be required for the payment of salary to teachers and employees of the institution, including the institution's contribution to the provident fund accounts at the rate it was required to make such contribution. The aforesaid Act did not provide for any provident fund scheme, as was the provisions under the then Central Provinces and Berar Educational Manual, 1928. Therefore, even after the enactment of the Act, the scheme under the 1928 Manual, continued to remain in force except that the institution's contribution was now required to be deposited in the institutional fund. Under the Act, rules were also framed. Rule 8 of Ashasakiya Shikshan Sanstha

Institutional Fund Rules, 1983, provided for opening of accounts for deposit of salary and teachers contribution with the provident fund.

3. Even prior to 1978 Madhya Pradesh Act, a central enactment being the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 came to be promulgated. Initially, the said central Act did not apply to educational institutions and the schemes under the 1928 Manual continued to operate for teachers and employees of educational institutions. However, by notification dated February 19, 1982, published on March 6, 1982, the aided schools of the State of Madhya Pradesh came within the ambit of 1952 Act.

4. It appears that a controversy arose between the Regional Provident Fund Commissioner, Jabalpur and Madhya Pradesh Shikshak Congress about the applicability of the Provident Funds and Miscellaneous Act, 1952, to such teachers and employees of the aided schools in the State of M.P., who were covered by a provision of the scheme. The matter ultimately was resolved by the Apex Court in the case of *Madhya Pradesh Shikshak Congress and another Vs. Regional Provident Fund Commissioner, Jabalpur and another* (1999)1 SCC 396. It was held by the Apex Court that after promulgation of the Act 1952, the provident fund to the employees was to be paid under the provisions of the said Act and the schemes, which were inconsistent to the said Act stood automatically abolished.

5. After judgment of the Apex Court, a circular dated July 17, 2000 has been issued by the State Government through which the State Government has provided that the liability to pay the provident fund w.e.f. August 1, 1982 was to be that of the employer i.e. of the management of the institution and the State Government was not liable to make any contribution/reimbursement.

6. The said circular has been appended as Annexure-D with the present petition and is subject matter of challenge before this Court. The petitioner-society has also challenged an order dated August 27, 2001 (Annexure-G) passed by respondent No. 2.

The basic grievance raised by the petitioner-society is that under the provisions of the Act of 1978, Section 5(2) thereto, specifically provided for the constitution of an institutional fund for payment of salary and provident funds of the employees of the aided institution and therefore, in terms of the said statutory provisions, issuance of the circular, Annexure D, dated July 17, 2000, by the State Govt. was wholly contrary to the said provisions and as such was ultra-vires. It has also been pleaded by the petitioner-society that issuance of the circular by the State Government was on the basis of a mis-interpretation of the judgment of the Apex Court.

7. The claim of the petitioner-society has been contested by the State Government. A detailed reply has been filed. The State Government has maintained that since under the provisions of the 1978 Act, the employees of an aided institution were for all practicable purposes under the employment of the institution itself,

therefore, all liability towards such employees was that of the management of the institution and could never been fastened upon the State Government, in any manner.

8. I have heard the learned counsel for the parties and with their assistance, have also gone through the record of the case.

9. At the outset, the relevant provisions of Section 5 of 1978 Act, may be reproduced as under.

> "5. Constitution of Institutional fund for payment of salary of teachers, etc., and amounts to be deposited therein.-(1) There shall be opened in a treasury or sub-treasury, a separate head of account under which shall be constituted a separate fund for each institution (hereinafter referred to as institutional fund) in accordance with the rules made in this behalf for the purpose of payment of salary of the teachers and employees of that institution.
>
> [(2) The State Government or the Ayog, as the case may be, shall place to the credit of the institution fund in advance by such date or dates as it may, from time to time, by notification specify, such sum as may be required for the payment of salary to teachers and employees of the institution including the institution's contribution to the provident fund accounts at the rate at which it is required to make such contribution under any enactment for the time being in force.
>
> X X X X X X X
> X X X X X X X
> X X X X X X X."

10. A perusal of sub-section 2 of Section 5 clearly shows that the State Government or the Ayog, as the case may be, has to place such funds to the credit of the institution fund in advance, as may be required for the payment of the salary to teachers and employees of the institution, including the institution's contribution to the provident fund accounts, at the rate at which it is required to make such contribution under any enactment for the time being in force.

11. In view of the mandatory provisions contained in Section 5(2) of the Act, it is not understandable as to how and in what manner the State Government can deny its liability to make the contribution of the employees provident fund payable for the employees of the petitioner-society. In such circumstances, the liability of the State Government to pay its part of the salary and the provident fund, is obvious.

12. At this stage, it may be noticed that during the course of arguments, learned counsel for the petitioner-society has contended that it appears that at the time of issuance of the circular dated July 17, 2000, the real import of the provisions of Section 5(2) of the Act was lost by the State Government and therefore, the circular in question, had in fact, been issued in ignorance of the said provisions, but later on, on realizing the said mandatory provisions of the Act, an amendment

was made in the year 2000, whereby subsection 2 of Section 5 was completely substituted by a new provision and as per the new provision, the liability of the State Government to pay the provident funds etc. payable for the employees of an institution, was withdrawn.

13. I have also perused the amended provisions of the Act made through an amendment in the year 2000. The contention raised by Shri N.K.Dave, learned counsel for the petitioner-society appears to be correct. Whereas under the 1978 enactment, there was a clear stipulation creating a liability of the State Government to pay not only the salary of an employee of an aided institution, but also the provident fund, there is no such provisions in the amended 2000 provision.

14. Thus, it is apparent that the circular Annexure-D, denying the liability of the State Government to pay the provident fund of an aided institution is clearly in-contravention of the mandatory provisions of 5(2) of the Act and therefore, the said circular has to be declared as ultra-vires of the Act and is quashed.

15. However, it may be clarified that the amended provisions of the Act shall continue to operate with regard to the institution in question from the date of enforcement of the amendment of Section 5(2) of the Act.

C.c. as per rules.

Order accordingly.

I.L.R. [2008] M. P., 1660
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice Shantanu Kemkar
3 March, 2008*

VIKRAM CEMENT ... Petitioner
Vs.
STATE OF M.P. & anr. ... Respondents

A. Electricity Duty Act, M.P. (10 of 1949), Section 5, Electricity Duty Rules, M.P. 1949, Rule 5(2) - *Recovery of duty and interest* - *Notification issued by State Govt. provides for payment of interest @ 12% if the delay is 3 months or less - 15% if the delay is more than 3 months and less than 6 months - 20% if delay is more than 6 months but less than 12 months - 24% if delay is more than 12 months - Held - Government has taken into consideration the true spirit of Section 5 - It cannot be said that there is any discrimination between the classes of defaulters.* (Para 9)

क. विद्युत शुल्क अधिनियम, म.प्र. (1949 का 10), धारा 5, विद्युत शुल्क नियम, म.प्र. 1949, नियम 5(2) – शुल्क और ब्याज की वसूली – राज्य शासन द्वारा जारी अधिसूचना 12% की दर से ब्याज का भुगतान करने के लिए उपबंध करती है, यदि विलम्ब तीन माह या कम है – 15% यदि विलम्ब तीन माह से अधिक और 6 माह से कम है – 20% यदि विलम्ब 6 माह से अधिक किन्तु

*W.P. No.6212/2002 (Jabalpur)

12 माह से कम है – 24% यदि विलम्ब 12 माह से अधिक है – अभिनिर्धारित – सरकार ने धारा 5 का सही अर्थ विचार में लिया है – यह नहीं कहा जा सकता कि व्यतिक्रमियों के वर्गों के मध्य में कोई भेदभाव है।

B. Electricity Duty Act, M.P. (10 of 1949), Section 5, Electricity Duty Rules, M.P. 1949, Rule 5(2) - ***Whether recovery of interest @ 24% p.a. is penal in nature - Held - Section 5 of Act does not put any cap on the rate of interest - Rule provides for a cap of 24% - Rule in fact serves the interest of public and defaulters - When Rule provides that rate of interest shall not go beyond 24%, one cannot argue that rate of interest is penal in nature.*** (Para 11)

ख. विद्युत शुल्क अधिनियम, म.प्र. (1949 का 10), धारा 5, विद्युत शुल्क नियम, म.प्र.1949, नियम 5(2) – क्या 24% वार्षिक की दर से ब्याज की वसूली दण्डात्मक प्रकृति की है – अभिनिर्धारित – अधिनियम की धारा 5 ब्याज की दर को किसी सीमा में नहीं बाँधती है – नियम 24% की सीमा उपबंधित करता है – वास्तव में नियम लोक एवं व्यतिक्रमियों के हित की पूर्ति करता है – जब नियम यह उपबंधित करता है कि ब्याज की दर 24% के बाहर नहीं जाएगी, कोई यह तर्क नहीं कर सकता है कि ब्याज की दर दण्डात्मक प्रकृति की है।

C. Electricity Duty Act, M.P. (10 of 1949), Section 5, Electricity Duty Rules, M.P. 1949, Rule 5 - ***Recovery of interest on delayed payment - Petitioner was enjoying certain exemption extended by State Govt. - Exemption were withdrawn later on - Petitioner instead of making payment as per demands under the head of electricity duty, challenged the order of demand - Order of demand was stayed however, petition was dismissed and S.L.P. was also dismissed - Held - When Court grants stay against execution of any order, it acts in favour of party who had secured such order - Equity and fairplay provide that if man secures certain privileges or benefits flowing from an order of Court, then such person should be required to return the benefit after vacation or rejection of order - Petitioner liable to pay interest on delayed payment - Petition dismissed.*** (Para 12)

ग. विद्युत शुल्क अधिनियम, म.प्र. (1949 का 10), धारा 5, विद्युत शुल्क नियम, म.प्र. 1949, नियम 5 – विलम्बित भुगतान पर ब्याज की वसूली – याची राज्य सरकार द्वारा विस्तारित कुछ छूट का उपभोग कर रहा था – बाद में छूट वापस ले ली गई – याची ने विद्युत शुल्क शीर्ष के अधीन माँग के अनुसार भुगतान करने के बजाय, माँग के आदेश को चुनौती दी – माँग का आदेश स्थगित किया गया, तथापि याचिका खारिज की गई और एस.एल.पी. भी खारिज हुई – अभिनिर्धारित – जब न्यायालय किसी आदेश के निष्पादन के विरुद्ध रोक प्रदान करता है, तो वह उस पक्षकार के पक्ष में कार्य करता है जिसने ऐसा आदेश प्राप्त किया है – साम्य और उचित व्यवहार यह उपबन्धित करते हैं कि यदि व्यक्ति न्यायालय के आदेश से कुछ विशेषाधिकार और लाभ प्राप्त करता है तो ऐसे व्यक्ति से आदेश के रद्द या नामंजूर होने पर लाभ को वापस करना अपेक्षित है – याची विलम्बित भुगतान पर ब्याज भुगतान करने के लिये दायी – याचिका खारिज।

Aditya Adhikari, for the petitioner.

V.K. Shukla, Dy.A.G., for the respondents/State.

JUDGMENT

The Judgment of the Court was delivered by **R.S. GARG, J.** :–By this writ petition filed under Article 226 of the Constitution of India the petitioner has challenged Annexure P/15 a demand letter issued by the Chief Engineer (Electricity Safety) on 12.2.2001 making a demand in sum of Rs.1,08,46,763.16 as interest on alleged dues of electricity duty, Annexure P/17 a demand letter dated 10.7.2001 issued by Chief Engineer, Electrical Safety and Chief Electrical Inspector demanding the above referred amount and Annexure P/19 letter-cum-demand notice dated 24.3.2005 issued by the Chief Engineer (Electrical Safety) and Chief Electrical Inspector. By way of amendment the petitioner has also challenged the notification no.2698-3752-XIII dated 22.7.1975 issued by the State Government in exercise of the powers under Section 5 of Madhya Pradesh Electricity Duty Act, 1949 and Rule 5 of the Madhya Pradesh Electricity Duty Rules, 1949 as ultra vires the Act and ultra vires the Constitution of India.

2. The short facts necessary for disposal of the present writ petition are that the petitioner was enjoying certain exemption extended by the State Government but later on the said exemptions were withdrawn. After withdrawing the said exemptions, the State Government started making certain demands under the head of the electricity duty but the petitioner instead of making the payments to the Government challenged the said order demanding the duty. The matter was dismissed by the High Court and ultimately the order of the High Court was confirmed by the Supreme Court. After dismissal of the writ application filed by the present petitioner, the respondents again issued demand note for recovery of the electricity duty. The petitioner without any objection paid the said amount. However, after sometime the respondents found that according to Section 5 of the Madhya Pradesh Electricity Duty, 1949 read with notification No.2678-3752-XIII dated 22.7.1975 they would be entitled to interest on the unpaid amount from the date of payment till it is paid. They accordingly issued the notice requiring the present petitioner to pay a sum of Rs.1,08,46,763.16. The petitioner again being aggrieved by the said demand and the reminders, filed this writ petition and challenged the demand notices and the notification dated 22.7.1975.

3. Learned counsel for the petitioner submitted that in absence of a provision in the Act for recovery of the interest on the delayed payments a notification in exercise of the powers conferred by sub-rule 2 of Rule 5 of Madhya Pradesh Electricity Duty Rules, 1949, could not be issued.

4. Shri Shukla, learned counsel for the State on the other hand submitted that Section 5 of the M.P. Electricity Duty Act, 1949 itself provides for recovery of duty and interest. According to him, if the Act provides for recovery of duty and interest then the petitioner would not be allowed to say that there is no provision in the Act.

5. Section 5 of M.P. Electricity Duty Act, 1949 reads as under :

"5 Recovery of duty and interest -

1) The amount of duty due and remaining unpaid shall carry interest at such rate and in such circumstances as may be prescribed.

(2) Without prejudice to any other mode of recovery available to the State Government, any duty falling due for payment and the interest accruing thereon, if any, may be recovered in the same manner as an arrear of land revenue."

6. Sub section (1) of Section 5 of M.P. Electricity Duty Act, 1949 clearly provides that the amount of duty due and the duty amount which remains unpaid shall carry interest at such rate and in such circumstances as may be prescribed. If sub-section (1) provides for recovery of the interest on the amount of the duty due and the amount of the duty unpaid then it cannot be argued that such interest cannot be levied. Rule 5 of the Madhya Pradesh Electricity Duty Rules, 1949 reads as under :

"5. Recovery of duty and interest :

(1) Where the duty is not paid within the period specified under Rule 3, the same shall be paid thereafter with interest thereon at the rate prevailing in accordance with sub-rule (2).

(For the purpose of calculating the interest part of a month shall be treated as equal to a month).

(2) The rate of interest payable under sub-rule (1) shall be such as may be fixed by the Provincial Government by notification from time to time subject to a maximum of (24%) per annum.

Rule 5(1) provides that if the duty is not paid within the period specified under Rule 3 the same shall become payable with interest thereon at the rate prevailing in accordance with sub-rule (2) of Rule 5. Sub-rule (2) clearly provides that the rate of interest payable under sub-rule (1) shall be such as may be fixed by the State Government by notification from time to time subject to maximum of 24% per annum.

7. The Act does no where say that what shall be the rate of interest or it shall always be less than 24%. However, when a cap is provided by the Act or Rule in relation to the rate of interest to be recovered then beyond the said cap, interest cannot be recovered.

8. The notification dated 22.7.1975 even otherwise cannot be held to be bad because it runs in accord with sub-section (1) of Section 5 of the M.P. Electricity Duty Act, 1949. Sub-section 1 of Section 5 provides (1) that the amount shall carry interest at such rate and (2) in such circumstances as may be prescribed. Under Section 5 of the Act the State would be entitled to fix any rate of interest taking into consideration the circumstances.

9. The State Government after taking into consideration the delays and defaults on the part of the defaulters/consumers issued the notification which provides that if there is a delay of three months or less the interest payable would be at the rate of 12%. If it is paid beyond three months but within six months the rate would be 15%, but if it is beyond six months but within 12 months rate of interest will be 20% and if the payment is made after 12 months the rate of interest shall be 24%. From the notification it would be clear that the Government is making a reasonable classification amongst the defaulters and is making classes between the defaulters by charging less or more interest. When the Government has taken into consideration the true spirit of Section 5 of the Act then one cannot say that there is any discrimination between the classes of the defaulters.

10. We are unable to agree with the first question raised by the learned counsel for the petitioner.

11. It was then contended that recovery of the interest at the rate of 24% per annum would be penal in nature. In our opinion, this argument again would not be available to the petitioner. Section 5 of the Act does not put any cap on the rate of the interest but gives an absolute discretion to the State Government but the Government in its wisdom has put a cap in Rule 5 by observing that the interest rate shall not go beyond 24%. As the Rule provides for a cap which was otherwise not provided by Section 5 of M.P. Electricity Duty Act, 1949, we must hold that the Rule in fact serves the interest of the public and the defaulters. In absence of Rule 5 the Provincial Government could levy interest at any rate but in this case the Government has chosen not to charge interest beyond 24%. When the Act itself provides recovery of the interest and the Rule provides that the rate of interest shall not go beyond 24% then one cannot argue that the rate of the interest is penal in nature.

12. It was then contended that as the High Court granted stay against the recovery on an earlier occasion in view of the bonafide dispute raised by the petitioner the State would not be entitled to recover the interest on delayed payment of duty. In our opinion this argument is also misconceived. When a Court grants stay against execution of any order or stays the operation of a particular action then such stay order acts in favour of the party who had secured such stay order. After vacation of the stay order the party which could secure the stay order cannot and should not be allowed to say that as the Court provided a protective umbrella, even after vacation of the order or rejection of the challenge the other side should not be allowed to recover the dues. If the argument is accepted then it would lead to a chaotic situation and judicial anarchy. After securing stay the party would enjoy non-payment and after dismissal if the other party is not allowed to recover the losses, which they suffered because of the non-recovery, then the other party would come to a position from where there is no retreat. Equity and fairplay provide that if a man secures certain privileges or benefits flowing from an order passed by the Court, then such a person should be required to return the

benefit after vacation or rejection of the order. The petitioner cannot be allowed to say that because some stay order was granted at that some time, they would not be liable to pay the interest.

13. In view of the discussions aforesaid, we are unable to hold that the State Government through the respondent no.2 was not justified in issuing the notice of demand. The demand notices are held not to be bad in law. We are also unable to hold that the notification dated 22.7.1975 is ultra vires the Madhya Pradesh Electricity Duty Act, 1949 or Madhya Pradesh Electricity Duty Rules, 1949 or the provisions of the Constitution of India. The petition is dismissed. There shall however be no order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 1665

WRIT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice Shantanu Kemkar

4 March, 2008*

M.P. CEMENT MANUFACTURERS ASSOCIATION ... Petitioner

Vs.

STATE OF M.P. & anr. ... Respondents

A. Upkar Adhiniyam, M.P., 1981 (1 of 1982) [As amended in 2001], Section 3(1), Vidyut Sudhar Adhiniyam, M.P., 2000, Section 12(3) - *Energy Development Cess - Constitutional validity of amendment 2001 challenged on the ground that M.P. Electricity Regulatory Commission not consulted - Held - Consequence of non-consultation in terms of Section 12(3) of Adhiniyam, 2003 would not be an incompetent piece of legislation.* (Para 12)

क. उपकर अधिनियम, म.प्र., 1981 (1982 का 1) [2001 में यथासंशोधित], धारा 3(1), विद्युत सुधार अधिनियम, म.प्र., 2000, धारा 12(3) – ऊर्जा विकास उपकर – संशोधन 2001 की संवैधानिक वैधता को इस आधार पर चुनौती कि म.प्र. विद्युत विनियामक आयोग से परामर्श नहीं लिया गया – अभिनिर्धारित – 2003 के अधिनियम की धारा 12(3) के निबन्धनों के अनुसार परामर्श न करने का परिणाम विधान का अक्षम खण्ड नहीं होगा।

B. Constitution, Article 226 - *Grounds to challenge constitutional validity - If the act of repository of power is in conflict with Constitution, or governing Act or general principles of law of land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.*

The Supreme Court also observed that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it. (Para 15)

*W.P. No.1082/2002 (Jabalpur)

ख. संविधान, अनुच्छेद 226 – संवैधानिक वैधता को चुनौती देने के आधार – यदि शक्ति के निधान का कृत्य संविधान या शासी अधिनियम या देश की विधि के सामान्य सिद्धांतों के विरोध में है, या यह इतना मनमाना या अनुचित है कि कोई निष्पक्ष भाव रखने वाला प्राधिकारी उसे कभी नहीं बना सकता था।

C. Upkar Adhiniyam, M.P., 1981 (1 of 1982) [As amended in 2001], Section 3(1), Vidyut Sudhar Adhiniyam, M.P., 2000, Section 12(3) - *Energy Development Cess - Effect of non-consultation with M.P. Electricity Regulatory Commission - Held - Adhiniyam, 1981 and Adhiniyam, 2000 have been enacted to meet different exigencies and are to operate in different fields - Adhiniyam, 2000 is to operate in relation to electrical industry and policies - Adhiniyam, 1981 is general in nature and is to operate in relation to cess/ tax on certain items - Provisions of one Act cannot be read into another Act - Act in which action is taken does not ask for consultation - Petitions dismissed.* (Para 20)

ग. उपकर अधिनियम, म.प्र., 1981 (1982 का 1) [2001 में यथासंशोधित], धारा 3(1), विद्युत सुधार अधिनियम, म.प्र., 2000, धारा 12(3) – ऊर्जा विकास उपकर – म.प्र. विद्युत विनियामक आयोग से परामर्श न करने का प्रभाव – अभिनिर्धारित – 1981 का अधिनियम और 2000 का अधिनियम विभिन्न अत्यावश्यकताओं को पूरा करने के लिये अधिनियमित हुए हैं और विभिन्न क्षेत्रों में संचालित होते हैं – 2000 का अधिनियम विद्युत उद्योग और नीतियों के संबंध में संचालन करने के लिए है – 1981 का अधिनियम सामान्य प्रकृति का है और कुछ मदों पर उपकर/कर के सम्बन्ध में संचालन करने के लिए है – एक अधिनियम के उपबन्धों को दूसरे अधिनियम में नहीं पढ़ा जा सकता है – अधिनियम जिसमें कार्यवाही की गई है परामर्श नहीं मांगता है – याचिका खारिज।

Cases referred :

(2004) 2 SCC 249, W.P. No.2828/2004, (1988) 4 SCC 59, (1990) 3 SCC 223, (1999) 3 SCC 422.

Alok Aradhe with *Sankalp Kochar*, for the petitioner.

V.K. Shukla, Dy.A.G., for the respondents.

ORDER

The Order of the Court was delivered by

R.S. GARG, J.:–The two petitions filed by the different petitioners are raising identical question, therefore, the arguments were simultaneously heard. This common order shall decide both the writ petitions.

2. Short facts necessary for disposal of the present petitions are that the petitioners have filed these petitions submitting inter alia that the provisions contained in M.P.Upkar (Dwitiya Sansodhan) Adhiniyam, 2001 by which the Energy Development Cess which is payable by the distributor of the electricity energy to the State Government has been increased from 1 paise per unit to 10 paise per unit is *ultra vires* the M.P. Upkar Adhiniyam, 1981 and is also *ultra vires* Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam, 2000. It is also submitted that the amendment made by the amending Act is not unconstitutional and the same is arbitrary.

3. In the matter of M.P.Cement Manufacturers Association, it is the case of the petitioner that it is an association of cement manufacturers duly registered under the provisions of M.P. Societies Registrikaran Adhiniyam, 1973. According to them, they are entitled to challenge the constitutional validity of provisions of law, which run contrary to the interest of the industry and also of the members.

4. M.P. Upkar Adhiniyam, 1981 is an Act for levy of certain cess. The aforesaid Act was initially amended by M.P. Upkar (Sansodhan) Ordinance, 2001, Section 3 of M.P. Upkar Adhiniyam, 1981 was substituted. According to the amended Section 3(1) of M.P. Upkar Adhiniyam, 1981, every distributor of electrical energy was obliged to pay to the State Government the energy development cess at the rate of one paise per unit on the total units of electrical energy sold or supplied to a consumer or consumed by himself or employees during any month.

5. The State Legislature also enacted another Act namely M.P.Vidyut Sudhar Adhiniyam, 2000, which came into force in the State of Madhya Pradesh on 3rd July, 2001. Section 12 of the Act referred to general powers of the State Government before issuing any policy directive on the matters concerning electricity in the State including on measures which are considered necessary for the overall planning in the region for the development of electricity industry in the State etc. Sub section 3 however provides that the State Government shall consult the Commission in relation to any policy directive which it proposes to issue or any legislation is proposed to be enacted affecting the Electricity Industry, it shall duly take into account the recommendation if any, given by the Commission within such reasonable time as the State Government may specify.

6. The State Government thereafter, came with Madhya Pradesh Upkar (Dwitiya Sansodhan) Adhiniyam, 2001 (Act No.30 of 2001) and amended Sub section 1 of Section 3 of M.P.Upkar Adhiniyam, 1981 and substituted ten paise in place of one paise.

7. According to the petitioners, before enhancing the cess/tax, the State Government did not have effective consultation with the M.P. Electricity Regulatory Commission, therefore, the enhancement from one paise to 10 paise was bad and not only that the provisions contained in Act No. 30 of 2001 are *ultra vires* the Constitution.

8. Shri R.P.Agrawal and Shri Alok Aradhe, learned senior counsel appearing for the petitioners submitted that undisputedly before making amendment in sub section 1 of Section 3 of the M.P. Upkar Adhiniyam, 1981, there was no consultation with the M.P. Electricity Regulatory Commission, therefore, the Act is *ultra vires* the Constitution. It is also submitted that the levy of the energy is to be used and utilized at the discretion of the State Government for the purposes given in Sub section 4 of Section 3 of the M.P.Upkar Adhiniyam and undisputedly the State Government is not utilizing the money in accordance with the provisions of law, the levy itself is bad.

9. Referring to certain decisions (which we shall consider at appropriate stage) it was submitted that non-consultation with the M.P. Electricity Regulatory Commission may not make the Act *ultra vires* the Constitution or constitutionally invalid however the provisions would be open to attack under Article 14 of the Constitution of India on the ground of arbitrariness.

10. Shri V.K.Shukla, learned Deputy Advocate General for the State, on the other hand, submitted that in the matter of *M.P.Cement Manufacture Association Vs. State of M.P. and others*, (2004) 2 SCC 249, the Supreme Court after considering the provisions has held that the provisions are not ultra vires the constitution nor the same is incompetent piece of legislation therefore, the provisions brought into force by amendment cannot be held to be *ultra vires* the Constitution. It is also submitted by Shri V.K.Shukla that the applicability of Section 12(3) which requires consultation with the M.P. Electricity Regulatory Commission was held to be non mandatory by a Division Bench of this Court in the matter of *Flex Industries Limited Vs. State of M.P. and others* [W.P.No. 2828/2004] decided on 31.8.2007. Placing reliance upon the said judgment, Shri Shukla submitted that once the scope and applicability of Section 12(3) of the M.P.Vidyut Sudhar Adhiniyam, 2000 has been considered by the Division Bench of this Court then there is no scope for any interference in the matter.

11. In the matter of M.P. Cement Manufactures Association (supra), the question before the Supreme Court was that whether amendment of Sub section 2 of Section 3 brought into service by M.P. Upkar Adhiniyam/Adhiniyam 2001 was ultra vires the Constitution or not. The Apex Court after considering the legal issue observed that the said Sub section 2 of Section 3 of M.P. Upkar Adhiniyam was *ultra vires* the Constitution on the ground of constitutional incompetence. Scope and applicability of Section 12(3) of M.P.Vidyut Sudhar Adhiniyam, 2000 was also pressed into service. However the Supreme Court held that in absence of consultation with M.P. Electricity Regulatory Commission, the provision would not become *ultra vires*. The Apex Court further observed that it was not necessary for the Court to decide scope and applicability of Section 12(3) of the M.P.Vidyut Sudhar Adhiniyam but they were considering the matter as the scope and applicability of Section 12(3) of the M.P.Vidyut Sudhar Adhiniyam was argued in detail. After considering the pros and cons, the Supreme Court has in paragraphs 38 & 39 held as under:-

> "38. In our opinion, the consequence of non-consultation in terms of Section 12(3) of the Sudhar Adhiniyam would not be an incompetent piece of legislation but a legislation introduced in breach of a salutary requirement to consult an expert statutory body. The statutory requirement for consultation with a body of experts before proposing legislation will serve as an inbuilt safeguard against a challenge under Article 14 of the Constitution apart from anything else.

39. Nevertheless, we do not propose to decide, whether by reason only of such non-consultation, Section 3(2) of the 1981 Adhiniyam is violative of Article 14, nor do we propose to decide whether the cess of 20 paise is excessive, nor the other grounds urged by the appellants pertaining to Article 14. We have referred to the provisions of the Sudhar Adhiniyam so that the State Government may in future act in consonance with Section 12(3)."

12. A fair reading and understanding of paragraph 38 would make it clear that the Supreme Court in clear terms observed that the consequence of non-consultation in terms of Section 12(3) of the 'Sudhar Adhiniyam' would not be an incompetent piece of legislation. However, the Supreme Court was of the opinion that the non-consultation would lead to a decision wherein legislation was introduced in breach of a salutary requirement to consult an expert statutory body. The Supreme Court if has already held that non-consultation would not make the amendment in M.P.Upkar Adhiniyam unconstitutional then at this stage anything contrary to the judgment of the Supreme Court can be observed. However, the liberty would be available to the petitioners to challenge the provisions on the ground that if a particular provision is not introduced in consultation with the expert body then the piece of legislation is arbitrary and would run contrary to the Article 14 of the Constitution of India.

13. Shri Alok Aradhe, learned senior counsel appearing for the petitioner has referred to certain judgments of the Supreme Court, which we shall now take into consideration. In the matter of *State of of Uttar Pradesh and others Vs. Renusagar Power Co. and others* (1988) 4 SCC 59, the Supreme Court had observed that "the exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous".

14. Shri Aradhe, learned senior counsel submitted that in the present matter as there was no consultation with the M.P. Electricity Regulatory Commission, the power has been exercised in a manner which is not known to law and therefore, the power has been exercised in an arbitrary manner.

15. In the matter of *Shri Sitaram Sugar Company Limited and another Vs. Union of India and others* (1990) 3 SCC 223, the Supreme court had observed that a repository of power acts *ultra vires* either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. The Supreme Court also observed that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.

16. Placing reliance upon these observations of the Supreme Court, it was contended by the learned senior counsel for the petitioners that the action on the part of the Government is patently illegal and runs contrary to Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam. It was then contended that the Apex Court had made observations in the matter of *Babu Verghese and others Vs. Bar Council of Kerala and others* (1999) 3 SCC 422, that if an act is to be done in a particular manner as provided by law then such act should be done in such a manner or not at all. The submission infact is that if effective consultation was to be made in accordance with Sub section 3 of Section 12 of M.P. Vidyut Sudhar Adhiniyam then in absence of such consultation or without taking into consideration the recommendations made by the Regulatory Commission, the State Government could not make amendment in Sub section 1 of Section 3 of M.P. Upkar Adhiniyam, 1981.

17. The question, therefore, is that the State Government whether was obliged to have effective consultation with the M.P. Electricity Regulatory Commission and as it did not enter into such consultation the action of the Government can be challenged as arbitrary or unreasonable.

18. After the judgment of the Supreme Court wherein Section 3 (2) was to be held *ultra vires* the Constitution, the State Government came with M.P.Upkar (Sanshodhan Tatha Vidhimanyatakaran) Adhiniyam, 2004 (Act No.8 of 2004), amended Section 3 and also validated the recovery. The Constitutional validity of the Act No.8 of 2004 was again challenged in number of writ petitions before this Court. The said writ petitions came up for hearing and decided by a Division Bench. In the matter of *Flex Industries Limited* (supra), the Division Bench of this court was required to consider the question relating to challenges thrown by different petitions. In paragraph 12 of the said judgments, the Division Bench summarized the question No.13 which reads as under:-

> "(xiii) Under Section 12(3) of M.P.Vidyut Sudhar Adhiniyam, 2003 it is mandatory for the State Government to consult the MPERC in relation to any legislation proposed to be enacted affected electricity industry but in the case at hand before enacting the Validation Act, 2004 though the State Government had sent the said proposal to the MPERC the same was not accepted and, therefore, the provisions contained in the Validation Act, 2004 are unsustainable."

19. The question relating to non-consultation under Section 12(3) of M.P.Vidyut Sudhar Adhiniyam was considered by Division Bench in paragraph 44 of the matter. After giving due consideration to the scope of Section 12(3) of Vidyut Sudhar Ahiniyam and Section 3 of M.P.Upkar Adhiniyam, 2001, the Division Bench observed that the provisions contained in Section 12 of Vidyut Sudhar are on general terms and the words used are 'electricity industry'. Section 12 (3) was required to be given restricted meaning which only covers the field of M.P.Vidyut

Sudhar Adhiniyam and Section 12(3) could not be allowed to entrench upon the field of tax/cess on electricity. The Division Bench also observed that the State Legislature enacted the law on the subject of imposition of tax/cess on electricity in exercise of legislative powers vested in it under Entry 53 List II of the VII Schedule to the Constitution of India. The Court clearly found the line of discretion between the two enactment. In paragraph 47 while summarizing the issues, the Court observed in sub para-F of para 47 that the Validation Act is not hit by Article 14 of the Constitution as the classification is reasonable and further the provisions do not suffer from any arbitrariness. The Court further observed that the Validation Act cannot be regarded to be ultra vires because of non-compliance of the conditions precedent as engrafted under Section 12(3) of Vidyut Sudhar Adhiniyam because both the statutes operate in different spheres and, in any case another piece of legislation could not be regarded as invalid because the Regulatory Commission as contemplated under Vidyut Sudhar Adhiniyam had not been consulted.

20. From these observations made by the Division Bench in the matter of *Flex Industries Ltd.* (supra), it is clear that the Acts namely M.P.Upkar Adhiniyam, 1981 and M.P.Vidyut Sudhar Adhiniyam, 2000 have been enacted to meet different exigencies and are to operate in different fields. M.P.Vidyut Sudhar Adhiniyam is an Act, which is to operate in relation to electrical industry and the policies etc. while M.P. Upkar Adhiniyam is an Act, which is general in nature and is to operate in relation to the cess/tax on certain items. If the two Acts are to operate in separate and different fields then provisions of one Act cannot be read into another Act nor it can be argued that the provisions of one Act should read in the other Act and non-compliance of the provisions of the other Act would make the action of the Government bad even though the Act in which action is taken does not ask for consultation.

21. After giving our thoughtful consideration to the totality of the circumstances and for the reasons aforesaid, we hold that these petitions have no merits. Both the petitions deserve to and are accordingly dismissed. There shall be no orders as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 1671
WRIT PETITION
Before Mr. Justice Rajendra Menon
12 March, 2008*

B.S.N. JOSHI & SONS LTD. ... Petitioner
Vs.
STATE OF MADHYA PRADESH & ors. ... Respondents

A. **Constitution, Article 19(1)(g)** - ***To practise any profession or to carry on any occupation, trade or business*** - *Condition in N.I.T. that Firm*

*W.P. No.7435/2007 (Jabalpur)

should have successfully executed work contract of similar type awarded by MPPGCL / MPSEB / MPEB without any default - Held - Prescribing terms and conditions and qualifications for tender does not permit interference to be made by Writ Court - Action of tendering authority can be interfered with only if it is found to be tainted with malice or is misuse of statutory power and taken in arbitrary manner. (Para 14)

क. संविधान, अनुच्छेद 19(1)(जी) – कोई वृत्ति या कोई उपजीविका, व्यापार या कारबार करना – निविदा आमंत्रित करने वाली सूचना में शर्त कि फर्म ने बिना किसी चूक हुए समतुल्य किस्म का कार्य संविदा सफलतापूर्वक निष्पादित किया हो जो एमपीपीजीसीएल / मप्रराविमं / मप्रविमं द्वारा दिया गया – अभिनिर्धारित – निविदा के लिए विहित निबन्धन व शर्तें और अर्हताएँ रिट न्यायालय द्वारा हस्तक्षेप करने की अनुमति नहीं देती हैं – निविदा अधिकारी के कार्य में हस्तक्षेप केवल तभी हो सकता है जब वह विद्वेष से दूषित पाया जाता है या कानूनी शक्ति का दुरुपयोग है और मनमाने ढंग से लिया गया है।

B. Constitution, Article 19 - *Protection of certain rights regarding freedom of speech, etc. - Fundamental Right guaranteed under Article 19 is absolute but subject to reasonable restrictions.* (Para 15)

ख. संविधान, अनुच्छेद 19 – वाक् की स्वतंत्रता आदि विषयक कुछ अधिकारों का संरक्षण – अनुच्छेद 19 के अन्तर्गत प्रत्याभूत मूल अधिकार आत्यंतिक किन्तु युक्तियुक्त निबंधनों के अध्यधीन है।

C. Constitution, Article 19(1)(g) - *To practise any profession, or to carry on any occupation, trade or business - Condition in N.I.T. that only those Firms shall be eligible if no litigation is pending - Held - Any rule, regulation or condition which prevents a person from litigating his grievance in a Court of Law is unsustainable - Condition quashed as unjustified.* (Para 18)

ग. संविधान, अनुच्छेद 19(1)(जी) – कोई वृत्ति या कोई उपजीविका, व्यापार या कारबार करना – निविदा आमंत्रित करने वाली सूचना में शर्त कि सिर्फ वे ही फर्में योग्य होंगी यदि कोई मुकदमा विचाराधीन न हो – अभिनिर्धारित – कोई नियम, विनियम या शर्त जो किसी व्यक्ति को अपनी शिकायत को न्यायालय में मुकदमा करने से रोकती हो, न टिक सकने वाली है – शर्त अन्यायपूर्ण होने से अभिखण्डित की गई।

Cases referred :

(2001) 1 SCC 182, (2005) 4 SCC 435, AIR 1997 SC 128, (2005) 1 SCC 679, (1995) 1 SCC 478, AIR 1990 SC 958, AIR 1980 SC 1992.

Kishore Shrivastava with *J.K. Pillay,* for the petitioner.

R.N. Singh, A.G. with *Arpan Pawar,* for the respondent No.1 to 3.

Rajendra Tiwari with *Vivek Ranjan Pandey,* for the intervener.

ORDER

RAJENDRA MENON, J. :–Challenging certain conditions incorporated as Condition No.(v), in a Notice Inviting Tender (hereinafter shall be referred to as 'NIT') issued by the respondents vide Annexure P/1, petitioner has filed this petition.

2. Petitioner claims to be a Registered Company having its Head-office at Vishakapatnam, engaged in the business of supplying coal to various Thermal Power Corporations, it is stated that the petitioner company has undertaken work in respect of quality and quantity materialization and shortage minimization including supervision of loading and movement of coal through rail for various Electricity Boards including the Andhra Pradesh State Electricity Board, Madhya Pradesh State Electricity Board, Rajasthan State Electricity Board and the West Bengal State Electricity Board. It is further stated that petitioner had earlier done the same work for the Madhya Pradesh State Electricity Board, which is notified, vide NIT (Annexure P/1). The NITs for the previous years issued by the respondents apart from various other conditions, consisted of the following Clauses:

> "(vi) Certified copy of the latest Income Tax Return filed by the firm.
>
> (vii) Solvency/Bankers Certificate, in original from nationalized bank and details of turn over for preceding 3 years showing that tenderer is solvent upto at least Rs.25 Lakhs (Rupees Twenty Five Lakhs).
>
> (viii) Experience details, copies of work order and performance certificate indicating that the party has successfully executed similar work for 1 (one) million tonne or more per annum in any of the preceding 3 years with any of the Electricity Board or Power Utility only as a single order.
>
> (ix) Firm which has successfully executed the work contract of similar type awarded to it during last three years. Documentary evidence/certificate issued by the concerned Electricity Board/Power utility to this effect shall be submitted by the tenderer."

It is alleged that in the condition stipulated in the earlier NITs, respondent Board had not incorporated any condition with regard to completing similar works for the MPPGCL/MPSEB/MPEB in the past, nor was there with any default clause and no clause pertaining to litigation in this behalf pending or sub judice. It is alleged that the following conditions as Clause (v), is inserted now in the NIT (Annexure P/1), the same is illegal, amounts to arbitrary exercise of power, interference with the fundamental right of the petitioners to carry out business guaranteed under Article 19 of the Constitution of India and is, therefore, unsustainable. The impugned Clause (v) reads as under:

> "(v) Firm which has successfully executed and completed the work contract of similar type awarded by MPPGCL/MPSEB/MPEB in the past, without any default and no litigation in this behalf is pending/sub judice in court of law, shall only be eligible."

3. Shri Kishore Shrivastava, learned counsel for the petitioner, argued that this Clause has been deliberately incorporated in the agreement to oust the petitioner from participating in the process of tendering. It is stated that restricting prospective tenderers who have worked only for the State of Madhya Pradesh in the past imposes unreasonable restrictions. It creates monopoly in favour of some and

results in ousting many eligible contractors from consideration merely on the ground of work done in a particular State. It is stated that such a condition, which creates monopoly and is incorporated without unjust cause or reason is unsustainable. It is further argued that the default clause and preventing from participating in the tender on the ground of litigation pending or sub judice in a Court of law is also improper and unsustainable. This amounts to preventing a person or a contractor from litigating his genuine grievance in a Court of law. It is stated that no authority can prevent a person from ventilating his grievance by resorting to litigation in a Court of law and the clause, which has the result of ousting a contractor, who is litigating his grievance in a Court of law, is unsustainable and has to be quashed.

4. Shri Kishore Shrivastava, learned Senior Counsel, taking me through the facts with regard to previous litigations that have taken place in the matter, the action of the respondents in refusing to grant tender documents to the petitioner, various orders passed by this Court in the matter, tried to emphasize that in incorporating the Clause (v), as indicated hereinabove in the NIT, respondents are acting in an arbitrary and illegal manner and the same is unsustainable. Placing reliance on the judgment delivered by the Supreme Court in the matter of *Kumaon Mandal Vikas Nigam Limited Vs. Girja Shankar Pant and Others* [(2001) 1 SCC 182], Shri Kishore Shrivastava sought for interference.

5. Shri R.N. Singh, learned Advocate General, representing the respondent Board argued that the Clause pertaining to preventing a defaulting contractor to participate in the tender process was already incorporated by the respondent Board on previous occasions, but for some reason it was not incorporated in some of the tenders issued for work in various Thermal Power Stations, but finding the mistake to be committed in this regard, the Clause is again incorporated in the present NIT.

6. It is argued by Shri R.N. Singh, learned Advocate General, that petitioner cannot agitate the matter with regard to restriction in awarding contract for the work done in the State of Madhya Pradesh as the said Clause does not adversely effect the petitioner. It is further stated by Shri Singh that as the past experience of the respondents with the petitioner had been bitter and as various litigations are pending between the parties with regard to previous contracts, the respondents have a right to fix norms and prescribe qualifications and in doing so, respondents have not committed any error which warrants interference in these proceedings. It is argued that Clause (v) impugned in this petition and inserted in the NIT is just, fair and reasonable and the same cannot be termed as arbitrary, discriminatory or tainted with malice warranting interference in these proceedings. It is further submitted by him that looking to the past performance of the petitioner for similar work executed by him, it cannot be said that respondents have acted in illegal manner.

7. Shri Rajendra Tiwari, learned Senior Advocate, alongwith Shri Vivek Ranjan

Pandey appearing for the intervener, emphasized that the terms of a tender can be subjected to judicial scrutiny and review only if it is found to be wholly arbitrary, discriminatory and detrimental to public interest or contrary to statutory and constitutional provisions. It is stated that if there had been a strained relationship between a contractor and the owner, the owner is empowered to incorporate a clause, which has the result of ousting a contractor who has not performed his work properly in the past and with whose work the owner is not satisfied. It was emphasized by Shri Tiwari, learned Senior Advocate, that in the realm of contract the owner is empowered to prescribe norms and qualifications to choose a contractor who can successfully execute the work and in doing so, if some provisions are incorporated which has the result of ousting an unwanted contractor for justifiable reasons, the same cannot be faulted with. Placing reliance on the following judgments Shri Tiwari sought for dismissal of this petition. *Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others* [(2005) 4 SCC 435]; *Krishnar Kakkanth Vs. Government of Kerala and others* AIR 1997 SC 128; *Association of Registration Plates Vs. Union of India and Others* [(2005) 1 SCC 679]; *New Horizons Limited and Another Vs. Union of India and Others* [(1995) 1 SCC 478]; *M/s G.J. Fernandez Vs. State of Karnataka and Others* AIR 1990 SC 958; *M/s Kasturi Lal Lakshmi Reddy Vs. The State of Jammu & Kashmir and another* AIR 1980 SC 1992.

8. Having heard learned counsel for the parties at length and on perusal of the records it is seen that for deciding the question with regard to tenability on the part of the respondents in incorporating the aforesaid Clause (v) in the NIT in question, it is necessary to refer to certain previous history of litigation between the petitioner, the respondent and the interveners. In the year 2007, a NIT was issued by the respondent electricity Board for some work of liaisoning in respect of quality and quantity materialization and shortage minimization including supervision of loading and movement of coal through rail in the Sanjay Gandhi Thermal Power Station, Birsinghpur. When the aforesaid notice was issued petitioner sought supply of the tender documents. Supply of tender documents was refused to the petitioner on the ground that they have not successfully executed work of similar type awarded to them in the past. This resulted in filing of Writ Petition No.18991/2006 before this Court and after hearing all concerned, vide order dated 2.1.2007 (Annexure P/2), the said writ petition was disposed of with a direction to the respondent Board to issue tender documents to the petitioner in accordance to the terms and conditions of the NIT, it was held that the same be not denied to the petitioner on the grounds contained in condition No.(iv) of the tender documents.

9. Condition No.(iv) of the tender documents reads as under :

> "Firm which has successfully executed the work contract of similar type awarded to it during last three years. Documentary evidence/certificate issued by the concerned power utility to this effect shall be submitted by the tenderer."

10. After the aforesaid writ petition was disposed of, again an order was passed rejecting the application of the petitioner for supply of tender documents on the ground that the petitioner is a defaulter and his past work with the respondents has not been satisfactory. This resulted in filing of the second writ petition being Writ Petition No.741/2007, again before this Court. The said writ petition was disposed of vide order dated 9.2.2007 (Annexure P/3) and the action of the respondents was quashed on the ground that in the present NIT condition No.(iv) as incorporated, does not incorporate a "default clause". It was stated that in the previous NITs issued, the words "not found defaulter" was specifically mentioned, these words are missing in the present Clause (iv) of the NIT and, therefore, on the ground that petitioner is a defaulter the tender documents cannot be denied. Accordingly the writ petition was allowed and the respondents were directed to issue tender documents to the petitioner. Even though this order was not challenged by the respondents, but a writ appeal against the aforesaid order of the learned Single Judge was filed by the intervener M/s Nair Coal Services under section 2 of the Madhya Pradesh Uchcha Nyalaya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2006 and a Division Bench of this Court vide order dated 24.2.2007, passed in Writ Appeal No.684/2007, upheld the order passed by the learned Single Judge and disposed of the writ appeal by directing the respondent Board to consider the tender of the petitioner in accordance to law and not to reject it on the ground of petitioner being a defaulter.

11. It is in the backdrop of these facts that the default clause has been incorporated in the NIT now as clause (v). NITs issued by the respondents on various other occasions with regard to some other similar work indicates that there had been a default clause in the NIT and merely because the default clause is now incorporated again, it cannot be a ground for interference by this Court exercising jurisdiction in a petition under Article 226 of the Constitution.

12. In the present NIT, clause (v) incorporation of which is objected to by the petitioner consists of three parts. The first part requires that a prospective contractor should have successfully executed and completed work or contract of similar type with MPPGCL/MPSEB/MPEB in the past. Secondly, it should be without any default and thirdly, no litigation in this behalf should be pending or sub judice in a court of law.

13. As far as the first condition pertaining to similar work being done for MPPGCL/MPSEB/MPEB is concerned, the petitioner qualifies in this category and petitioner cannot be aggrieved by incorporation of this condition, at the instance of the petitioner interference into the said clause cannot be made. It would be for any other aggrieved person who is prevented from participating in the contract on the aforesaid condition to challenge the same. At the instance of the petitioner, who is qualified to participate in the tender inspite of the aforesaid clause and as the aforesaid clause does not prevent the petitioner from participating in the tender, this court does not deem it appropriate to interfere in the matter. That being so, at

the instance of petitioner the first condition of Clause (v) cannot be impugned, as they cannot have any grievance due to incorporation of the said condition.

14. As far as the second condition pertaining to "default clause" is concerned, the same is clearly beyond the realm of judicial review and the principles of law governing prescribing terms and conditions and qualifications for tender does not permit interference to be made by a writ court exercising jurisdiction in a writ petition under Article 226 of the Constitution. It is well settled in law that in matters of formulating conditions for a tender or is laying down terms and qualifications for awarding a contract, the pre-conditions or qualifications can be laid down to ensure that the contractor has the capacity and resources to successfully execute the work, they are beyond the realm of judicial review and action of the tendering authority can be interfered with only if it is found to be tainted with malice or is misuse of statutory power and taken in an arbitrary manner. The law in this regard is laid down by the Supreme Court, in the case of *Association of Registration* (supra).

15. In the case of *Krishnar Kakkanth* (supra), the Supreme Court has held that the fundamental right guaranteed under Article 19 of the Constitution, is absolute, but the same are subject to reasonable restrictions to be imposed against enjoyment of such right. The restriction is to be determined in an objective manner and from the stand-point of interest of general public and not from the stand-point of the interest of the person upon whom the restrictions are imposed.

16. In the case of *New Horizons Limited and Another* (supra) it is further laid down by the supreme Court that the terms and conditions of a tender have to be evaluated from the stand-point of a competent businessman and if the action is found to be in conformity with standards and norms which are not arbitrary, irrational or irrelevant, interference should not be made. It is laid down in the said judgment that certain measures of "free play in the joints" is necessary for the administrative body for functioning in an administrative sphere.

17. Similar principles are laid down and re-iterated in most of the judgments relied upon by Shri Rajendra Tiwari, learned Senior Counsel. Considering the second condition i.e.. the default clause in the back-drop of the aforesaid legal principles, I am of the considered view that incorporation of this condition is neither arbitrary or illegal. It has a reasonable nexus with the purpose to be achieved and, therefore, petitioner cannot have any grievance with regard to imposition of this clause in the NIT.

18. As far as the third condition for preventing a contractor who is litigating his grievance in a court of law is concerned, every person has a statutory legal right, so also a constitutional right to ventilate his genuine grievance by approaching a court of law. Any Rule, Regulation or Condition which prevents a person from litigating his grievance in a Court of law is unsustainable. Merely because a person is aggrieved by the action taken against him and he ventilates his grievance

by instituting proceedings on the basis of constitutional and statutory right available to him or on the basis of rights available under the contract or agreement, the same cannot be a ground for preventing a litigant from participating in future tender process. That being so, there is much force with regard to objections of the petitioner in the matter of challenging the third condition incorporated in Clause (v), pertaining to no litigation in this behalf pending or sub judice in a Court of law. The aforesaid clause has the effect of curtailing the constitutional, statutory and contractual right of a contractor and, therefore, the same cannot be incorporated. Accordingly, clause (v) to the said extent has to be held to be unjustified.

19. Considering the totality of the facts and circumstances of the case and for the reasons indicated hereinabove, this petition is allowed in part. Clause No.(5) so far as it imposes restriction with regard to completion of work of similar type awarded by MPPGCL/MPSEB/MPEB in the past without any default is concerned, is upheld. However, the provision in the said clause so far as it prevents a contractor who is litigating with regard to some contract with the respondents is concerned, this clause being arbitrary and unreasonable, adversely effecting the constitutional and statutory right of the petitioner is held to be unsustainable and cannot be enforced against the petitioner. To that extent, Clause (v) is declared as illegal and not enforceable on the petitioner.

20. Petition stands allowed to the extent indicated hereinabove, and disposed of without any order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 1678
WRIT PETITION
Before Mr. Justice Abhay M. Naik
31 March, 2008*

SATISH GANGRADE & anr. ... Petitioners
Vs.
M.P. MADHYA KSHETRA VIDYUT VITRAN COMPANY LTD. & ors. ... Respondents

Electricity Supply Code, 2004, Clause 4.17 - ***New electricity connection by auction purchaser*** - *Petitioners purchased a flat in public auction - Applied for new electricity connection - New connection denied on the ground that certain dues were outstanding against previous owner - Held - Petitioners are bonafide auction purchaser - Release of new electricity connection cannot be denied - Petitioners entitled for new connection - Petition allowed with cost of Rs.10,000/-.* (Paras 9 & 10)

विद्युत प्रदाय संहिता, 2004, खण्ड 4.17 – नीलाम खरीददार द्वारा नया विद्युत संयोजन – याचियों द्वारा एक फ्लेट सार्वजनिक नीलामी में खरीदा – नये विद्युत संयोजन के लिये

*W.P. No.8232/2007 (Jabalpur)

आवेदन दिया – नये संयोजन से इस आधार पर इंकार कर दिया कि पूर्वस्वामी के विरुद्ध कुछ देय बकाया थे – अभिनिर्धारित – याची सद्भावी नीलाम खरीददार है – नया विद्युत संयोजन देने से इंकार नहीं किया जा सकता – याची नया कनेक्शन पाने का हकदार – रु. 10,000/– वाद व्यय के साथ याचिका मंजूर।

Cases referred :

(1995) 2 SCC 648, (2004)3 SCC 587.

Hemant Shrivastava, for the petitioners.

Indira Nair with *Tulika Gulati,* for the respondents.

ORDER

ABHAY M. NAIK, J. :–Petitioners have assailed the denial of Madhya Pradesh State Electricity Board contained in its letter dated 8.5.2007 marked as Annx.P/1, in respect of electric connection to auction purchasers on the ground that there were dues against the person who availed electricity in the same premises prior to auction.

2. Short facts giving rise to the present writ petition are that the Cent Bank, Home Finance Limited (respondent No.4) issued a notice to auction various properties in exercise of powers under Rule 8 framed under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as Act of 2002 for brevity) which included the subject flat situated in Serve Dharma Colony, Bhopal, as revealed in the advertisement marked as Annx.P/2. Petitioners being the highest bidder, purchased the said flat in open auction on 28.2.2007. A sale certificate was duly issued on 16.3.2007 and it was duly forwarded for registration to the office of Sub-Registrar, Bhopal, vide Annx.P/4 dated 16.3.2007. Thereafter, the petitioner made application in due manner to the M.P. Madhya Kshetra Vidyut Vitran Company Limited (respondent No.1) for grant of electric connection. Respondent No.I refused to grant the connection on the ground that certain dues were outstanding against the electricity connection availed in the same flat by the previous owner. Aggrieved by the same, present writ petition has been preferred on 3.7.2007.

3. It has been averred in the writ petition that the respondent No.3 had published an auction notice in the newspaper for sale of the subject property to recover the loan amount under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as Act of 2002 for brevity). Petitioners purchased the said flat for Rs.1,26,000/- being the highest bidder and was granted sale certificate. Requisite charges for its registration with the office of Sub-Registrar were also deposited vide receipt dated 28.3.2007. Petitioners are entitled to obtain a new electricity connection in the purchased property and the same cannot be denied on account of dues of the previous owner. Strength has been derived by the petitioner from the law laid down by the Apex Court in the case of *Isha Marbles Vs. Bihar State Electricity Board and another* [(1995) 2 SCC 648] and *Ahmedabad Electricity Co. Ltd. Vs. Gujarat Inns Pvt. Ltd. And others* [(2004) 3 SCC 587].

4. Respondents No. 1 to 3 submitted their return refuting thereby the claim of petitioners. They asserted that they have a right to insist for dues of the previous owner and may deny the grant of electricity connection in the same premises until the dues are cleared. For this purpose, rule 4.17 of the Madhya Pradesh Electricity Supply Code, 2004, has been quoted in specific in the return, which is reproduced below :-

"यदि उपभोक्ता किसी पूर्ववर्ती अनुबंध जो कि उसके नाम में या उस फर्म या कम्पनी जिसके साथ वह पूर्व में भागीदार, निदेशक या प्रबंध निदेशक के रूप में संबद्व रहा हो के नाम में निष्पादित किया गया था, से उस परिसर, जहां नवीन कनेक्शन का आवेदन दिया जाना है, पर विद्युत प्रदाय के बकाया या अन्य बकाया राशि है और यह बकाया राशि अनुज्ञप्तिधारी को देय है तो अनुज्ञप्तिधारी द्वारा आपूर्ती के आवेदन पर तब तक कोई विचार नहीं किया जायेगा जब तक बकाया राशि का पूर्ण भुगतान नहीं हो जाता है । किसी व्यक्ति का एक नई सम्पत्ति का अधिष्ठाता बनने पर, यह दायित्व होगा कि आधिपत्य ग्रहण करने के पहले वह पूर्व महीनों के विद्युत बिलों की जांच करे अथवा आपूर्ति संयोजन के विच्छेदित रहने की स्थिति में परिसर के अधिष्ठान के शीर्ष पहले, अनुज्ञप्तिधारी के अभिलेखों से बकाया राशि की जांच करे और यह सुनिश्चित करे कि बिल में दर्शायी बकाया विद्युत राशि का निपटान एवं भारमोचन हो चुका है । ऐसे किसी व्यक्ति के आवेदन पर उस परिसर में पूर्व में या वर्तमान में स्थापित कनेक्शन पर बकाया राशि का प्रमाण–पत्र जारी करने के लिए अनुज्ञप्तिधारी बाध्य होगा । अनुज्ञप्तिधारी पहले से चालू किसी कनेक्शन के द्वारा परिसर को विद्युत आपूर्ति देने या परिसर में नवीन कनेक्शन देने से मना कर सकता है, जब तक कि अनुज्ञप्तिधारी को ऐसी बकाया राशि का भुगतान नहीं हो जाता है ।"

5. Return was submitted on 29.8.2007. This apart, it has been stated in the return that the petitioners while making application for electricity connection, have submitted affidavits acknowledging thereby their liability to clear the dues of the previous owner. It is categorically stated that in view of Clause 4.17 (supra), the judgment of the Apex Court as well of High Court referred to in the writ petition are no more relevant and the petitioners are not entitled to the new electricity connection without paying the debts of respondents No. 1 to 3, which are in the nature of dues of the previous owner. It is further stated that the petitioners while purchasing the flat in the auction was knowing well that they were liable to make payment of all the outstanding against the said premises and there is no obligation on the part of the respondent-Board to provide fresh electricity connection without receiving the outstanding amount of the previous owner.

6. Right of the Electricity Board to recover the dues from auction purchaser while entertaining an application of the latter to obtain a fresh electricity connection, came up for consideration before the Apex Court in the case of *Isha Marbels* (supra) which was heard with certain other identical matters. Hon'ble Supreme Court after taking into consideration various provisions of the Electricity Act, observed :-

"56. From the above, it is clear that the High Court has chosen to construe Section 24 of the Electricity Act correctly. There is no charge over the property. Where that premises comes to be owned or occupied by the auction-purchaser, when such purchaser seeks supply of electric energy he cannot be called upon to clear the past arrears as a condition precedent to supply. What matters is the contract entered into by the erstwhile consumer with the Board. The Board cannot seek the enforcement of contractual liability against the third party. Of course, the bona fides of the sale may not be relevant.

57. The form of requisition relating to the contract is in Annexure VIII prescribed under clause VI of the Schedule to the Electricity Act. They cannot make the auction-purchaser liable. In the case of Isha Marbles we have already extracted the relevant clause wherein the consumer was asked to state his willingness to clear off the arrears to which the answer was in the negative. Therefore, the High Court has rightly held that the auction-purchaser, namely, "the writ petitioner before us is ready and willing to enter into a new contract (sic and) that the auction-purchaser does not intend to obtain the continuance of supply of electrical energy on the basis of the old agreement". It is true that it was the same premises to which reconnection is to be given. Otherwise, with the change of every ownership new connections have to be issued does not appear to be the correct line of approach as such a situation is brought about by the inaction of the Electricity Board in not recovering the arrears as and when they fall due or not providing itself by adequate deposits."

61. What we have discussed above appears to be the law gatherable from the various provisions which we have detailed out above. It is impossible to impose on the purchasers a liability which was not incurred by them."

7. In the return, it has been stated that the petitioners while making application for new electricity connection have submitted affidavits acknowledging thereby the liability to clear the dues of previous owner. This contention is also not impressive in view of *Isha Marbles's case* (supra).

8. Although, the decision of Isha Marbles' case has been doubted later on by the Apex Court in the case of *Ahmedabad Electricity Co. Ltd.* (supra), but it is with reference to reconnection and not of fresh connection. Since in the instant case, this Court is concerned with a fresh connection in favour of the auction-purchaser, the decision of *Isha Marbles' case* (supra) stands nowhere diluted. astonishing fact came up before this Court at the time of arguments that Clause 4.17 of the M.P. Electricity Supply Code, 2004, stood substituted by the following Clause w.e.f. 11.8.2006 :-

"4.17 : If the consumer, in respect of an earlier agreement executed in his name or in the name of a firm or company with which he was

associated either as a Partner, director or Managing Director or as occupier and or owner of the premises, has any arrears of electricity dues or other dues on the premises where the new connection is applied for and such dues are payable to the licensee, the requisition for supply may not be entertained by the Licensee until the dues are paid in full. However, release of new connections shall not be refused by the Distribution Licensee in following cases :-

(i) If the lease deed is cancelled by the State Govt. on account of any reason and allocated to a new party/consumer, then the new party/consumer shall not be required to pay the energy dues of erstwhile consumer.

(ii) If the property is attached and sold by the Income Tax Department/Commercial Tax Department or such other Govt. Departments for recovery of their dues, then the new purchaser shall not be required to pay the energy dues of erstwhile consumer.

(iii) If the Financial Institutions created under the State Act/ Central Act attach and sale property for recovery of their dues, then the purchaser shall not be required to pay the energy dues of erstwhile consumer.

(iv) On vacation of Govt. Quarter/Flat on transfer of an employee leaving arrears of energy charges, new occupant shall not be required to pay the energy dues of erstwhile consumer.

(v) If there is a specific order from a Court for non-recovery of arrears outstanding on the premises."

9. By virtue of Sub-clause (iii) of the substituted Clause, release of new electricity connection cannot be legally denied by the respondents to the petitioners who have purchased the property on account of sale having been effected by respondent No.4 (who happens to be a financial institution) for recovery of its dues. No strength is required to be derived even from the case of *Isha Marbles* (supra). Impugned letter-cum-order contained in Annx.P/1 is absolutely unsustainable in the light of the aforesaid substituted Clause 4.17 of the M.P. Electricity Supply Code 2004. Accordingly, it is held that Annx.P/1 being in flagrant violation of Clause 4.17 (supra), is highly illegal and arbitrary and is not sustainable in law. Accordingly, the same is, hereby, quashed.

10. Shri Hemant Shrivastava, learned counsel for the petitioner strongly contended that respondents No. 1 to 3 have not committed merely illegality but have acted in gross dereliction of duties, inasmuch as, they have denied the electricity connection to the petitioners in utter disregard of existing Clause 4.17. Petitioners having purchased the subject flat for residential use in February 2007 are without any electricity connection on account of highly obstinate attitude of

the respondents. Petition having been submitted in the month of July 2007, has been opposed by the respondents without even considering the relevant legal provisions governing the situation. Petitioners have not been merely dragged into this writ litigation, but were being opposed contrary to the object and purpose of Clause 4.17. Despite such a clause, respondents have obtained affidavits from the petitioners while submitting application for new connection and have compelled them to acknowledge their liability to make the payment of dues of previous owner. This act is clearly in utter disregard of the legal provisions applicable to the present situation, therefore, the respondents No. 1 to 3 are liable to be saddled with exemplary costs.

11. Accordingly, a cost of Rs.10,000/- is imposed on respondents No. 1 to 3 which shall be payable by respondent No.1 to the petitioners within a period of one month from receipt of certified copy of this order. In case of failure, the amount of cost would attract interest @ 9% per annum until its realisation. Petition accordingly, stands allowed in the aforesaid terms.

No order as to costs of litigation

Petition allowed.

I.L.R. [2008] M. P., 1683
WRIT PETITION
Before Mr. Justice Abhay M. Naik
10 April, 2008*

BHUVNESHWAR PRASAD @ GUDDU DIXIT ... Petitioner
Vs.
STATE OF M.P. & others ... Respondents

A. Constitution, Article 226 - *Alternative Remedy* - *Petition once admitted, could not be dismissed on the ground of alternative remedy.* (Para 6)

क. संविधान, अनुच्छेद 226 – वैकल्पिक उपाय – एक बार गृहीत की गई याचिका वैकल्पिक उपाय के आधार पर निरस्त नहीं की जा सकती।

B. Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P., 1993 (1 of 1994), Sections 36(1)(m), 2(a), 122 - *Disqualification* - *Petitioner submitted false information regarding date of birth of his fourth child - Election Petition filed u/s 122 of Adhiniyam - S.D.O. instead of deciding election petition referred the matter to Collector as question involves disqualification u/s 36 - Collector disqualified the petitioner - Held - Disqualification on account of having more than two children one of whom is born on or after 26.01.2001 was not decided in any election petition - No impediment in deciding petition u/s 36 by Collector.* (Para 11)

*W.P. No. 3140/2007 (Jabalpur)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(1)(एम), 2(ए), 122 – निरर्हता – याची ने चौथे बच्चे के जन्म दिवस की गलत जानकारी दी – अधिनियम की धारा 122 के अधीन चुनाव याचिका पेश – निरर्हता अन्तर्गत धारा 36 का प्रश्न अंतनिर्हित होने से अनुविभागीय अधिकारी ने चुनाव याचिका पर निर्णय देने की जगह, कलेक्टर को विचारार्थ भेजी – कलेक्टर ने याची को अयोग्य घोषित किया – अभिनिर्धारित – दो से अधिक बच्चे, जिनमें से एक 26.01.2001 के बाद पैदा हुआ हो, के कारण अयोग्यता चुनाव याचिका में निर्णीत नहीं या कलेक्टर के द्वारा धारा 36 के अन्तर्गत याचिका निर्णीत करने में कोई रुकावट नहीं है।

C. **Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994) [As amended w.e.f. 01.09.2006], Section 36(1)(m) - *Deleted* - *Clause (m) was inserted in the year 2000 which provided that a person shall be disqualified in election to be an office bearer if he has more than two living children one of whom is born on or after 26th day of January 2001 - Clause was deleted by Sansodhan Adhiniyam, 2006 w.e.f. 01.09.2006 - Deletion has been effected in prospective manner and no retrospective effect have been given.*** (Para 12)

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र., 1993 (1994 का 1) [01.09.2006 से यथा संशोधित], धारा 36(1)(एम) – विलोपित – सन् 2000 में अंतस्थापित खण्ड (एम) विदित करता है कि व्यक्ति चुनाव के लिए अयोग्य होगा, यदि उसके दो से अधिक जीवित बच्चे हों, जिनमें से एक 26.01.2001 को या बाद में पैदा हो – खण्ड को संशोधन अधिनियम, 2006 द्वारा 01.09.2006 से विलोपित किया – विलोपन उत्तरदायी रूप से प्रभावी किया एवं कोई पूर्व व्यापी प्रभाव नहीं दिया।

Cases referred :

AIR 1971 SC 33, 1986 MPLJ 561

Rohit Arya with *Bhagwan Singh,* for the petitioner.
G.P. Singh, G.A., for the respondent Nos.1 to 4.
R.S. Verma; for the respondent No.5.

ORDER

ABHAY M. NAIK , J.:–Petitioner has challenged the order dated 16.1.2007 (Annexure/P-1) passed by the Collector, Katni disqualifying thereby the petitioner from the post of Sarpanch.

2. Facts in brief are that the election for the post of Sarpanch of Gram Panchayat Badari, Tahsil Vijayraghavgarh, District Katni was held on 23.1.2005. Petitioner was elected as Sarpanch in the result declared on 27.1.2005. Respondent No.5, a defeated candidate on the post of Sarpanch submitted W.P. No.947/2005 which was withdrawn on 29.3 2005 with liberty to file an election dispute. Thereafter on 5.5.2005 he submitted a petition (Annexure/P-3) in the form election petition under Section 122 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as Panchayat Raj Adhiniyam for brevity) before the Sub Divisional Officer, Vijayraghavgarh on the ground that the petitioner on 29.12.2004 had submitted nomination form, affidavit and declaration. In paragraph-7 of the affidavit, he admitted to have four children. His fourth child was born on 13.5.2003 whereas in the affidavit the child is shown

to have been born before 26.1.2006 which being a false statement, he has committed an offence. This was objected to in writing by respondent No.5 before the Collector alongwith documentary proof. However, the nomination form of the petitioner was accepted contrary to law by respondent No.2 under political pressure. Accordingly, it was prayed in the petition that the election of the petitioner on the post of Sarpanch may be declared null and void.

3. Since, the petition involved a question of disqualification on ground under Section 36(1)(m) of Panchayat Raj Adhiniyam and jurisdiction to decide such a dispute vested in Collector by virtue of sub section (3) of Section 36, learned S.D.O, Vijayraghavgarh vide order dated 5.8.2005 referred the matter to the Collector, Katni. Collector, Katni after receipt of the case did not take requisite steps in the matter, therefore, respondent No.5 submitted W.P. No.13747/2006. It was disposed of on 4.10.2006 vide Annexure/R-1 with the following operative portion :-

> "Considering the short grievance of the petitioner, matter is pending before the Collector, Katni as referred by the S.D.O. by the order Annexure/P-5 dated 5.8.2005 which deserves to be heard and decided by the Collector, Katni expeditiously. This petition is finally disposed of with following directions :-
>
> (i) Petitioner may file an application for expeditious hearing of the matter to the Collector, Katni. Alongwith the application, petitioner shall enclose copy of this petition and order dated 5.8.2005 of the S.D.O. Vijayraghavgarh for ready reference of the Collector, Katni.
>
> (ii) On filing aforesaid application, the Collector, Katni shall look into the matter and expedite the hearing of the case and shall make all endeavour to decide the matter expeditiously as far as possible within three months from the date of receipt of the aforesaid application."

In pursuance of Annexure/R-1, learned Collector, Katni recorded the evidence and passed a final order on 16.1.2007 which is impugned herein as Annexure/P-1

5. Shri Rohit Arya, learned Sr. Advocate, Shri G.P. Singh, learned Govt. Advocate and Shri R.S. Verma, learned Advocate made their extensive submissions.

6. As a preliminary objection, it is contended that the order under Section 36 of the Panchayat Raj Adhiniyam is appeallable. The petitioner ought to have availed the alternative remedy under the provisions of M.P. Panchayat (Appeal and Revision) Rules, 1995. Suffice it to say, that the writ petition having been admitted on 12.3.2007, it would not be proper to dismiss the petition on the ground of availability of alternative remedy. This is a settled position of law as laid down by the Apex Court in the case of *Hirday Narain Vs. Income Tax Officer, Bareilly*

(AIR 1971 SC 33). Division Bench of this Court also following the decision of the Apex Court in *Hirday Narain's case* (supra) held in the case of *Tata Exports Ltd. Vs. The Union of India and others* 1986 M.P.L.J. 561 that once a petition has been admitted it could not be dismissed on the ground of alternative remedy. Thus, the the preliminary objection is without any substance and is hereby rejected.

7. Shri Rohit Arya, learned Sr. Advocate forcefully submitted that jurisdiction to decide an election petition of Gram Panchayat is vested in S.D.O.(Revenue) by virtue of Clause-(i) of sub-section (1) of Section 122 of Panchayat Raj Adhiniyam which reads as under :-

> "122. Election petition.- (1) An election under this Act shall be called in question only by a petition presented in the prescribed manner :-
>
> (i) in case of [Gram Panchayat or Gram Sabha] to the Sub-Divisional Officer (Revenue);
>
> (ii) In case of Janpad Panchayat to the Collector; and
>
> (iii) In case of Zila Panchayat to the Divisional Commissioner and not otherwise."

In the light of the aforesaid provision it is contended that the validity of the election of the petitioner could be examined only by S.D.O.(Revenue) and not by the Collector. Even, the High Court by passing an order on 4.10.2006 in W.P. No.13747/2006 vide Annexure/R-1 could not have conferred jurisdiction on Collector, Katni to decide the election dispute. This contention of the learned senior counsel in my opinion is beyond dispute. However, it is to be examined that whether the petition marked as Annexure/P-3 which contains ground of disqualification of the petitioner by virtue of clause (m) of sub-section (1) of Section 36 of Panchayat Raj Adhiniyam may be treated as petition under Section 36 of the said Act. Learned senior counsel Shri Rohit Arya vehemently contended that the Collector, Katni assumed jurisdiction under Section 36 of the said Act and has virtually decided the election petition under the garb of the said provision.

8. Relevant portion of Section 36 is as follows :-

> "36. Disqualification for being office bearer of Panchayat.- (1) No person shall be eligible to be an office-bearer of Panchayat who-
>
> (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k) .....
>
> (l) is so disqualified by or under any law made by the legislature of the State.
>
> (m) has more than two living children one of whom is born on or after the 26th day of January, 2001.
>
> (2) If any person having been elected as an office bearer of Panchayat :-
>
> (a) subsequently becomes subject to any of the disqualification mentioned in sub-section (1) and such disqualification is not removable or being

removable is not removed [or becomes office bearer concealing his disqualification for it which has not been questioned and decided by any election petition under Section 122]; (underlined by me)

(b), (c) .....

(3) In every case the authority competent to decide whether a vacancy has occurred under the sub-section (2) shall be Collector in respect of Gram Panchayat and Janpad Panchayat and Commissioner in respect of Zila Parishad who may give his decision either on an application made to him by any person or on his own motion. Until, the Collector or the Commissioner, as the case may be, decides that the vacancy has occurred, the person shall not cease to be an office bearer :

Provided that no order shall passed under this sub-section against any office bearer without giving him a reasonable opportunity of being heard.

(4) Any person aggrieved by the decision of Collector or Commissioner, as the case may be, under sub-section (3), may, within a period of 30 days from the date of such decision appeal to Commissioner or Board of Revenue respectively whose orders in such appeal shall be final."

9. Thus, sub-section (3) clearly confers jurisdiction on Collector to decide whether the vacancy has occurred under sub-section (ii). Under sub-section (ii) if any person having been elected as office bearer of Panchayat becomes officer bearer concealing his disqualification for it which has not been questioned or decided in election petition under Section 122, the Collector of the district is empowered to decide the question of disqualification and consequent occurrence of the vacancy due to it. Shri Rohit Arya, learned senior counsel contended that if disqualification exists prior to submission of nomination form, an election petition is the only remedy against an elected office bearer and an application under Section 36 would not be maintainable. This submission is clearly opposed to the underlined portion of clause (a) (supra) which lays down that if any person having been elected as an office bearer of Panchayat becomes office bearer concealing his disqualification for it which has not been questioned and decided by any election petition under Section 122 shall subject to the provisions of sub-section (3), cease to be such office bearer and his office shall become vacant.

10. Petition, though captioned as under Section 122 of Panchayat Raj Adhiniyam was directed to be decided by the Collector, Katni perhaps in the light of the provisions of Clause (l) and (m) of sub-section (1) of Section 36. Since, the S.D.O. Vijaraghavgarh had already referred it to the Collector, Katni, it is obvious that the disqualification of the petitioner on the aforesaid ground was not questioned and decided by election petition under Section 122 of Panchayat Raj Adhiniyam. In view of the language of clause (a) of sub-section (2) of Section 36 it may be said that the petition for disqualification of office bearer of Gram Panchayat on the ground of concealment of facts causing disqualification would not be tenable

if such disqualification has been questioned and decided by election petition under Section 122.

11. In the instant case, the disqualification of the petitioner on account of having given birth to the last child (with two or more already living children) was not admittedly decided in any election petition under Section 122 and thus, there was no legal impediment in deciding the petition marked as Annexure/P-3 by the Collector, Katni under Section 36 of the Panchayat Raj Adhiniyam. Although, there is no specific mention in Annexure/R-1 that this Court treated the petition (Annexure/P-3) as under Section 36 but perhaps it was the intention of this Court while passing the order marked as Annexure/R-1 directing thereby the Collector, Katni to decide the petition contained in Annexure/P-3 as one under Section 36 of Panchayat Raj Adhiniyam. If the matter is viewed from this angle, Annexure/R-1 would not amount to conferring jurisdiction on the Collector, Katni but merely amounts to a direction to him to decide the petition obviously in the light of the allegations contained in it pertaining to the disqualification of the petitioner on the ground of having given birth to a child in excess of two living children on or after 26.1.2001. Accordingly, I find that the Collector, Katni has acted within jurisdiction and the impugned order does not suffer for want of it.

12. It is contended by Shri Rohit Arya, learned senior counsel that Clause (m) has been omitted from sub-section (1) of Section 36 w.e.f. 1.9.2006 and the learned Collector, Katni has committed an illegality in basing his order on the deleted provision of law. Clause (m) was inserted in the year 2000 which provided that a person shall be disqualified in the election to be an office bearer if he has more than two living children one of whom is born on or after the 26th day of January, 2001. This clause was deleted by the Madhya Pradesh Panchayat Raj Avam Gram Swaraj (Sanshodhan) Adhiniyam, 2006 (Act No.27 of 2006). Act No.27 of 2006 was published in the M.P. Gazette (Extra-ordinary) dated 1.9.2006. Thus, the deletion has been effected in prospective manner and no retrospective effect is found to have been given by Act No.27 of 2006. Election was held, result was declared and affidavits were submitted after 1.9.2006. Thus, on all the crucial dates clause (m) was in force and was equally effective and a person having two living children and giving birth to the next child on or after 26.1.2001 did incur a disqualification by virtue of the said clause and was not eligible to be an office bearer of Gram Panchayat on the aforesaid crucial dates. Accordingly, it is found that the impugned order is not based on any non-existing legal provision.

13. Further contention of Shri Rohit Arya, learned senior counsel is that a reasonable opportunity of hearing was not granted to the petitioner as required by the proviso to sub-section (3) of Section 36. There was no authentic evidence to hold that the fourth child of the petitioner was born on or after 26.1.2001. Document relied upon by the learned Collector, Katni were not supplied to the petitioner and therefore, they could not be looked into and relied upon while passing the impugned order. Although, the learned senior counsel orally submitted that the fourth issue

was born on 4.11.2000, it may be seen that such defence/stand was not taken before the Collector, Katni. Petitioner was admittedly served with the show cause notice by respondent No.2. She did not submit any reply to the petition which was directed to be decided by this Court vide Annexure/R-1. She did not submit any written statement before the Collector, Katni and did not take any specific stand that the fourth child was born on any particular date prior to 26.1.2001. She had filed written submissions before the Collector, Katni which is on record as Annexure/P-6. Even in there written submissions, no date was specified with respect to date of birth of the fourth child. The defence of the petitioner was merely of denial without taking any specific stand. On the other hand doctor's certificate Annexure/P-10 is on record which certifies that the fourth child was born on 13.5.2003. This certificate was prepared and issued on the basis of various authentic record like Annexure/P-9 and P-11 to P-14. True copy of the birth register is on record wherein the child is shown to have born on 13.5.2003. Mrs. Dorthi Charles was examined who was working on the post of A.N.M. in the Primary Health Centre, Vijayraghavgarh. Medical Officer, namely, Dr. Vinod Kumar was also examined who verified that the last issue of the petitioner was born on 13.5.2003. Thus, in the light of the evidence on record, it is found that the Collector, Katni has not recorded any perverse finding in holding that the last child of the petitioner was born after 26.1.2001. This apart, Smt. Kalpana Tiwari has also been examined who was Anganwadi Worker in village Badari. The case before the Collector, Katni proceeded on the basis of preponderance of probabilities and in the absence of any evidence by the petitioner, the Collector is not found to have recorded any perverse finding.

14. Shri Rohit Arya, learned senior counsel made a feeble attempt on the ground that the petition having been submitted after the prescribed period of limitation ought to have been dismissed on the ground of limitation, moreso, because there is no provision for condonation of delay in the matter of election petition. Suffice it to say that this Court has already held that the petition has been treated as under Section 36 of the Panchayat Raj Adhiniyam and no limitation is provided in law for such a petition.

15. In the totality of facts and circumstances, I do not find any merit in the writ petition and the same is hereby dismissed, however, with no order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 1690
WRIT PETITION
Before Mr. Justice S.K. Seth
11 April, 2008*

GUJRATI SAMAJ, UJJAIN ... Petitioner
Vs.
COMMISSIONER OF INCOME TAX, UJJAIN ... Respondent

Income Tax Act (43 of 1961), Section 80G(5)(vi) - *Exemption from income tax - Denied by the Commissioner - Object of the trust to promote and improve social or moral or material condition of a community - Held - Object can not be considered as charitable in nature - Petition dismissed.* (Para 4)

आयकर अधिनियम (1961 का 43), धारा 80जी(5)(vi) – आयकर से छूट – कमिश्नर द्वारा इंकार किया गया – न्यास का उद्देश्य समाज की सामाजिक या नैतिक या सारवान स्थिति की उन्नति और सुधार करना – अभिनिर्धारित – उद्देश्य धर्मार्थ प्रकृति का नही माना जा सकता है – याचिका खारिज।

Case referred :
256 ITR (2002) 277

ORDER

S.K. Seth, J. :–This petition although captioned as petition under Article 226, in fact it is petition under Article 227 of the Constitution of India. It is directed against the order dated 25/28.8.2006 passed by the Commissioner of Income Tax, Ujjain. By the order impugned, Commissioner of Income Tax, Ujjain has rejected the petitioner's application dated 17.1.2006 for grant of exemption u/s. 80G(5) (vi) of the Income Tax Act, 1961 (hereinafter referred to as "the Act" for short).

2. The petitioner, Gujrati Samaj, Ujjain is a registered trust u/s. 12A of the Act. The objects of the petitioner trust admittedly are as under :–

"क- उज्जैन नगर में निवास करने वाले सभी गुजराती बन्धुओं और सर्व साधारण के सामाजिक, शारीरिक, मानसिक तथा नैतिक विकास के लिए एवं परस्पर स्नेह मातृभाव, एकता तथा संगठन के लिए उपयुक्त योजनाएँ बनाना हैं।

ख- बालकों की शिक्षा के लिए शिक्षण संस्थायें खोलना तथा उन्हें चलाना

ग- जनता की ज्ञात वृद्धि के लिए वाचानालय तथा पुस्तकालय की स्थापना करना और उसे चलाना।

घ- बाहर गॉव से उज्जैन में आने वाले गुजराती भाईयों के ठहरने तथा रहने की व्यवस्था के लिए यात्रीगृह का निर्माण करना तथा उसे चलाना।

द- छात्रों एवं छात्राओं के शारीरिक विकास के लिए व्यायामशाला की स्थापना करना और उसे चलाना।

च- बहनों के विकास के निए महिला मण्डल की स्थापना करना और उसे चलाना।

छ- गुजराती भाईयों के आर्थिक विकास के लिए बैंकिग तथा हाउसिंग सोसायटी जैसी

*W.P. No. 947/2008 (Indore)

संस्थाएँ सहकारिता के नियमों के आधार पर स्थापित करना और उन्हें चलाना।

ज- शहर की अन्य संस्थाओं तथा जनता एवं शासन के साथ समाज के हित के कार्यों के लिए सहयोग स्थापित करना।

भ- गुजराती छात्र एवं छात्राओं के लिए छात्रवृत्ति तथा जरुरत मन्द छात्रों के लिए ऋण-फीस तथा किताबों की सहायता देने के लिए धन एकत्रित करना तथा उसके लिए शासन के पास से अनुदान आदि प्राप्तिकरने के लिए योग्य प्रयत्न करना।

उपरोक्त उद्देश्यों की पूर्ति के लिए यदि आवश्यक हो तो प्रबंध करने के लिए योग्य भूमि तथा भवन खरीदना और भवन बनवाना।

3- किसी भी प्रकार की मदद दान के ट्रस्ट फण्ड के लिए तथा समाज के उद्देश्यों के अनुकूल हो तो उसे लिए समाज स्वीकार कर सकेगा और उसका स्वामित्व इस समाज का रहेगा।

4- इस समाज के कोष तथा अन्य आय केवल इस समाज के उद्देश्यों को पूरा करने के लिए ही उपयोग किए जायेंगे।

5- इस समाज के द्वारा जो फण्ड रखे जायेंगे उन्हें ट्रस्ट एक्ट के द्वारा प्रमाणित, स्वीकृत उपरोक्त जमानतों के लिए तथा बैंक में तथा फर्स्ट प्रिफरन्स शेयरों में तथा कंपनियों में जमानत के तौर पर तथा साहूकारों के सहाँ अमानत के तौर पर रखे जा सकेंगे।

6- उपरोक्त कॉलम 5 में बताएँ गए अनुपयुक्त इस फण्ड की तथा समाज की सभी प्रकार की चल एवं अचल संपत्ति के प्रबंध की व्यवस्था 1952 की तारीख 13/04/1952 को सामान्य सभी द्वारा नियुक्त स्थाई समिति के हाथ में रहेगी और उसके लिए दिए गए अधिकारों के आधार पर काम करेगी।"

3. Learned counsel for the petitioner submitted that petitioner trust has been registered way back in the year 1974 by order dated 28.2.1974 and now, the Commissioner, Income Tax, Ujjain cannot sit in appeal over the orders passed by his predecessors. It is also submitted that if any donation is made by a person, he would not be entitled for the deduction under the provisions of the Act for want of exemption u/s. 80G of the Act. Learned counsel for the petitioner placed reliance on a Single Bench decision of this Court reported in 256 ITR (2002) 277 in the case of *M. P. Madhyam* vs. *Commissioner of Income Tax & others* in support of his submission that once registration is granted, then it is binding on the Income Tax authorities.

4. After having heard learned counsel for the petitioner at length and going through the material available on record, we are of the view that Commissioner, Income Tax, Ujjain by the order impugned has rightly held that main objects of the petitioner trust do not fall in the category of charity in nature. Before arriving at this finding, a show-cause notice was given to the petitioner and after affording opportunity of hearing, the aforesaid finding was recorded considering the relevant case-law on the subject. A categorical finding was recorded that the object of Gujrati Samaj, Ujjain is to promote and improve the social or moral or material condition of a community cannot be considered as charitable in nature. The burden

in such a situation is always on the petitioner to prove that the income earned by it is solely for charitable purposes and if the said burden is not discharged, then such an assessee is not entitled to claim as a matter of right the exemption certification under the Act. A trust is required to fulfil the conditions specified in Sub-section (5) of Section 80-G. The real purpose of the trust is to be found out and not just the ostensible purpose. It is only when the specified conditions are fulfilled then only a trust is entitled to exemption u/s. 80-G (5) of the Act.

5. In view of the foregoing discussion, we do not find any merit and substance in the writ petition. Same is hereby dismissed summarily, without any order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 1692
WRIT PETITION
Before Mr. Justice S.C. Sharma
11 April, 2008*

UNION OF INDIA & ors. ... Petitioners
Vs.
M/S N.J. DEVANI BUILDERS PVT. LTD. ... Respondent

Arbitration and Conciliation Act (26 of 1996), Sections 34 & 36 - ***Applicability of the Act - Respondent awarded contract but was not able to complete it within stipulated period and thus a dispute arose - Sole Arbitrator passed an award in favour of respondent - Petitioners challenged the award u/s 34 of the Act before the District Court Gwalior - Application for setting aside the Award dismissed - Respondent filed application u/s 36 for enforcement of the award - Held - As the petitioner has filed an application u/s 34 of the Act for setting aside the award and the respondent filed an application u/s 36 for enforcement of the award the parties have themselves accepted the applicability of the Act by their own conduct - Petition dismissed.*** (Paras 11 & 14)

माध्यस्थम् एवं सुलह अधिनियम (1996 का 26), धाराएँ 34 व 36 – अधिनियम का लागू होना – प्रत्यर्थी को संविदा दी गई परन्तु उसे वह नियत कालावधि के भीतर पूरा नहीं कर सका और इसलिए विवाद उत्पन्न हुआ – एकल मध्यस्थ ने प्रत्यर्थी के पक्ष में अधिनिर्णय दिया – याची ने अधिनिर्णय को अधिनियम की धारा 34 के अन्तर्गत जिला न्यायालय, ग्वालियर के समक्ष चुनौती दी – अधिनिर्णय को अपास्त कराने का आवेदन खारिज – प्रत्यर्थी ने अधिनिर्णय के प्रवर्तन के लिए धारा 36 के अधीन आवेदन पेश किया – अभिनिर्धारित – चूंकि याची ने अधिनियम की धारा 34 में अधिनिर्णय को अपास्त करने का आवेदन दिया और प्रत्यर्थी ने धारा 36 में अधिनिर्णय के प्रवर्तन के लिए आवेदन पेश किया, पक्षकारों ने अपने स्वयं के आचरण से अधिनियम के लागू होने को स्वीकार किया – याचिका खारिज।

Cases referred :
(1999) 9 SCC 334, (2003) 6 SCC 36.

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*W.P. No.1398/2007 (Gwalior)

V.K. Sharma, A.S.G., for the petitioners.
Arvind Dudawat, for the respondent.

ORDER

S.C. SHARMA, J.:– The petitioners / Union of India and its functionaries have filed the present petition under Article 227 of the Constitution of India and prayed for quashing the orders passed by the VI Additional District Judge, Gwalior dated 10th March, 2004 (Annexure P/1), 21st April, 2004 (Annexure P/2) and 30th April, 2004 (Annexure P/3) in execution case No.31 of 2003. The contention of the petitioners is that a tender was floated in respect of certain work under the control of the Garrison Engineer (Air Force), Maharajpura, Gwalior and the tender of the respondent was accepted. It has been further stated that the respondent was required to complete the work within a period of eighteen months from the date of award of the contract. It has also been alleged that the respondent was unable to complete the work within the time stipulated as per the terms and conditions of the agreement but physically completed the work on 12th October, 1991. It has been further stated that the respondent raised a dispute with regard to the extra claims and as they were not settled, the matter was referred for arbitration. The sole arbitrator appointed in the matter has delivered the award on 21st December, 2000. It has been further stated by the petitioners that the respondent has preferred an application under sections 14 and 17 of the Arbitration Act, 1940 before the civil Court at Ahmedabad, State of Gujarat for making the award as the Rule of the Court. A reply was submitted by the present petitioners before the civil Court at Ahmedabad and it has been stated in the present writ petition that the said miscellaneous civil case is still pending before the civil Court at Ahmedabad. It has also been stated in the writ petition that the respondent, later on, preferred an execution application before the Sixth Additional District Judge, Gwalior under section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) and on 29th October, 2003 notices were issued by the executing Court. A reply was submitted by the Garrison Engineer, petitioner No.3 and it was stated in the reply that parallel proceedings in respect of the same award cannot be permitted to continue. It has been further stated that in spite there being an objection regarding maintainability of the execution proceedings, the learned Sixth Additional District Judge, Gwalior has proceeded ahead in the matter without deciding the objections with regard to maintainability of the execution proceedings vide order dated 10th March, 2004 and issued direction for issuance of warrant of attachment. The petitioners being aggrieved by the orders passed by the executing Court have initially preferred a Miscellaneous Appeal before this Court and the same was registered as M.A.No.448 of 2004 and an interim order was passed on 14th May, 2004.. However, a Division Bench of this Court vide order dated 29th January, 2007 disposed of the aforesaid miscellaneous appeal granting liberty to the petitioners to file a petition under Article 227 of the Constitution to challenge the interlocutory orders passed by the

Sixth Additional District Judge, Gwalior. The petitioners thereafter filed the present petition challenging the orders passed by the Sixth Additional District Judge, Gwalior in the execution proceedings.

2. The sole respondent has filed return and in the return, it has been stated by the respondent that the orders impugned dated 10th March, 2004 (Annexure P/1), dated 21st April, 2004 (Annexure P/2) and dated 30th April, 2004 (Annexure P/3) passed by the learned Sixth Additional District Judge, Gwalior in execution case No.31 of 2003 now pending in the Court of the Second Additional District Judge, Gwalior as case No.55/2005 have been challenged in the year 2007, and therefore, the petition deserves to be dismissed on the ground of delay and laches. It has been further stated by the respondent that the execution proceedings have been initiated under section 36 of the Arbitration and Conciliation Act, 1996 . The stand of the respondent is that the work in question was completed in the year 1990-91 and the petitioners have not made payment to the respondent and as the payment was not being done, the matter was referred for arbitration and the sole arbitrator delivered the award on 21st December, 2000. It has also been stated in the return that an application was preferred by the petitioners under section 34 of the Act of 1996 for setting aside the award passed by the sole arbitrator and the same was dismissed vide order dated 10th September, 2003 by the learned Court, copy whereof has been brought on record as Annexure R/1. It has been further stated in the return that after dismissal of the application preferred by the petitioners under section 34 of the Act, the same has not been challenged by the petitioners before any forum, and therefore, the award has attained finality.

3. The contention of the respondent is that the agreement was executed and the work was completed at Gwalior, and therefore, the civil Courts at Gwalior have jurisdiction in the matter. It has also been pointed out that the application preferred before the Ahmadabad Civil Court for making the award as the Rule of the Court had been withdrawn, and therefore, it is not a case of parallel proceeding pending before two Courts as averred by the petitioners. The respondent further contended that the order passed by the Sixth Additional District Judge, Gwalior does not suffer from any legal infirmity and prays for dismissal of the petition.

4. After having heard learned counsel for the parties and on perusal of the record, it is evident that in the present matter, a sole arbitrator was appointed by the petitioners and the arbitrator has delivered the award in question on 21st December 2000. The petitioners being aggrieved by the award passed by the arbitrator have preferred an application under section 34 of the Act of 1996, for setting aside the award but the same was dismissed vide order dated 10th September 2003 (Annexure R/1), and the same has not been challenged by the petitioners till date, therefore, the award has attained finality. It is further evident from the material available on record that initially the respondent has preferred an application for making the award Rule of the Court before the Civil

Court at Ahmadabad, however, the same has been withdrawn subsequently by the respondent. It is further evident from the material on record that before the civil Court at Ahmadabad, an objection was raised by the petitioners with regard to the jurisdiction and maintainability of the application filed by the respondent for making the award passed by the arbitrator as the Rule of the Court before the civil Court at Ahmadabad on the ground that the construction work has been carried out Maharajpura near Gwalior, State of Madhya Pradesh, therefore the civil Court at Ahmadabad does not have any jurisdiction to entertain any such application.

5. As the agreement in question was executed, work has been carried out and some payment towards the work carried out by the respondent was made in Gwalior, hence this Court is of the firm opinion that the executing Court at Gwalior has jurisdiction to deal with the application filed by the respondent for execution of the award passed by the arbitrator under the provisions of the Act of 1996. The record further indicated that against the award passed by sole arbitrator, the petitioners have preferred an application under section 34 of the Act of 1996, for setting aside the arbitral award passed by the arbitrator and the same has been rejected by the Sixth Additional District Judge, Gwalior vide order dated 10th September 2003. Thus initially, the petitioners initiated the proceedings for setting aside the award under the provisions of the Act of 1996 but have not challenged the order passed in that regard by the competent Court and the same has resulted in attaining finality of the award passed by the sole arbitrator.

6. The respondent has filed an application under the provisions of section 36 of the Act of 1996 for enforcement of the arbitral award dated 21st December, 2000 passed by the sole arbitrator. The section 36 of the Act of 1996 is relevant which reads as under:

> "Enforcement- Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

7. Thus, this Court is of the opinion that the respondent has preferred an application under section 36 of the Act of 1996 for execution of the award in question in accordance with the provisions of law.

8. During the course of arguments, it was also argued by the learned Assistant Solicitor General on behalf of the petitioners that the proceedings for arbitration have taken place under the provisions of the Arbitration Act, 1940, and therefore, the provisions of the Act of 1996 are not applicable in the facts and circumstances of the present case.

9. From a bare perusal of the entire material available on record, it is evident that the sole arbitrator has proceeded to decide the dispute in question under the

provisions of the the Act of 1996. Annexure R/4 dated 31st July, 2000 is a written statement filed under the signature of Shri S N Chatterjee Brig Chief Engineer. The defence on behalf of the Union of India to the statement of the claim made by the respondent (contractor) has been made under the provisions of the Act of 1996 on 20th September 2000 vide Annexure R/5. Again, it has been categorically mentioned that the reply has been filed under the Act of 1996. Not only this, the award was challenged under section 34 of the Act of 1996 by the petitioners before the civil Court at Gwalior, however, the application was dismissed by the learned Court vide order dated 10th September, 2003 (Annexure R/1). Section 34 of the Act of 1996 reads as under:

"Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity,or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part;or

(b) the Court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

10. In the backdrop of the aforesaid facts and the provisions of law, the Apex Court in the case of *Thyssen Stahlu Union GMBH vs. Steel Authority of India Limited*, (1999) 9 SCC 334 as held under :

"Section 85(2)(a) of the new Act is in two limbs: (1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties, and (2) the new Act shall in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two: (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression "in relation to" is of the widest import as held by various decisions of this Court in *Doypack Systems (p) Ltd.*(1988) 2 SCC 299, *Mansukhlal Dhanraj Jain* (1995) 2 SCC 665, *Dhanrajamal Gobindram* AIR 1961 SC 1285 and *Navin Chimicals Mfg* (1993) 4 SCC 320 This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word "to" could have sufficed and when the legislature has

used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. The first limb of Section 85(2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of enforcement of the award under that Act.".

11. In the present case, from the aforesaid, it is clear that the petitioners have filed an objection before the arbitrator under the provisions of the Act of 1996. More over, the Union of India and its functionaries have challenged the award passed by the sole arbitrator under section 34 of the Act of 1996, and therefore, the parties by their own conduct have accepted the applicability of the Act of 1996. In view of the above, there remains no manner of doubt that the provisions of the Act of 1996 are applicable in the facts and circumstances of the present case, and therefore, the respondent was justified in filing the application under section 36 of the Act of 1996 for execution of the award in question.

12. The Apex Court in the case of *Delhi Transport Corporation Limited vs. Rose Advertising*, (2003) 6 SCC 36 has observed that only conduct of the proceedings can be looked at to ascertain whether the Act of 1940 or the Act of 1996 shall be applicable and it has been held in paragraphs 5 and 7 as under:

> "..... The conduct of the arbitration proceedings and the participation of the parties therein shows that the parties acted under the 1996. Even the arbitrator proceeded on that understanding and gave his award in pursuance of the 1996 Act. Therefore, the impugned judgment of the High Court appears to be totally unassailable. We are unable to find any ground or reason to differ with the view taken; by the High Court on the main issue.
>
> The question whether time for making an application for setting aside an award can be extended will have to be decided as and when an application for that purpose is made. Then alone the stage for a judicial decision on the point will arise. Therefore, at this stage we need not go into this question, the same is left open to be decided as and when occasion arises....."

13. In the present case, there was a specific clause in the agreement between the parties, i.e., condition No.51 which read as under:

> "Laws governing the contract .- This contract shall be governed by the Indian laws for the time being in force."

14. In view of the aforesaid conclusion and by their own conduct, the parties have accepted the applicability of the provisions of the Act of 1996 and the execution proceedings have been preferred by the respondent under the provisions of section 36 of the Act of 1996 before the Sixth Additional District Judge, Gwalior which does not warrant any interference in the present proceedings.

15. Accordingly, this Court is of the firm opinion that the orders impugned in this petition dated 10th March, 2004 (Annexure P/1), dated 21st April, 2004 (Annexure P/2) and dated 30th April, 2004 (Annexure P/3) passed by learned

Sixth Additional District Judge, Gwalior does not suffer from any vice or non-application of mind warranting interference in these proceedings under Article 227 of the Constitution.

16. The writ petition deserves to be and is hereby dismissed. No order as to cost.

Petition dismissed.

I.L.R. [2008] M. P., 1699
WRIT PETITION
Before Mr. Justice S.C. Sharma
22 April, 2008*

H.K. KALA & anr. ... Petitioners
Vs.
STATE OF M.P. ... Respondent

Factories Act (63 of 1948), Sections 9, 92 & 105 - *Powers of Factory Inspector - Maintainability of Complaint - Petitioner No.1 working as Chief Workshop Manager and Petitioner No. 2 working as Deputy Chief Mechanical Engineer in Deep Paint Plant in Gwalior - They are Occupiers as per definition of the Act - A small explosion took place on 05.04.2002 - Factory Inspector appointed u/s 8 of the Act - On the basis of his report prosecution u/s 92 launched against petitioners - Held - Factory Inspector is empowered to visit factory within the local limits for which he is appointed along with assistants i.e. experts - He went alone in the factory - His report was not based on the reports of Assistants -Factory Inspector was not an Expert - He violated provision of Section 9 and thus prosecution on the basis of his report liable to set aside - Petition Allowed.* (Paras 3 to 5)

कारखाना अधिनियम (1948 का 63), धाराएँ 9, 92 व 105 – कारखाना निरीक्षक की शक्तियाँ – परिवाद की पोषणीयता – याची क्रमांक 1 चीफ वर्कशॉप मैनेजर के रूप में और याची क्रमांक 2 डिप्टी चीफ मैकेनिकल इंजीनियर के रूप में डीप पेंट प्लांट, ग्वालियर में कार्यरत – अधिनियम की परिभाषा के अनुसार वे अधिष्ठाता हैं – 05.04.2002 को एक छोटा विस्फोट हुआ – अधिनियम की धारा 8 के अधीन कारखाना निरीक्षक नियुक्त हुआ – उसके प्रतिवेदन के आधार पर धारा 92 के अधीन याचीगण के विरुद्ध अभियोजन आरम्भ हुआ – अभिनिर्धारित – कारखाना निरीक्षक उन स्थानीय सीमाओं के अन्दर जिनके लिए वह नियुक्त हुआ है सहायकों अर्थात् विशेषज्ञों के साथ कारखाने का निरीक्षण करने को सशक्त है – वह कारखाने में अकेला ही गया – उसका प्रतिवेदन सहायकों के प्रतिवेदनों पर आधारित नहीं था – कारखाना निरीक्षक विशेषज्ञ नहीं था – उसने धारा 9 के उपबन्धों का उल्लंघन किया और इसलिए उसके प्रतिवेदन पर आधारित अभियोजन अपास्त किये जाने योग्य – याचिका मंजूर।

H.D. Gupta with *S.B. Gupta*, for the petitioners.
Praveen Newaskar, Dy.A.G., for the respondent/State.

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*W.P. No.360/2005 (Gwalior)

ORDER

S.C. SHARMA, J. :–The petitioners before this Court under Article 227 of the Constitution are the Officers of the Rail Spring Factory, Sitholi, Gwalior. The petitioners have filed the present petition challenging the order dated 18th January, 2005 passed by Labour Court No. 1, Gwalior in case no. 180/2002, by which, their application for dismissal of the complaint preferred before the Labour Court No. 1, Gwalior under Section 105 of the Factories Act, 1948 (hereinafter referred to as 'the Act') has been turned down.

2. The facts in brief necessary for disposal of the present petition are that the petitioner No. 1 is working as the Chief Workshop Manager and petitioner No. 2 is working as the Deputy Chief Mechanical Engineer, are the occupiers within the definition of the Act. -The Rail Spring Factory, Shitoli has a Deep Paint Plant located at Shitoli, Gwalior and on 05.04.2002 a small explosion took place in the Deep Paint Plant. The Factory Inspector was appointed under the provisions of Section 08 of the Act who inspected the factory and submitted his report. On the basis of his report, a prosecution was initiated under Section 92 of the Act. The petitioners submitted an objection regarding maintainability of the complaint and it was stated by the petitioners that the Factory Inspector has violated the provisions of the Act and, therefore, the petitioners cannot be prosecuted. It is also argued on behalf of the petitioners before this Court that the factory in question is under the control of the Union of India and the petitioners are the senior officers working under the Union of India. It has been further stated that because of the incident in question, which took place on account of explosion in the factory neither any causality has taken place nor any injury has been caused to any workman as it was a simple and small explosion occurred in the Deep Paint Plant.

3. Chapter 2 of the Act deals with inspecting spot which includes the inspector also. Section 9 of the Act read as under:-

> **9. Powers of Inspectors:-** Subject to any rules made in this behalf, an Inspector may, within the local limits for which he is appointed;
>
> (a) enter, with such assistants, being persons in the service of the Government, or any local or other public authority, (or with an expert) as he thinks fit, any place which is used, or which he has reason to believe is used, as a factory;
>
> (b) make examination of the premises, plant, machinery, article or substance;
>
> (c) inquire into any accident or dangerous occurrence, whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry;
>
> (d) require the production of any prescribed registered or any other document relating to the factory;

(e) seize, or take copies of, any register, record or other document or any portion thereof as he may consider necessary in respect of any offence under this Act, which he has reason to believe, has been committed;

(f) direct the occupier that any premises or any part thereof; or anything lying therein, shall be left undisturbed (whether generally or in particular respects) for so long as is necessary for the purpose of any examination under clause (b);

(g) take measurements and photographs and make such recordings as he considers necessary for the purpose of any examination under clause (b), taking with him any necessary instrument or equipment;

(h) in case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same is, in the circumstances necessary, for carrying out the purposes of this Act), and take possession of any such article or substance or a part thereof, and detain it for so long as is necessary for such examination;

(i) exercise such other powers as may be prescribed.

Provided that no person shall be compelled under this section to answer any question or give any evidence tending to incriminate himself."

From a bare perusal of the aforesaid Section, it is evident that the Inspector of the factory is empowered to visit the factory within the local limits for which he was appointed. However, it is also provided that while entering into the factory, he is required to enter into the factory with assistants being persons in service of the government or any public authority i.e. an expert.

4. In the present case, as already stated earlier that a small explosion has been taken place, the Factory Inspector could have entered the factory premises with an expert as provided under Section 9 of the Act, and, that too, such assistants being persons in service of the government or any local or other public authority. However, the Factory Inspector all alone went inside the factory and submitted a report in the matter with regard to the explosion. It is also pertinent to mention that Factory Inspector as already stated above was not a specialist/expert, on the basis of whose report, the complaint has been entertained under Section 105 of the Act. This Court is of the considered opinion that the minor explosion took place at the time when the plant was being switched on, keeping in view the fact that a small explosion has taken place in the matter when the plant was being switched on and in view the provisions of Section 9 of the Act, which have been violated, no useful purpose would be served for taking any action on the complaint

against the occupiers of the factory as they are not at all responsible for the explosion in question. It has been stated in the report that three workmen have suffered some minor injuries in the matter and proper safety equipments were available on the spot, and therefore, the report of the Factory Inspector does not help the respondents to make the petitioners responsible for the explosion. Merely because the petitioners are occupiers of the factory, they cannot be prosecuted by filing a complaint under Section 105 of the Act in view of the fact that provisions of Section 9 have not been complied with by the Factory Inspector.

5. In view of the aforesaid, this Court is of the opinion that the writ petition deserves to be and is hereby allowed by setting aside the impugned order dated 18th January, 2005 and the proceedings initiated against the petitioners under Section 105 of the Act which are pending before the Labour Court No. 1, are hereby quashed. No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 1702
WRIT PETITION
Before Mr. Justice K.K. Lahoti
24 April, 2008*

HARCHARAN RAJPALI ... Petitioner
Vs.
THE COLLECTOR, TIKAMGARH & ors. ... Respondents

A. Cooperative Societies Act, M.P., 1960 (17 of 1961), Section 58-B (As amended w.e.f. 05.05.2005) - *Petitioner retired on 31.08.06 from the post of Supervisor from Zila Sahkari Kendriya Bank, Tikamgarh - Number of employees including the petitioner found responsible for indulging in misconduct of defalcation - At the instance of Bank RRC issued by Collector against the petitioner - Petitioner has challenged RRC in W.P. - Held - No opportunity of hearing given prior to issuance of RRC as per the provisions of first proviso of Section 58-B - Bank was not entitled to make a request to the Collector for issuance of RRC - Such order shall be passed by the Registrar - RRC issued by the Collector at the request of Bank was without jurisdiction.*

(Paras 10 & 11)

क. सहकारी समितियाँ अधिनियम, म.प्र., 1960 (1961 का 17), धारा 58–बी (05.05.2005 से यथासंशोधित) – याची जिला सहकारी केन्द्रीय बैंक, टीकमगढ़ से पर्यवेक्षक के पद से 31.08.06 को सेवानिवृत्त हुआ – याची सहित काफी संख्या में कर्मचारी गबन के दुराचरण में निरत होने के लिये उत्तरदायी पाये गये – बैंक के प्रेरण पर कलेक्टर द्वारा याची के विरुद्ध आरआरसी जारी की गई – याची ने आरआरसी को रिट याचिका में चुनौती दी है – अभिनिर्धारित – धारा 58–बी के प्रथम परन्तुक के उपबंध के अनुरूप आरआरसी जारी करने के पूर्व सुनवाई का कोई अवसर प्रदान नहीं किया गया – बैंक

*W.P. No.8707/2007 (Jabalpur)

आरआरसी जारी कराने के लिये कलेक्टर से अनुरोध करने की हकदार नहीं थी – ऐसा आदेश रजिस्ट्रार द्वारा पारित किया जायेगा – बैंक के अनुरोध पर कलेक्टर द्वारा जारी की गई आरआरसी अधिकारिता विहीन थी।

B. Cooperative Societies Act, M.P., 1960 (17 of 1961), Section 84-A - *Registrar is competent authority to make request to the Collector for recovery of amount as arrears of land revenue and not the Society - Neither certificate was issued by Registrar nor Registrar had determined or ascertained the amount as recoverable as an arrears of land revenue - Issuance of RRC by the Collector was without jurisdiction.* (Para 13)

ख. सहकारी समितियाँ अधिनियम, म.प्र., 1960 (1961 का 17), धारा 84–ए – भू राजस्व की बकाया के तौर पर राशि की वसूली करने के लिये कलेक्टर से अनुरोध करने को रजिस्ट्रार सक्षम प्राधिकारी है न कि सोसायटी – न तो रजिस्ट्रार द्वारा प्रमाण–पत्र जारी किया गया और न रजिस्ट्रार ने भू–राजस्व के तौर पर वसूली योग्य राशि अवधारित या अभिनिश्चित की थी – कलेक्टर द्वारा आरआरसी जारी करना अधिकारिता विहीन था।

C. Revenue Recovery Act (1 of 1890), Section 5 - *To invoke the provisions of Section 5, the Collector was required to satisfy himself that a sum was recoverable as arrears of land revenue and the authority who approached to the Collector was empowered to make such a request to the Collector and after satisfying with the aforesaid requirement of law only then the Collector was empowered to issue RRC and not otherwise.* (Para 12)

ग. राजस्व वसूली अधिनियम (1890 का 1), धारा 5 – धारा 5 के उपबन्धों का अवलंब लेने से पूर्व कलेक्टर को स्वयं को संतुष्ट करना आवश्यक था कि भू राजस्व के तौर पर कोई रकम वसूली योग्य थी और प्राधिकारी जो कलेक्टर के पास पहुंचा, कलेक्टर से ऐसा निवेदन करने को अधिकृत था और विधि की उपर्युक्त अपेक्षा से संतुष्ट होने पर ही कलेक्टर आरआरसी जारी करने को अधिकृत था अन्यथा नहीं।

Sanjay Patel, for the petitioner.
P.N. Dubey, Dy.A.G., for the respondent No.1 & 2.
Sheel Nagu, for the respondent Nos.4.

ORDER

K.K. Lahoti, J. :–In all the aforesaid cases, recovery initiated by respondent Zila Sahkari Kendriya Bank, Tikamgarh through Revenue Recovery Certificates (hereinafter referred to as 'RRC' for short) issued by the Collector, Tikamgarh are under challenge.

2. As the common questions of law are involved in all the aforesaid cases based on similar facts, all these cases are being decided by this common order.

3. In W.P.No.8707/2007 the petitioner has challenged RRC Annexure P-1 dated 18.4.2007 issued by the Collector, Tikamgarh on the ground that petitioner was an employee of Zila Sahkari Kendriya Bank, Tikamgarh (hereinafter referred to as 'Bank' for short) and was appointed as the Committee Manager in Prathmik Krishi Sakha Shahkari Samiti Maryadit, Shivpuri, Kundleshwar, District Tikamgarh. He was appointed in the year 1975 and continued in the service of the said society.

He was promoted on the post of Supervisor on 2nd December, 1997 and served in the Samiti till his retirement on 31.8.2006. The petitioner received a notice from Tehsildar, Tikamgarh in respect of proceedings initiated against the petitioner on the basis of RRC issued by the Collector, Tikamgarh on 18.4.2007. The petitioner submitted his objections before the Tehsildar and thereafter filed this petition on following grounds :-

(1) That no show cause notice was issued or opportunity of hearing was extended to the petitioner before issuing such an RRC.

(2) That no such an amount was due against the petitioner.

(3) No enquiry was conducted against the petitioner.

On the aforesaid grounds the RRC for Rs.8,78,000/- has been assailed before this Court.

4. The respondent no.4 has filed reply in which it is stated that petitioner was issued a chargesheet on 22.8.2005 as Annexure R-4/1. That Departmental proceedings could not proceed as the petitioner attained age of superannuation and retired on 31.8.2006 from the post of Supervisor. In para 6 it is stated that a detailed investigation was made by the Deputy Registrar, Cooperative Societies in respect of complaints of wide spread defalcation of financial assistance extended by respondents to various primary credit Cooperative Societies including the respondent Society in which number of employees including the petitioner were found responsible for indulging in misconduct of defalcation. In para 7 of the reply it is stated that the purpose of obtaining a decree from the Registrar, Cooperative Societies is to enable the employee concerned to be afforded an opportunity of being heard before an order of recovery is passed against him. In the instant case, the reasonable opportunity in the shape of informing the petitioner of the alleged mis-conduct of defalcation and conduction of an inquiry were completed and therefore, the purpose of approaching Registrar Cooperative Societies for obtaining a decree in this respect was achieved, though by another mode. On the aforesaid ground the respondent no.4 submitted that due procedure was followed and RRC was rightly issued at the instance of respondent no.4 by the Collector, Tikamgarh.

The State has adopted the return filed by respondent no.4.

4. In W.P.No.9324/2007 petitioner Raghuraj Singh has challenged the RRC Annexure P-1 dated 18.4.2007 issued by the Collector, Tikamgarh at the instance of respondent no.4 for Rs.4,56,779/- alongwith 18% interest, on the ground that petitioner has filed a case before the Deputy Registrar, Cooperative Societies under section 64 of the M.P.Cooperative Societies Act, 1960 (hereinafter referred to as 'Act of 1960' for short), which is registered as case no.187/2007. During the pendency of the case, RRC has been issued by the Collector. The petitioner on receiving notice from the Tehsildar submitted his objection to the Revenue Recovery Certificate, but without any result. As the petitioner was apprehending recovery

under the RRC, so this petition has been filed on the same grounds which are raised in W.P.No.8707/2007 by the petitioner Harcharan Rajpali and one additional ground that the dispute under section 64 of the Act of 1960 is pending before the Deputy Registrar, Cooperative Societies.

5. The respondent no.4 has filed reply stating that the petitioner was an employee of the society and was functioning as its salesman. He defalcated a sum of Rs.4,56,779/- for which he was proceeded with a Departmental Enquiry which culminated into issuance of an order of removal from service of the society, after affording due and sufficient opportunity to the petitioner. Thereafter various notices were issued to the petitioner inviting his attention to refund the defalcated amount to the society, but when no response was made by the petitioner, respondent no.4 initiated proceedings for issuance of RRC. A copy of notice dated 27.3.2007 is filed on record as Annexure R-4/1. So far as the loss to the society is concerned, the Deputy Registrar conducted an enquiry as per Annexure R-4/2 in which irregularities were found of the petitioner to the tune of Rs.4,56,779/- and accordingly the RRC was issued against the petitioner.

It is pertinent to mention here that respondent no.4 has not filed the report of Departmental Enquiry in the case, showing that any charge was levelled against the petitioner in respect of alleged defalcation. No particulars of such enquiry has been furnished by respondent no.4 in the return. The enquiry report Annexure R-4/2 dated 2.2.2006 is on record, but alleged defalcation was not subject matter of the Enquiry.

6. In W.P.No.9448/2007 petitioner Kishor Singh has assailed RRC Annexure P-1 dated 18.4.2007 issued by the Collector, Tikamgarh at the instance of respondent no.4 on the ground that Collector was having no jurisdiction to issue such an RRC. The RRC which was stated to be issued under the provisions by the Revenue Recovery Act, 1890 (hereinafter referred to as 'Act of 1890' for short) but the provisions of this Act were not applicable. The provisions of the Act of 1960 shall apply in the matter of petitioner, because the petitioner was an employee of a cooperative society. That no details in respect of recovery amount were furnished and the recovery was malafide. That no show cause notice or opportunity of hearing was extended to the petitioner before issuance of such RRC.

The respondent no.4 has filed reply in which it is stated that recovery of Rs.1,56,521/- was effected against the petitioner without obtaining any decree from Registrar on the ground that petitioner was involved in defalcation of public money, which was received by respondent no.3 Primary Credit Society from respondent no.4 bank as financial assistance. The petitioner was subjected to a Departmental Enquiry in which he was removed from the service as a measure of penalty. Petitioner was duly extended an opportunity of hearing in the Departmental proceedings conducted prior to his removal and so far as quantification of defalcation amount is concerned it was duly enquired into by the Deputy Registrar of the Cooperative Societies, Tikamgarh as per Annexure R-4/1 who certified

that petitioner committed irregularity for an amount of Rs.1,56,521/-. It was submitted that after a due enquiry the Deputy Registrar recorded the aforesaid finding that the petitioner was involved in defalcation of aforesaid amount of the Bank and RRC was rightly issued against the petitioner.

In this case the respondent no.4 has not filed any decision of the Departmental Enquiry in which the petitioner was removed from service. Apart from this no document has been filed by respondent no.4 showing that before issuing RRC Annexure P-1, any show cause notice or opportunity of hearing was extended to the petitioner.

7. In W.P.No.9592/2007 petitioner Balram has assailed RRC Annexure P-2 dated 18.4.2007 for Rs.6,56,719/- and interest on the grounds that respondent no.3 Primary Agricultural Creditors Cooperative Societies Ltd, Arora Tehsil Baldeogarh, Dist, Tikamgarh filed a dispute before the Deputy Registrar Cooperative Societies, Tikamgarh as case no.64-/140-5 by which a recovery was sought against the petitioner for Rs.6,56,719.23p. The aforesaid dispute was allowed by Deputy Registrar by an order dated 28.2.2005 but against this order the petitioner preferred an appeal before the Joint Registrar, Cooperative Societies, Sagar Division Sagar as appeal no.78-32/2005. By order Annexure P-1 dated 19.5.2005 the order of Deputy Registrar dated 28.2.2005 was set aside and the matter was remanded back to the Deputy Registrar, Cooperative Societies, Tikamgarh with the directions to serve a copy of complaint and documents to the petitioner, extend due opportunity of hearing to the petitioner, record evidence and thereafter to decide the matter afresh. It was submitted that the aforesaid dispute is still pending before the Deputy Registrar, Cooperative Society, Tikamgarh and without final adjudication of the dispute the recovery was effected which was not only illegal but without jurisdiction. Before issuance of RRC no show cause notice or opportunity of hearing was extended to the petitioner and issuance of such RRC was without jurisdiction and may be quashed.

The respondent no.4 has filed reply in which it is stated that petitioner was removed from service by order dated 4.11.2006 Annexue R-4/1. The aforesaid order was passed after holding due Departmental Enquiry against the petitioner in which the charges were found proved and petitioner was removed from service. In the said order it was found that petitioner had not deposited the amount which was recovered by him from the members of the society and thereby committed defalcation of money of respondent no.4. In the said order, recovery of various amounts was directed.

Learned counsel for petitioner submitted that before issuing the aforesaid RRC no show cause notice or opportunity of hearing was extended to the petitioner. Respondents before issuing RRC ought to have extended an opportunity of hearing to the petitioner and without taking such recourse issuance of RRC was not only illegal but also without jurisdiction.

8. Shri Sheel Nagu appearing for respondent no.4 submitted that it was not necessary for the respondents to take recourse under section 64 of Act of 1960, but under section 58-B as amended by M.P.Cooperative Societies amendment Act 2004 (No.10/2005) published in the M.P.Rajpatra dated 5.5.2005, the respondent no.4 was empowered to recover the loss caused to respondent no.4 by enforcing recovery through RRC and in this regard respondent no.4 had taken the recourse under section 58-B of the Act in which there is no illegality.

To this Shri Sanjay Patel, appearing for petitioner submitted that under proviso to section 58-B(1) it was mandatory requirement of law to extend petitioner a reasonable opportunity of hearing before effecting the aforesaid recovery and in this case before issuance of RRC no opportunity of hearing was extended to the petitioner.

9. Learned counsel appearing for respondents though opposed the contention, but were unable to place any material on record that before issuing RRC as referred hereinabove any opportunity of hearing was extended to the petitioner by issuing show cause notice or extending personal opportunity of hearing to controvert the correctness of the amount stated in the RRC.

10. Section 58-B as amended by the amendment Act 10/2005 (supra) reads thus :-

> "**58-B. Procedure for making good, losses caused to a society** - (1) If in the course of an audit, inquiry, inspection or the winding up of a society or otherwise, it is found that any person, who is or was entrusted with organisation or management of such society or any deceased, past or present chairman, secretary, member of Board of Directors, officer or employee of the society has made any payment contrary to the provisions of this Act or the rules made thereunder or byelaws of a society or has caused any deficiency or loss by gross negligence or misconduct or has misappropriated or fraudulently retained any money or other property belonging to such society, the Registrar may on his own motion or on the application of the Board of Directors, liquidator or any creditor may make an order requiring such person or in the case of a deceased person, his legal representative who inherits his estate, to repay or restore the money or property or any part thereof, with interest at such rate or to pay contribution and costs or compensation to such extent as the Registrar may consider just and equitable :
>
> Provided that no order under this sub-section shall be made unless the person concerned is given a reasonable opportunity of being heard in the matters :
>
> Provided further that the liability of a legal representative of the deceased, shall be to the extent of the property of the deceased, which has come to the hands of such legal representative.

(2) Any person aggrieved by the order made under sub-section (1) may within thirty days from the date of communication of the order to him appeal to the Tribunal :

Provided that in computing the period of limitation, the time requisite for obtaining a copy of the order appealed against shall be excluded.

(3) Any order made under sub-section (1) or sub-section (2) shall be enforced in accordance with the provisions of Section 85.

(4) If the Registrar is satisfied on affidavit, enquiry or otherwise that any person with intent to delay or obstruct the enforcement of any order that may be made against him under this Section :-

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the jurisdiction of the Registrar,

he may, unless adequate security is furnished, direct the condition attachment of the said property or such part thereof as he thinks necessary."

Section 58-B (1) provides that if the society finds that an employee of the society has made any payment contrary to the provisions of the Act or Rules or has caused any defalcation or loss by gross negligence or mis-conduct or has mis-appropriated or fraudulently retained any money or other property belonging to such society, the Registrar may on his own motion or on the application of Board of Directors may make an order requiring such person to repay or restore the money or property or any part thereof with interest at such rates as Registrar may consider just and equitable. The first proviso provides that no order under section 58-B shall be made unless the person concerned is given a reasonable opportunity of hearing.

11. Admittedly in this case no opportunity of hearing was extended to the petitioners by issuance of a show cause notice or extending personal opportunity of hearing, in absence of such issuance of RRC was without jurisdiction. Apart from this the requirement of section 58-B is that such order shall be passed by the Registrar and not by respondent no.4 or the Collector. In absence of any order passed by the Registrar or following the provision of 1st proviso, the respondent no.4 was not entitled to make a request to the Collector for issuance of RRC. The RRC so issued by the Collector at the request of respondent no.4 was without jurisdiction.

12. At this stage, Shri P.N.Dubey, Deputy A.G., submitted that Collector, Tikamgarh recovered the aforesaid amount under section 5 of Act of 1890 and he was within his jurisdiction to issue such RRC at the request of General Manager, Zila Sahkari Kendriya Bank Maryadit, Tikamgarh, which reflects from the perusal of RRC in which the General Manager had signed the certificate and put his seal on the aforesaid certificate. Only thereafter the Collector issued the RRC to the

Tehsildar for recovery. It was submitted that under section 5 of Act of 1890 the action of Collector was within his jurisdiction and the RRC cannot be quashed.

Section 5 of Act of 1890 reads thus :-

> "5. **Recovery by Collectors of sums recoverable as arrears of revenue by other public officers or by local authorities** - Where any sum is recoverable as an arrear of land revenue by any public officer other than a Collector or by any local authority, the Collector of the district in which the office of that officer or authority is situate shall, on the request of the officer or authority, proceed to recover the sum as if it were an arrear of land revenue which had accrued in his own district, and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act, as if the sum were payable to himself."

The aforesaid provision specifically provides that for issuance of RRC the sum sought to be recovered must be recoverable as an arrears of land revenue by an officer other than the Collector or by any local authority and on the request of such an officer or authority the Collector shall proceed to recover the sum as if it were an arrears of land revenue, which had accrued in his District. To invoke the provisions of section 5, the Collector was required to satisfy himself that a sum was recoverable as arrears of land revenue and the authority who approached to the Collector was empowered to make such a request to the Collector and after satisfying with the aforesaid requirement of law, only then the Collector was empowered to issue RRC and not otherwise. Section 5 of the Act of 1890 specifically provide that such recovery can be made in respect of amount, which was recoverable as an arrears of land revenue and the public officer should be empowered to do so, only then the Collector was having jurisdiction in this regard.

13. Now the question arises, whether such amount was recoverable as an arrears of land revenue. Merely such amount was recoverable by Bank will not be treated such an amount recoverable as arrears of land revenue. Under the Act of 1960 specific provision has been made in this regard. Section 84-A and section 85 deals with such situation. For the ready reference section 84-A and 85 are quoted as under :-

> "**84-A Recovery of sums due to certain societies** - (1) Notwithstanding anything contained in sections 64, 69 and 78 on an application made by a co-operative housing society or Madhya Pradesh State Co-operative Housing Federation or primary urban Co-operative bank for recovery of arrears of its dues, the Registrar may, after making such enquiry as he deems fit, grant a certificate for the recovery of the amount stated therein to be due as an arrear.
>
> (2) The certificate granted by the Registrar shall be final and conclusive proof of the arrears stated therein, and the same shall be recoverable as arrears of land revenue.

85. Execution of orders, etc - Every order or award passed or decision given by the Registrar under any provision of this Act, every order passed by the Appellate or Revisional Authorities and every order made, decision given by the Liquidator, if not carried out -

(a) on a certificate signed by the Registrar or any person authorised by him in this behalf be deemed to be decree of a Civil Court and shall be executed in the same manner as a decree of such Court; or

(b) be executed according to the law and under the rules for the time being in force for the recovery of arrears of land revenue;

(c) be executed by the Registrar or any other person empowered by the Registrar in this behalf, by the attachment and transfer in the manner as may be prescribed or sale or sale without attachment of any property of the person or a society against whom the order, decision or award has been obtained or passed:

Provided that any application for the recovery under clause (b) shall be made -

(i) to the Collector and shall be accompanied by a certificate signed by the Registrar or by any person authorised in this behalf; and

(ii) within five years from the date fixed in the order, decision or award and if no such date is fixed, from the date of order, decision or award, as the case may be."

Section 84-A empowers a primary urban Cooperative Bank to file an application for recovery of its dues to the Registrar and the Registrar after making such enquiry as he deems fit can grant certificate for recovery stated to be due as arrears. Meaning thereby the authority empowered was the Registrar and not the society who could directly make a request to the Collector for recovery of aforesaid amount. In this case as appears from the perusal of Annexure P-1, the request was made by General Manager of the Bank to the Collector and the Collector without looking into the provisions of section 84-A issued RRC. Section 85 of the Act of 1960 also empowers for enforcement of order or award passed after decision by the Registrar under any provision of the Act and under sub-section (b) the aforesaid amount can be recovered as an arrears of land revenue, but in this case no decision by the Registrar has been produced before this Court to show that the aforesaid arrears were certified by the Registrar as an arrears which could be recovered as an arrears of land revenue. The proviso of section 85 also provides that the recovery under clause (b) shall be made on an application to the Collector and shall be accompanied by the certificate signed by the Registrar or any person authorised in this behalf. Admittedly in this case neither certificate was issued by the Registrar in this regard, nor Registrar had determined or ascertained the amount as recoverable as an arrears of land revenue. In these

circumstances, the issuance of RRC by the Collector was without jurisdiction, even under the provisions of Act of 1890. No other provision was shown before this Court to justify the Act of respondents. In view of the contention raised and decided hereinabove it is found that action of respondent no.4 by issuing RRC was without jurisdiction.

In the result, all the petitions are allowed. All the RRC's issued by the Collector, Tikamgarh at the request of respondent no.4 are hereby quashed. All the consequential action taken by the Tehsildar in enforcing the RRC shall also stand quashed. If any property was attached by the Tehsildar for enforcing RRC that shall be released forthwith. However, the respondent no.4 shall be free to take recourse of law for recovering the amount either under section 58-B and section 64 of Act of 1960 as the case may be, or as may be advised, but after following due procedure of law.

Considering facts of the case there shall be no order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 1711
WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Sanjay Yadav
7 May, 2008*

JYOTI GUPTA (Smt.) ... Petitioner
Vs.
REGISTRAR GENERAL, HIGH COURT OF M.P. & anr. ... Respondents

Constitution, Article 233(2), Uchchatar Nyayik Sewa (Bharti Tatha Sewa Shartein) Niyam, M.P., 1994, Rule 7(1)(c) - *Qualification for appointment as District Judge entry level - Whether an Advocate who has put in seven years of practice but has been appointed as Public Prosecutor or Asstt. Public Prosecutor or Asstt. District Public Prosecutor is eligible for appointment as District Judge (Entry Level) by way of Direct recruitment - Held - As per rules framed by Bar Council, a Law Officer of State Govt. is qualified to be admitted as an Advocate if by terms of his appointment, he is required to act and plead in Courts on behalf of State - If person has been enrolled as an advocate and thereafter appointed as P.P. / A.P.P. / A.D.P.P. and by terms of his appointment continues to conduct cases on behalf of State Govt. before Criminal Courts, does not cease to be an Advocate within meaning of Art.233(2) of Constitution and Rule 7(1)(c) of Niyam, 1994.*

(Para 18)

संविधान, अनुच्छेद 233(2), उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम, म.प्र., 1994, नियम 7(1)(सी) – जिला न्यायाधीश (प्रारंभिक स्तर) के रूप में नियुक्ति हेतु

*W.P. (S) No.17894/2006 (Jabalpur)

योग्यता – क्या एक अधिवक्ता जो सात वर्षों से वकालत के पेशे में हो किन्तु लोक अभियोजक या सहायक लोक अभियोजक या सहायक जिला लोक अभियोजक के रूप में नियुक्त किया गया है, सीधी भर्ती के द्वारा जिला न्यायाधीश (प्रारम्भिक स्तर) के रूप में नियुक्ति के लिये योग्य है – अभिनिर्धारित – अधिवक्ता परिषद् द्वारा विरचित नियमों के अनुसार राज्य सरकार का एक विधि अधिकारी अधिवक्ता के रूप में शामिल करने योग्य है, यदि उसकी नियुक्ति के निबंधनों के द्वारा उससे राज्य की ओर से न्यायालय में वकालत करना अपेक्षित है – यदि व्यक्ति अधिवक्ता के रूप में नामांकित किया गया है एवं उसके बाद वह लोक अभियोजक/सहायक लोक अभियोजक/सहायक जिला लोक अभियोजक के रूप में नियुक्त होता है और उसकी नियुक्ति के निबंधनों द्वारा राज्य सरकार की ओर से दाण्डिक न्यायालयों के समक्ष मामले संचालित करना जारी रखता है, संविधान के अनुच्छेद 233(2) व नियम, 1994 के नियम 7(1)(सी) के अर्थ में अधिवक्ता होना समाप्त नहीं होता है।

Cases referred :

(1999) 1 SCC 330, Civil Misc. Writ Petition No.20016/2007, (1999) 2 SCC 745, (2001) 2 SCC 665, 2002 Lab.I.C. 2074.

Aditya Sanghi, for the petitioner.

V.S. Shroti with *Ashish Shroti,* for the respondent No.1.

Vivek Awasthi, G.A., for the respondent No.2.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, C. J.** :–The question which arises for decision in this writ petition is whether a Public Prosecutor or Assistant Public Prosecutor who has been an Advocate for not less than seven years is eligible for appointment by direct recruitment to the posts of District Judges (Entry Level) in the M.P. Higher Judicial Service.

2. The relevant facts briefly are that the High Court of Madhya Pradesh issued an advertisement inviting applications for recruitment to twenty posts of District Judges (Entry Level) in the cadre of Higher Judicial Service by direct recruitment from the Bar. The advertisement stipulated, inter-alia, that to be eligible for appointment to the post of District Judge (Entry Level) in the Higher Judicial Service by direct recruitment, the candidate must have practiced as an Advocate or Pleader for not less than seven years as on the 1st day of January, 2006. In response to the advertisement, the petitioner who was enrolled as an Advocate in the State Bar Council of Madhya Pradesh on 10.3.1992 and had practiced at Dewas as an Advocate till 12.8.2004 and then joined as Assistant Public Prosecutor at Dewas on 13.8.2004 and had continued as Assistant Public Prosecutor, applied. The application of the petitioner was however rejected by the Registrar General of the High Court of Madhya Pradesh on the ground that she was no longer an Advocate or Pleader being a full-time salaried employee of the Government and she was not eligible for recruitment to the post of District Judge (Entry Level) in the M.P. Higher Judicial Service as per the eligibility criteria stipulated in the advertisement. Aggrieved, the petitioner has filed this writ petition under Art. 226 of the Constitution of India praying for writs/directions/orders quashing

the communication dated 24.1 1.2006 of the Registrar General of the High Court of Madhya Pradesh and directing the respondents to accept her application and to permit her to appear in the examination scheduled to be held on 17.12.2006. On 6.12.2006, the Court while issuing notice in the writ petition to the respondent Registrar General, High Court of Madhya Pradesh passed an interim order that the petitioner be allowed to take the recruitment examination scheduled to be held on 17.12.2006 after complying with the formalities but the results of the petitioner will not be declared until further orders

3. Thereafter on 29.3.2007, the Court modified the interim order and directed that in case the petitioner has qualified in the written examination, she will be called for interview but the final results will not be published until further orders. On 29.3.2007, the Court also passed orders directing that the State Government, represented by the Principal Secretary, Government of Madhya Pradesh, Department of Home, Bhopal will be impleaded as arespondent and further directing that the State Government in the Home Department will file an affidavit stating the nature of duties performed by Public Prosecutors/Assistant Public Prosecutors and Assistant District Public Prosecutors appointed under the M.P. Public Prosecution (Gazetted) Services Rules, 1991.

4. Pursuant to the stay order dated 29.3.2007, an affidavit has been filed in W.P.No.18678 of 2006 (S) stating therein that Public Prosecutors, Assistant Public Prosecutors and Assistant District Public Prosecutors are appointed under Sections 24 and 25 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C.") and they perform the duties in accordance with the said provisions of the Cr.P.C., besides other duties detailed in the order dated 25.1.1994 of the Director of Public Prosecution. A copy of the order dated 25.1.1994 has also been annexed to the affidavit and it appears from the copy of the order dated 25.1.1994 that Public Prosecutors, Assistant Public Prosecutors and Assistant District Public Prosecutors have to appear in different criminal Courts and conduct cases on behalf of the State. Therefore, the question which falls for consideration in this writ petition is whether an Advocate who is enrolled as an Advocate with the State Bar Council under the Advocates Act, 1961 and has put in seven years of practice but has been appointed as Public Prosecutor or Assistant Public Prosecutor or Assistant District Public Prosecutor under the M.P. Public Prosecution (Gazetted) Services Recruitment Rules, 1991 and appears and conducts cases on behalf of the State in Criminal Courts, is eligible for appointment as District Judge by way of direct recruitment.

5. Mr. Aditya Sanghi, learned counsel for the petitioner submitted that Art. 233 (2) of the Constitution provides that a person not already in service of the Union or of the State shall only be eligible to be appointed as District Judge (Entry Level) if he has been for not less than seven years an Advocate or a Pleader and is recommended by the High Court for appointment. He submitted that keeping in view this provision in Art. 233 (2) of the Constitution, the Supreme Court has held

in *Sushma Suri vs. Government of National Capital Territory of Delhi and another,* (1999) I S.C.C. 330 that an Advocate employed by the Government or a body corporate as Law Officer even on terms of payment of salary would not cease to be an Advocate in terms of Rule 49 of the Bar Council of India Rules if the condition is that such Advocate is required to act or plead in the courts on behalf of the employer. He submitted that in the present case since the petitioner, who is an Assistant Public Prosecutor by the nature of her duties is required to act and conduct cases on behalf of the State in the criminal courts, does not cease to be an Advocate on her being appointed as Assistant Public Prosecutor under the M.P. Public Prosecution (Gazetted) Services Recruitment Rules, 1991 and therefore, she is eligible for appointment to the post of District Judge (Entry Level) in the M.P. Higher Judicial Service. Mr. Sanghi also cited the judgment of the Division Bench of the Allahabad High Court in *Sanjay Agrawal vs. State of U.P. and others* (Civil Misc. Writ Petition No.20016 of 2007) in which a similar view has been taken following the decision of the Supreme Court in *Sushma Suri* (supra) that the person who is enrolled as an Advocate under the Advocates Act, 1961 and has worked for seven years as such and thereafter appointed as Public Prosecutor/Assistant Public Prosecutor does not incur the disqualification under Art. 233 (2) of the Constitution or the Advocates Act, 1961 or the Rules framed by the U. P. State Bar Council under the Advocates Act, 1961 for consideration for appointment to the post of District Judge.

6. Mr. V.S. Shroti, learned Senior Counsel appearing for the High Court, on the other hand, submitted that Section 2 (1) of the Advocates Act, 1961 defines 'advocate' to mean an advocate entered in any roll under the provisions of the Act. He submitted that under Section 17 of the Advocates Act, 1961, every State Bar Council is required to prepare and maintain a roll of advocates in which the names and addresses of all persons who have been enrolled as advocate are entered. He further submitted that in Rule 49 of the Bar Council of India Rules, it is provided that an advocate shall not be a full time salaried employee, inter-alia, of any Government so long as he continues to practice and shall on taking any such employment intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an advocate so long as he continues in such employment. He further submitted that prior to 22" June, 2001, there was a provision appended to Rule 49 that nothing in the rule shall apply to the Law Officer of the Central Government or the State Government, who is entitled to be enrolled under the Rules of State Bar Council under Section 28 (2) (d) read with Section 24 (1) (c) of the Act despite his being a full time salaried employee and that Law Officer for the purpose of this rule would mean a person who is so designated by the terms of his appointment and who by the said term is required to act and/or plead in courts on behalf of his employer. Mr. Shroti submitted that the decision of the Supreme Court in *Sushma Suri* (supra) was delivered when this note under Rule 49 of the Bar Council of India Rules was in force and the

Supreme Court took into consideration the aforesaid note and held that an advocate who is employed as a Law Officer and on the terms of his appointment is required to act and/or plead in courts on behalf of the employer, would not cease to be an advocate on his becoming such Law Officer and would be eligible for appointment to the post of District Judge under Art. 233 (2) of the Constitution. He submitted that by a resolution dated 22" June, 2001 of the Bar Council of India, this note appended to Rule 49 has been deleted and the result is that as soon as an advocate is employed as a full time salaried employee of the Government, he ceases to practice as an advocate so long as he continues in such employment as provided in Rule 49 of the Bar Council of India Rules. He argued that the view taken by the Registrar General of the M.P. High Court in the impugned communication that the petitioner having been appointed as Assistant Public Prosecutor had ceased to be an advocate and was not eligible to be considered for recruitment to the post of District Judge in the M.P. Higher Judicial Service, is, therefore, correct. In support of his submissions, Mr. Shroti cited the decisions of the Supreme Court in *Baldev Singh Dhingra and others vs. Madanlal Gupta and others,* (1999) 2 S.C.C. 745 and in *Satish Kumar Sharma vs. Bar Council of H.P.,* (2001 (2) S.C.C. 665. He also relied on the decision in *Mallaraddi H. Itagi and others vs. The High Court of Karnataka and another,* 2002 Lab. I.C. 2074 in which a Division Bench of the High Court has held that Assistant Public Prosecutors are not Advocates.

7. Article 233 (2) of the Constitution is quoted herein below:

> "233 (1) xxx xxx xxx
>
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed as district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. "

The language of Art. 233 (2) of the Constitution of India is clear that a person who is not in the judicial service of the Union or the State would be eligible to be appointed as District Judge if he has been for not less than seven years an advocate or a pleader.

8. This provision in Art. 233 (2) of the Constitution has been bodily lifted and incorporated in Rule 7 (c) of the M.P. Uchchtar Nyayik Sewa (Bharti Tatha Sewa Shartein) Niyam, 1994 which reads as follows:

> "**7. Qualification for direct recruitment :** No person shall be eligible for appointment by direct recruitment unless -
>
> (a) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> (c) he has been for not less than seven years an Advocate or a Pleader. (d) xxx xxx xxx"

9. Section 2 (1) of the Advocates Act, 1961 defines 'advocate under clause (a) to mean an advocate entered in any roll under the provisions of the Act. Section 17 of the Advocates Act, 1961, inter-alia, provides that every State Bar Council shall prepare and maintain a roll of advocates in which all persons who are admitted as advocates will be enrolled. Section 24 of the Advocates Act, 1961 is titled "persons who may be admitted as advocates on a State roll" and states that subject to the provisions of the Act and the Rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll if he fulfills the conditions mentioned in clauses (a) to (f) therein. Under clause (e) of Section 24, a person to be qualified to be admitted as an advocate on a State roll is required to fulfill such other conditions as may be specified in the rules made by the State Bar Council. Section 28(1) of the Advocates Act, 1961 confers power on the State Bar Council to make rules for carrying out the provisions of the Chapter and Section 28 (2) provides that in particular, and without prejudice to the generality of the power under Section 28 (1), such rules may provide for the matters specifically provided in clauses (a) to (e) of Section 28 (2) of the Advocates Act, 1961. Under clause (d) of Section 28 (2) of the Advocates Act, 1961, such rules made by the State Bar Council may provide for the conditions subject to which a person may be admitted as an advocate on the roll of the State Bar Council. In accordance with the powers under Section 28 (2) (d) read with Section 24 (1) (c) of the Advocates Act, 1961, the State Bar Council of M.P. has framed rules titled "State Bar Council of Madhya Pradesh, Jabalpur Rules" and relevant portion of Rule 143 is quoted herein below:

> **" 143.** A person who is otherwise qualified to be admitted as an Advocate but is either in full or part time service or employment or is engaged in any trade, business or profession shall not be admitted as an Advocate:
>
> Provided, however, that this rule shall not apply to: -
>
> (i) Any person who is a law officer of the Central Government or the Government of a State or of any Public Corporation or body constituted by statute. For the purpose of this Clause a 'Law Officer' shall mean a person who is so designated by the terms of his appointment and who by the said terms is required to act and/or plead in courts on behalf of his employer."

10. It is clear from the main provision in Rule 143 of the State Bar Council of Madhya Pradesh Jabalpur Rules, quoted above, that a person who is otherwise qualified to be admitted as an advocate but is either on full or part time service or employment, or is engaged in any trade, business or profession, shall not be admitted as an advocate. Proviso (i) under Rule 143 says that this rule shall not apply to any person who is a Law Officer of the Central Government or of a Government of the State or of any public corporation or body constituted by a statute and for the purpose of this clause, a Law Officer shall mean a person who is so designated by the terms of his appointment and who by the said terms is required to act and/

or plead in courts on behalf of his employer. It is thus amply clear that under the Rules made by the State Bar Council of M.P. under Section 28 (2) (d) read with Section 24 (1) (e) of the Advocates Act, 1961, a Law Officer of Government of State is qualified to be admitted as an Advocate if by the terms of his appointment, he is required to act and/or plead in courts on behalf of the State Government. Since Public Prosecutors, Assistant Public Prosecutors or Assistant District Public Prosecutors by the terms of their employment under the State have to appear and conduct cases on behalf of the State before the criminal courts, they do not become disqualified to be entered in the rolls of the State Bar Council as advocates and accordingly do not cease to be advocates on their becoming Public Prosecutors, Assistant Public Prosecutors or Assistant District Public Prosecutors.

11. This is what has been held by the Supreme Court in *Sushma Suri* (supra) in para 10 of the judgment as reported at page 336 of the S.C.C., which is quoted herein below: "

> 10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, an exception is made in such cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on tenns of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does - whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression "advocate" as one who is actually practicing before courts which expression would include even those who are law officers appointed as such by the Government or body corporate."

12. Mr. Shroti is right in his submission that in the aforesaid judgment in *Sushma Suri* (supra), the Supreme Court relied on the exception provided in the note appended under Rule 49 of the Bar Council of India Rules that a Law Officer

of the Central Government or the State Government or a body corporate would be entitled to be enrolled as an advocate despite his being a full time salaried employee if he is designated by the terms of his appointment to act and/or plead in courts on behalf of the employer and that the exception in the note has been deleted by the Bar Council of India by resolution dated 22"' June, 2001. But in our considered opinion, this deletion of exception in the note appended to Rule 49 of the Bar Council of India Rules does not make any material difference. Rule 49 along with the note provided in the exception of the Bar Council of India Rules prior to the deletion of the note by resolution dated 22"' June, 2001 are extracted below:

> " 49. An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise, and shall on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon, cease to practice as an advocate so long as he continues in such employment."
>
> "Nothing in this rule shall apply to a Law Officer of the Central Government or a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of the State Bar Council made under section 28 (2) (d) read with section 24 (1) (e) of the Act despite his being a full time salaried employee.
>
> Law Officer for the purpose of the rule means a person who is so designed by the terms of appointment and who, by the said terms, is required to act and/or plead in courts on behalf of his employer."

13. A careful reading of the note provided in the exception states that nothing in Rule 49 of the Bar Council of India Rules shall apply to a Law Officer of the Central Government, State Government or a body corporate who is entitled to be enrolled under the rules of the State Bar Council under Section 28 (2) (d) read with Section 24 (1) (e) of the Advocates Act, 1961 despite his being a full time salaried employee. Hence, the exception to Rule 49 has been provided because of the provisions in the Rules of State Bar Council made under Section 28 (2) (d) read with Section 24 (1) (e) of the Advocates Act. 1961 for a Law Officer of the Central Government or the State Government or a body corporate to be admitted into the roll of the State Bar Council if he is required by the terms of his appointment tc act and/or plead in courts on behalf of his employer. In other words, if the rules made by the State Bar Council under Section 28 (2) (d) read with Section 24 (1) (e) of the Advocates Act, 1961 provide for admission as an advocate, enrolment in the State Bar Council as an advocate of a Law Officer of the Central Government or the State Government or a body corporate, who, by the terms of his employment, is required to act and/or plead in courts on behalf of his employer, he can be admitted as an advocate and enrolled in the State Bar Council by virtue of the provisions of Sections 24 (1) (e) and 28 (2) (d) of the Advocates Act, 1961

and the rules made thereunder by the State Bar Council and he does not cease to be an Advocate on his becoming such Law Officer of the Central Government, State Government or a body corporate. As we have seen, the State Bar Council of M.P. has provided under Proviso (i) of Rule 143 that a Law Officer of the Central Government or a Government of State or a public corporation or a body constituted by a statute, who by the terms of his appointment, is required to act and/or plead in courts on behalf of his employer, is qualified to be admitted as an advocate even though he may be in full or part time service or employment of such Central Government, State Government, public corporation or a body corporate. The position of law, therefore, has not materially altered after the deletion of the note contained in the exception under Rule 49 of the Bar Council of India Rules by the resolution of the Bar Council of India dated 22nd June, 2001.

14. The decision of the Supreme Court in *Baldev Singh Dhingra and others vs. Madanlal Gupta and others* (supra) cited by Mr. Shroti has no application to the facts of the present case. In the aforesaid case, a person before his appointment as Judicial Officer was enrolled as an advocate and he had got his licence to practice suspended when he was appointed as judicial officer. In a departmental enquiry, he was found to be guilty of the misconduct of unbecoming of a judicial officer and on prosecution, he was found guilty of the offence punishable under Section 5 (1) (e) of the Prevention of Corruption Act and on the recommendation of the High Court, the State Government dismissed him from service. After dismissal from service, he was permitted to resume his practice as an advocate by the Chairman of the State Bar Council and a complaint was filed under Section 35 (1) of the Advocates Act, 1961 before the State Bar Council against him contending that in view of his misconduct, he cannot practice as an advocate and on these facts, the Supreme Court has held that the complaint was not maintainable against him for any misconduct which is not committed by him as practicing advocate. This decision has no relevance to the present case in which we are dealing with the question whether Public Prosecutors/Assistant Public Prosecutors/ Assistant District Public Prosecutors who had been advocates before their appointment as such Law Officer in the State Government cease to be advocates even when they continue to act and/or plead cases in the courts on behalf of the State Government.

15. In *Satish Kumar Sharma vs. Bar Council of H.P.* (supra), the Supreme Court referred to its earlier decision in *Sushma Suri* (supra) and held that the test indicated in the said decision is whether a person is- engaged to act or plead in a court of law as an advocate and not whether such person is engaged on terms of salary or payment of remuneration and held that there was no indication in any of the appointment/promotion orders issued to the appellant in that case that he was to act or plead in courts of law on behalf of the State Electricity Board except in a particular order dated 5.7.1984 and that the appellant was required to work in the Legal Cell of the Secretariat of the Board to whom different pay scales and

seniority rules were applicable and he was given promotion on the basis of recommendations of the DPC and was amenable to the disciplinary proceedings and who was not mainly or exclusively employed to act or plead in courts. This was a decision of the Supreme Court in a case in which the appellant was not found to be eligible by the terms of his appointment to act and/or plead on behalf of his employer in the courts.

16. In *Mallaraddi H. Itagi vs. High Court of Karnataka,* (supra), Rule 2 of the Karnakata Judicial Services (Recruitment) Rules, 1983 read with the Schedule to the Rules prescribed that an applicant to be eligible to be considered for appointment as a District judge must be, on the last date fixed for submission of the applications, enrolled as an advocate and must have so practiced for not less than seven years as on such date and the question before the Division Bench of the Karnataka High Court was that petitioners 1 to 9 in that case who had been appointed as Assistant Public Prosecutors were eligible to be considered for appointment as District Judges but the Division Bench held that petitioners 1 to 9 before the date of their appointment as Assistant Public Prosecutors had surrendered their certificates of practice to the Karnataka State Bar Council and that therefore, after their after the appointment as Law Officers of the Company were not acting or pleading in courts on behalf of the employer as per the terms of their appointment and were not eligible for being considered to appointment to the posts of District Judges and the decision of the Supreme Court in *Sushma Suri* (supra) was not applicable to the nine petitioners. In the facts of the present case. on the other hand, we have held that Public Prosecutors, Assistant Public Prosecutors and Assistant District Public Prosecutors are required by the terms of their appointment to appear and conduct cases on behalf of the State in criminal courts.

17. The Division Bench of the Allahabad High Court, on the other hand, has held in its judgment dated 15.6.2007 in *Sanjay Agarwal vs. State of U.P. and others* (Civil Misc. Writ Petition No.20016 of 2007), following the decision of the Supreme Court in *Sushma Suri* (supra) that the petitioner who was enrolled as an advocate under the Advocates Act, 1961 and had worked for seven years as such and thereafter appointed as APP/APO cannot be disqualified only for the reason that he has been appointed as prosecuting officer even while working as APP/ APO because he was required to discharge his duties by pleading cases on behalf of the State before the courts of law.

18. In the result, we hold that if a person has been enrolled as an advocate under the Advocates Act, 1961 and has thereafter been appointed as Public Prosecutor/ Assistant Public Prosecutor or Assistant District Public Prosecutor and by the terms of his appointment continues to conduct cases on behalf of the State Government before the criminal courts, he does not cease to be an Advocate within the meaning of Art. 233 (2) of the Constitution and Rule 7 (1) (c) of M.P. Uchchatar Nyayik Sewa (Bharti Tatha Sewa Shartein) Niyam, 1994 for the purpose

of recruitment to the post of District Judge (Entry Level) in the M.P. Higher Judicial Service. The writ petition is accordingly allowed and the respondent No. 1 is directed to publish the results of the petitioner.

Petition allowed.

I.L.R. [2008] M. P., 1721
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
19 June, 2008*

PRAJAPAL SINGH ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P., 1993 (1 of 1994), Section 91, Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 -Appeal - *Appeal would lie against an order of appointment of Panchayat Karmi issued by Sarpanch of the Gram Panchayat u/s 91 of the Act r/w Rule 3 of the Rules - Appellate Authority has all necessary powers to grant relief in case while allowing the appeal - Such powers will also include the powers to decide whether the selection made by the Gram Panchayat by adopting the resolution was not correct either on facts and law.* (Para 7)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र., 1993, (1994 का 1), धारा 91, पंचायत (अपील और पुनरीक्षण) नियम, 1995, म.प्र., नियम 3 – अपील – ग्राम पंचायत के सरपंच द्वारा जारी पंचायतकर्मी के नियुक्ति आदेश के विरुद्ध अपील अधिनियम की धारा 91 सहपठित नियमों के नियम 3 में की जा सकती है – अपील प्राधिकारी को जब अपील मंजूर की जा रही हो, मामले में अनुतोष दिलाने की सभी आवश्यक शक्तियाँ प्राप्त हैं – ऐसी शक्तियों में यह विनिश्चय करना भी सम्मिलित है कि ग्राम पंचायत द्वारा प्रस्ताव को अंगीकृत करते हुए चयन किया जाना तथ्य और विधि दोनों में सही नहीं था।

B. Constitution, Article 226 - *Ground regarding maintainability of appeal not raised - Held - Petitioner not taking the ground of maintainability of appeal before all three authorities and even in writ petition cannot be permitted to raise at the time of final hearing.* (Para 8)

ख. संविधान, अनुच्छेद 226 – अपील की पोषणीयता के संबंध में आधार नहीं उठाया – अभिनिर्धारित – याची ने अपील की पोषणीयता का आधार तीनों प्राधिकारियों के समक्ष नहीं उठाया और रिट याचिका में भी नहीं लिया, अंतिम सुनवाई के समय उठाने की अनुमति नहीं दी जा सकती।

C. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (1 of 1994), Section 70 - *Appointment of Panchayat Karmi by the resolution of Gram Sabha - Appointment of petitioner by majority of votes and not on the basis of merits in terms of scheme of appointment - Held - Appointment rightly cancelled and fresh selection process rightly ordered - No interference called for - Petition dismissed.* (Para 9)

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*W.P. (S) No.1276/2006 (Indore)

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, 1993 (1994 का 1), धारा 70 – पंचायत कर्मी की नियुक्ति ग्राम सभा के प्रस्ताव द्वारा – याची की नियुक्ति स्कीम के निबंधनों के अनुसार योग्यता के आधार पर नहीं बल्कि बहुमत द्वारा की गई – अभिनिर्धारित – नियुक्ति सही रूप में निरस्त और नई चयन प्रक्रिया सही रूप में आदेशित – कोई हस्तक्षेप आवश्यक नहीं – याचिका खारिज।

Cases referred :

1997(2) VB 113, 1998(2) JLJ 267, 2000(2) MPLJ 176, 2001(1) MPLJ 229, 2008(1) MPHT 256 (DB), ILR (2008) MP 1370.

L.C. Patne, for the petitioner.

Arvind Gokhale, G.A., for the respondents No.1 to 3.

None, for the respondent No.4.

ORDER

SHANTANU KEMKAR, J. :–This is a petition filed under Art.226 of the Constitution of India.

2. The relevant facts of the case briefly are that the petitioner applied for the appointment to the post of Gram Panchayat Karmi in Gram Panchayat, Balodiya District Mandsaur. The Gram Panchayat adopted the resolution dated 8.6.02 for the appointment of the petitioner as Gram Panchayat Karmi. Aggrieved, the 4th respondent Ramchandra filed an appeal under Section 91 of the M.P. Panchanyat Raj Evam Swaraj Adhiniyam,1993 (For short "Adhiniyam") before the Sub Divisional Officer. The Sub Divisional Officer did not find any illegality in the resolution by which the petitioner was selected and appointed as Panchayat Karmi. He accordingly dismissed the appeal filed by the 4th respondents vide order dated 31.01.2003 (Annexure P/12).

3. Aggrieved, the 4th respondent filed revision No.52/02-03 before the Additional Collector Mandsaur. The Additional Collector Mandsaur vide order dated 28.07.03 (Annexure P/13) allowed the revision holding that on persual of the record of Gram Panchayat it appears that the petitioner has been wrongly selected. It has been further observed that in spite of there being other meritorious candidates, the petitioner has been selected not on merits but by way of majority of votes in the meeting which is contrary to the criteria of selection fixed by the Panchayat Karmi Scheme notified by the Government of Madhya Pradesh. The petitioner challenged the aforesaid order passed by the Additional Collector by way of revision before the Additional Commissioner Ujjain. The Additional Commissioner vide order dated 8.4.02 (Annexure P/14) dismissed the petitioner's revision. Hence, this petition.

4. The counsel for the petitioner contended that the petitioner being more meritorious than 4th respondent Ramchandra, he was rightly selected and another candidate Laxman who was having more marks then the petitioner was subsequently elected as Sarpanch of the Gram Panchayat, in the circumstances, the Additional Collector and the Additional Commissioner should not have interfered into the petitioner's selection

and his appointment on the post of Panchayat Karmi. He argued in the appeal filed by the the 4th respondent before the Sub Divisional Officer he challenged the resolution and the resolution being not appeable in view of the judgment of this Court in case of *Ram Lakhan Rawat v/s State of M.P. and ors.* 2000(2) MPLJ 176 the appeal before the Sub Divisional Officer was incompetent.

5. Shri Arvind Gokhale, learned GA argued that selection of the petitioner by way of resolution was followed by issuance of order of appointment by the Gram Panchayat. The challenge before Sub Divisional Officer by way of an appeal was whether the selection made by the Gram Panchayat by adopting the resolution was not correct either on facts or in law. In the circumstances, According to him, the appeal was competent before the Sub Divisional Officer. He further pointed out that this point was not raised by the petitioner before any of the Courts below and the ground in this regard has been raised in this petition also. In the circumstances, the petitioner is not entitled to raise this ground for the first time at this stage of final arguments. According to him, petitioner's selection was not on the basis of the consideration of comparative merits and de-merits of the candidates but was made by the Gram Panchayat on the basis of the majority of votes which is contrary to the provisions of the Scheme and criteria for the selection. In the circumstances, the Additional Collector as also Additional Commissioner have committed no illegality in setting aside the petitioner's selection as Panchayat Karmi and directing the Gram Panchayat to carry out fresh process for the appointment of Panchayat Karmi. He further argued that after passing of the orders of the Additional Commissioner, petitioner's power of Secretary has been revoked on 10.02.2006. In support he referred to paragraph 5 of the return.

6. The petitioner was selected on the basis of the resolution adopted by the Gram Panchayat on 8.6.02. Pursuant to the said resolution an order of appointment was issued on 10.07.02 (Annexure P/7). The 4th respondent challenged the petitioner's selection made by the Gram Panchayat by adopting the aforesaid resolution by filing an appeal under Section 91 of the Adhiniyam read with Rule 3 of the M.P. Panchayat (Appeal and revision) Rules, 1995 (for short, "the rules"). The Sub Divisional Officer while deciding the appeal vide order dated 31.01.2003 (Annexure P/12) has considered whether the selection made by the Gram Panchayat by adopting resolution was correct or not. Merely because the appeal was filed against the resolution, it cannot be said that the same was incompetent as the order of appointment passed on 10.07.02 pursuant to the said resolution and the selection of the petitioner was very much under consideration in appeal before the Sub Divisional Officer.

7. A Division Bench of this Court at Jabalpur in the case of Devidayal Raikwar v/s State of M.P. (Writ Appeal No. 360/08 decided on 8.4.08) after considering conflicting decisions of this Court in the case of *Smt. Hemlata v/s State of M.P. and ors.* 1997(2) Vidhi Bhasvar 113; *Ram Chandra Ahirwar v/s Sub Divisional*

Officer, Jatara and ors; 1998(2) JLJ 267; *Ram Lakhan Rawat v/s State of M.P. and others;* 2000 (2) MPLJ 176 and Hukumchand v/s Dheer Ji and others; 2001 (1) MPLJ 229 and also considering the Division Bench Judgment of this Courtin the Case of *S.M.Sahakari Samiti Seoni v/s Chief Executive Officer, Janapad Panchayat Seoni and another;* (2008 (1) MPHT 254(DB) has held that the view taken by the learned Single Judge in *Ramlakhan Rawat* (Supra) is not correct in law. The Division Bench also held that an appeal would lie against an order of appointment of Panchayat Gram Karmi issued by the Sarpanch of Gram Panchayat under Section 91 of the Adhiniyam read with rule 3 of the rules of 1995. The Division Bench further observed that obviously, while deciding the appeal the Appellate authority will have all necessary powers to grant relief in a case where he decides to allow the appeal and as such powers will also include the power to decide whether the selection made by the Gram Panchayat by adopting resolution was not correct either on facts on in law.

8. Thus in view of the division Bench Judgment of this Court in case of *Devidayal Raikwar* (Supra) and also taking note of the fact that the objection in regard to the maintainability of the appeal having not been taken by the petitioner before all three authorities below and also not even in Writ Petition the objection in this respect is rejected.

9. The petitioner could not establish that there is any material illegality in the orders of the Additional Collector and Additional Commissioner so as to warrant interference by this Court. The findings recorded by these authorities clearly show that the petitioner's appointment was made by the Gram Panchayat not on the basis of merits in terms of the scheme for appointment of Panchayat Karmi but on the basis of majority of votes in the meeting of the Gram Panchayat. Merely because the Additional Collector and Additional Commissioner in their orders have observed that one Laxman was more meritorious then the petitioner and the said Laxman having been been elected Sarpanch subsequently cannot be a ground to sustain illegality committed by the Gram Panchayat in selecting the petitioner. The Additional Collector and the Additional Commissioner have rightly exercised their jurisdiction in holding that the selection process is vitiated since the norms and the criteria fixed for the selection has not been followed by the Gram Panchayat and the selection is made on the basis of majority of votes. In my considered view the authorities have rightly ordered the Gram Panchayat to initiate fresh selection process.

10 Accordingly, the petition deserves to be and is hereby dismissed with no order as costs.

Petition dismissed.

I.L.R. [2008] M. P., 1725

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Sanjay Yadav

22 July, 2008*

AVINASH ... Petitioner

Vs.

UNION OF INDIA & ors. ... Respondents

A. Cigarettes and Other Tobacco Productions (Prohibition of Advertisement and Regulation of Trade and Commerce, Production Supply and Distribution) Act, (34 of 2003), Section 7(5) - *Restrictions on trade and commerce in, and production; supply and distribution of cigarettes and other tobacco products - Section 7(5) of Act, 2003 provides that every package of cigarette or tobacoo product must contain nicotine and tar contents along with maximum permissible limits thereof - Object of Act, 2003 is to create general awareness of ill effects of tobacco products - Object will be frustrated unless provisions of Section 7(5) are enforced by U.O.I. as early as possible.* (Para 8)

क. सिगरेट और अन्य तम्बाकू उत्पाद (विज्ञापन का प्रतिषेध और व्यापार एवं वाणिज्य, उत्पादन आपूर्ति और वितरण का विनियमन) अधिनियम (2003 का 34), धारा 7(5) – सिगरेट और अन्य तम्बाकू उत्पादों के व्यापार एवं वाणिज्य, उत्पादन, आपूर्ति और वितरण पर निर्बन्धन – अधिनियम, 2003 की धारा 7(5) उपबंध करती है कि सिगरेट या तम्बाकू उत्पाद के प्रत्येक पैकेज पर निकोटिन व टार की मात्रा उनकी अधिकतम अनुमेय सीमाओं के साथ दर्शित होनी चाहिए – अधिनियम, 2003 का उद्देश्य तम्बाकू उत्पादों के दुष्प्रभावों की सामान्य जागरूकता पैदा करना है – यदि भारत संघ द्वारा धारा 7(5) के उपबंध यथाशीघ्र प्रवर्तित नहीं किये जाते हैं तो उद्देश्य निष्फल हो जाएगा।

B. Constitution, Article 226 - *Date of enforcement of Act - No mandamus can be issued to bring statutory provision into force when the date on which it is brought into force is left to the discretion of Central Govt. - However, Court can always issue mandamus to consider whether time for bringing a provision of an Act has arrived or not.* (Para 10)

ख. संविधान, अनुच्छेद 226 – अधिनियम के प्रवर्तन की तिथि – वैधानिक उपबन्धों को प्रवर्तन में लाने कोई परमादेश जारी नहीं किया जा सकता है, जब वह तिथि, जिसको यह प्रवर्तन में आता है, केन्द्र सरकार के विवेक पर छोड़ी गई हो – तथापि न्यायालय यह विचार करने सर्वदा परमादेश जारी कर सकता है कि क्या अधिनियम के उपबन्ध को लाने का समय आ गया है या नहीं।

Cases referred :

AIR 1988 SC 1768, (2001) 8 SCC 765

Vivek Tankha, for the petitioner.

Anjali Banerjee, for the respondent No.1.

S.A. Dharmadhikari, for the respondent No.2.

*W.P. No.14976/2007 (Jabalpur)

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.**:–Petitioner is an NGO registered under the Societies Registration Act, 1860 and Dr. Harish Bhalla, a leading de-addiction expert in India is its Honorary Secretary. The petitioner has filed this writ petition as a Public Interest Litigation making a grievance that although tobacco directly and indirectly kills 2,800 people everyday and to prevent such death, Parliament has enacted the Cigarettes and Other Tobacco Productions (Prohibition of Advertisement and Regulation of Trade and Commerce, Production Supply and Distribution) Act, 2003 (for short **'the Act'**) the respondents are not enforcing its provisions and as a consequence, the number of deaths on account of smoking of cigarettes has increased substantially. The petitioner has stated that the Central Government has not yet issued a gazette notification prescribing the permissible level of nicotine and tar contents in tobacco products and has also not taken steps for recognizing laboratories for testing the nicotine, tar and other contents in cigarettes and other tobacco products despite clear provisions in this regard in Sections 7 and 11 of the Act. The petitioner has therefore prayed that the Central Government be directed to enforce a Product Regulation Policy so as to regulate the toxicity and carcinogenicity of all tobacco products, which includes a fixed level of tar, nicotine and carbon monoxide and to constitute and grant recognition to the testing laboratories for nicotine and tar contents in cigarettes and other tobacco products as per Section 11 of the Act. The petitioner has also prayed that the Government be directed to enforce a taxation policy so as to control the toxicity levels in tobacco products and levy higher taxes on products having higher toxicity level.

2. When the hearing of the writ petition was taken up on merits, Mr. Vivek Tankha, learned senior counsel for the petitioner, brought to the notice of the Court the provisions of Section 7 of the Act which puts restrictions on the trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products. He submitted that sub-section (5) of Section 7 of the Act states that no person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco product unless every package of cigarettes or any other tobacco product produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be, on any other tobacco product along with the maximum permissible limits thereof, and the Proviso to sub-section (5) of Section 7 states that the nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may be prescribed by rules made under the Act. He submitted that the language of sub-section (5) of Section 7 of the Act is thus clear that even where the maximum permissible quantity of nicotine and tar contents is not prescribed by the rules, the package of cigarettes or any other tobacco product must disclose on its label the nicotine and tar contents so that the consumer buying the package of cigarettes or any other tobacco product knows exactly the nicotine and tar contents of the cigarettes or any other tobacco product that he is going to buy for consumption.

He further submitted that the Act received the assent of the President on 18.5.2003 and although more than five years have passed thereafter, sub-section (5) of Section 7 of the Act has not been enforced and as a consequence the entire object of the Act has been frustrated and the number of deaths on account of consumption of cigarettes and other tobacco products are increasing in the country every year. He submitted that the Court should issue appropriate directions so that the nicotine and tar contents are displayed on the label of the package of cigarettes or any other tobacco product. He submitted that the Court should also direct the Central Government to frame the Rules prescribing the maximum permissible quantity of nicotine and tar contents under sub-section (5) of Section 7 of the Act and to establish and recognise laboratories for testing of such products. He cited the decision in *Hindustan Coca-cola Beverages (P) Ltd. vs. Santosh Mittal and others*, (2005) 5 SCC 771 in which the order passed by the Division Bench of the High Court of Rajasthan issuing directions to Pepsi Company and Coca-Cola and other manufacturers of beverages and soft drinks to disclose the composition and contents of the product including the presence of pesticides and chemicals on the bottle, package or container, as the case may be, was not interfered with by the Supreme Court.

3. Miss Anjali Banerjee, learned counsel for the respondent No. 1, on the other hand, submitted that sub-section (3) of Section 1 of the Act provides for appointment of different dates for bringing into force the different provisions of the Act. She submitted relying on the return filed by the respondent No. 1 that the provisions of the Act are being enforced in a phased manner as and when the infrastructure for their enforcement is available and thereafter, the rules are being framed. Regarding enforcement of sub-section (5) of Section 7 of the Act. she submitted that there is little institutional capacity to test the nicotine and tar contents and hence, the Central Government is actively engaged in the process of building capacity in the country by setting up Regional/Referral laboratory facilities for testing tar and nicotine contents in all forms of tobacco products. She also submitted that the Central Government is also in the process of taking technical assistance from the Centre for Disease Control, Atlanta USA, which is a world class institution having necessary technical expertise. Relying on paragraph 4 of the return filed on behalf of the respondent No. 1 she submitted that the rules for implementation of Section 7 of the Act will be framed only after the laboratory facilities are in place, otherwise enforcement of the rules will not be possible. She submitted that the intention of the Central Government is to discourage the use and consumption of tobacco products in any form and quantity by creating a general awareness of the ill effects of tobacco products amongst smokers and non-smokers and by enacting stringent laws to this effect, which will reduce the demand for tobacco products and thereby its supply and will eventually eradicate the menace caused by the consumption of tobacco products.

4. Mr. Dharmadhikari, learned counsel appearing for the respondent No. 2,

relying on a separate return filed by the respondent No.2 submitted that duty structures for various goods/products is determined after taking into account all relevant factors, including revenue requirement, need to encourage/discourage consumption of such products, administrative feasibility of tax collection etc. He also submitted relying on the return of the respondent No 2 that as per the present duty structure on cigarettes of tobacco and cigarettes of tobacco substitutes, excise duty on cigarettes increases with the increase of the length of cigarettes and cigarettes of tobacco substitutes attract lesser rate of duty as compared to cigarette of tobacco (except small length cigarette). He submitted that fiscal policy fall within the domain of the legislature or the executive and regulation of toxicity of tobacco falls within the domain of the Ministry of Health and Family Welfare.

5. Fiscal policy with regard to taxation of tobacco and tobacco products is not within the domain of the Court and it is well settled that a wide latitude has to be given to the Government in matters of taxation and the Court normally does not interfere in such matters unless there is a clear violation of the Constitution or the law. Hence, in this writ petition, we are not inclined to issue any directions to the respondent No.2 to adopt a fiscal , policy of controlling toxicity levels in tobacco products and impose a higher tax on products having higher toxicity level. We leave it to the wisdom of the Government and the legislature to decide a policy that they deem fit and proper considering all relevant factors including the need to control and reduce the consumption of tobacco and tobacco products.

6. Regarding enforcement of the provisions of the Act, sub-section (3) of Section 1 of the Act provides that the Act shall come into on such date as the Central Government may by notification in the Official Gazette appoint and different dates may be appointed for different provisions of the Act. We find that notification dated 25.2.2004 has been issued under sub-section (3) of Section 1 of the Act enforcing the provisions of Sections 1,2,3,4,5,6 (a), 12 (1) (b), 12 (2), 13 (1) (b), 13 (2), 14, 16, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the Act with effect from 1.5.2004. We also find that a notification dated 16.11.2007 has also been issued under sub-section (3) of Section 1 enforcing the provisions of Sections 7(1) (2) (3) (4), 8. 9, 10 and 20, but no notification appears to have been issued as yet by the Central Government bringing into force the provisions of sub-section (5) of Section 7 and Section 11 of the Act.

7. Sections 7 and 11 of the Act are quoted herein below:

> "7. Restrictions on trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products–
>
> (1) No person shall, directly or indirectly, produce supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him bears thereon, or on its label, 1 [such specifiec warning including a pictorial warning as may be prescribed].

(2) No person shall carry on trade or commerce in cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco product; sold, supplied or distributed by him bears thereon, or on its label, the specified warning.

(3) No person shall import cigarettes or any other tobacco products for distribution or supply for a valuable consideration or for sale in India unless every package of cigarettes or any other tobacco products so imported by him bears thereon, or on its label, the specified warning.

(4) The specified warning shall appear on not less than one of the largest panels of the package in which cigarettes or any other tobacco products have been packed for distribution, sale or supply for a valuable consideration.

(5) No person shall, directly or indirectly, produce supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be on other tobacco products along with the maximum permissible limits thereof:

Provided that the nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may be prescribed by rules made under this Act.

11. **Testing laboratory for nicotine and tar contents**– For purposes of testing the nicotine and tar contents in cigarettes and any other tobacco products the Central Government shall by notification in the Official Gazette grant recognition to such testing laboratory as that Government may deem necessary.'

8. A reading of Section 7 of the Act quoted above would show that sub-section (1) of Section 7 of the Act provides for specified warning including a pictorial warning to be prescribed on the label of the package containing the cigarettes or any other tobacco product and prohibits the production, supply or distribution of cigarettes or other tobacco products unless the package of cigarettes or other tobacco products contain the specified warning. Sub-section (2) of Section 7 of the Act provides for specified warning on the label of the cigarettes or any other tobacco product and prohibits the sale, supply or distribution of any cigarette or any other tobacco product unless its label contains the specified warning. Sub-section (5) of Section 7 of the Act prohibits a person from directly or indirectly producing, supplying or distributing cigarettes or any other tobacco product unless every package of cigarettes or any other tobacco product produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be, on any other tobacco product al.ongwith the maximum permissible limits thereof. The proviso to sub-section (5) of Section 7 further states that the nicotine and tar contents shall not exceed the

maximum prescribed quantity as may be prescribed by the rules made under the Act. These provisions have been made by the Legislature to ensure that the consumer knows of the consequences of consuming a cigarette or any other tobacco product which he is buying for consumption, but unless the provisions of sub-section (5) of Section 7 of the Act are enforced the consumer will not know the tar and nicotine contents of the cigarette or any other tobacco product and whether such tar and nicotine contents in the product which he proposes to consume exceeds the maximum permissible limits. Hence, the laudable objects of the Act, as mentioned in the return filed by the respondent No. 1, namely, reducing the demand for tobacco products by creating a general awareness of the ill effects of the tobacco products amongst smokers and non-smokers and thereby reducing its supply and eventually eradicating the menace caused by the consumption of tobacco cigarettes and other tobacco products, will be frustrated unless the provisions of sub-section (5) of Section 7 of the Act are enforced by the respondent No. 1 as early as possible.

9. The difficulties pleaded in the return filed by the respondent No. 1 for not enforcing the provisions of sub-section (5) of Section 7 of the Act are that there is little institutional capacity to test the nicotine and tar contents of the cigarettes and other tobacco products and that the Central Government is also in the process of obtaining technical assistance from the Centres for Disease Control, Atlanta USA which is having necessary technical expertise in the matter and that the rules for implementation of the provisions can only be framed after laboratory facilities are in place or otherwise enforcement of the rules will not be possible. When the matter was listed on the previous occasion before the Court on 8.5.2008, it was brought to the notice of the Court by Miss Banerjee that before the Supreme Court, a counter affidavit has been filed by the Central Government stating that a budget of approximately rupees 51 crores has been proposed for the capacity building of 5-6 laboratories so that the laboratories as contemplated by Section 11 of the Act are established and recognised and the nicotine and tar contents of cigarettes and other tobacco products can be tested to find out whether they exceed maximum permissible limit.

10. The use of the word "may" in sub-section (3) of Section I of the Act by the legislature shows that a discretion is vested in the Central Government under sub-section (3) of Section 1 of the Act to appoint the date when the provisions in sub-section (5) of Section 7 and Section 11 shall come into force. The Supreme Court has held in *Aeltemesh Rein vs Union of India and others*, AIR 1988 SC 1768 that a writ of mandamus cannot be issued to the Central Government to bring a statutory provision into force when according to the statute the date on which it is brought into force is left to the discretion of the Central Government, but the Court can always issue a mandamus to the Central Government to consider whether the time for bringing a provision of an Act into force has arrived or not. In *Murii S. Deora vs. Union of India*, (2001) 8 SCC 765, after considering the

right to life guaranteed under Article 21 of the Constitution as well as harmful effects of the contents of tobacco including nicotine and tar on the life of human beings the Supreme Court has also issued directions prohibiting smoking in public places.

11. For the aforesaid reasons, we direct the respondent No. 1 to seriously consider whether the provisions of sub-section (5) of Section 7 of the Act could be enforced by issuing necessary notification under sub-section (3) of Section 1 of the Act and to consider whether the rules prescribing the maximum permissible limits of nicotine and tar in cigarettes and other tobacco products could be made and testing laboratories contemplated by Section 11 of the Act could be established and recognised as early as possible. We further direct the respondent No. 1 to file an affidavit showing such consideration within a period of six months from the date of receipt of the copy of this order.

With the aforesaid directions, the writ petition is disposed of.

Petition disposed of.

I.L.R. [2008] M. P., 1731
WRIT PETITION
Before Mr. Justice Ajit Singh
22 July, 2008*

SAVITA BEN THAKUR DAS PATEL (Smt.) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Lok Dhan (Shodhya Rashiyon Ki Vasuli) Adhiniyam, 1987 (1 of 1988), Sections 3, 4, Land Revenue Code, M.P., 1959, Sections 147, 154-A - ***Recovery of dues of Banking Company as arrears of land revenue - Petitioners had taken loan from bank and mortgaged their agricultural land - Lands were auctioned under Adhiniyam, 1987 as the petitioners committed default in repayment of loan amount - Auction proceedings challenged on the ground that they are in violation of Sections 147,154-A of Code - Held - When there are two apparently conflicting provisions and if a Special provision is made on a certain matter, that matter is excluded from general provision - Provisions of Adhiniyam will prevail over provisions of Sections 147,154-A of Code - Petition dismissed.*** (Para 8)

लोक धन (शोध्य राशियों की वसूली) अधिनियम, 1987 (1988 का 1), धाराएँ 3, 4, भू–राजस्व संहिता, म.प्र., 1959 धाराएँ 147, 154–ए – बैंकिंग कम्पनी के शोध्य की वसूली भू राजस्व के बकाया के तौर पर – याचीयों ने बैंक से ऋण लिया एवं अपनी कृषि भूमि बंधक रखी – भूमियाँ 1987 के अधिनियम के अधीन नीलाम हुई क्योंकि याचीयों ने ऋण के प्रतिसंदाय में व्यतिक्रम किया – नीलामी कार्यवाही को इस आधार पर चुनौती दी गई कि वे संहिता की धारा 147,154–ए के उलंघनों में हैं – अभिनिर्धारित – जब दो प्रगट तौर पर विरोधी उपबंध हों एवं यदि एक विशिष्ट उपबन्ध किसी मामले

*W.P. No 4969/2008 (Jabalpur)

के लिये निर्मित हो तब मामला सामान्य उपबन्ध से अपवर्जित होगा – अधिनियम के उपबन्ध संहिता की धारा 147, 154–ए के उपबन्धों पर अभिभावी होंगे – याचिका खारिज।

ORDER

AJIT SINGH, J. :–The order passed in Writ Petition No. 4969/2008 *(Smt. Savita Ben Thakur Das Patel Vs. The State of Madhya Pradesh and others)* shall also govern the disposal of Writ Petition No. 4972/2008 *(Rupesh Thakur Das Patel Vs. The State of Madhya Pradesh and others)*. Since both these petitions involve a common question of law, they were heard together.

2. The petitioners herein have prayed for quashing of recovery proceedings and notification dated 4.3.2008, Annexure P1, issued by the Tahsildar (respondent no. 3) in respect of proclamation of sale of their immovable property for recovery of dues of the Citizen Cooperative Bank Limited (respondent no. 4) (in short, "the Bank").

3. The petitioners are mother and son. They, for their business, took financial assistance of huge amount from the Bank after mortgaging their agricultural land in the form of security against the loan. The petitioners after paying some installments committed default. The Bank, therefore, initiated recovery proceedings against them under the provisions of Madhya Pradesh Cooperative Societies Act, 1960 but did not pursue the proceedings and instead it took recourse for recovery of dues under the provisions of the Madhya Pradesh Lok Dhan (Shodhya Rashiyon Ki Vasuli) Adhiniyam, 1987 (in short, "the Adhiniyam"). The Bank sent a certificate on 10.2.2005 to the Collector for recovery of dues who, in turn, issued the Revenue Recovery Certificate on 15.2.2005 against the petitioners. The Tahsildar thereupon issued demand notices to the petitioners and when these notices were not honoured, he issued the impugned proclamation for sale of the immovable property of petitioners mortgaged with the Bank. The property was auctioned on 11.4.2008 and the sale was ultimately finalized in favour of one Surya Developers being the highest bidder for an amount of Rs. 20,21,000/-. The auction purchaser has also deposited the amount with the Bank.

4. It is pertinent to mention here that in *Manoj Tarwala Vs. The State of Madhya Pradesh and others* 2006 (3) M.P.H.T. 443 a Division Bench of this Court has held that Revenue Recovery Certificate issued at the instance of Bank is executable under the provisions of the Adhiniyam and the proceedings initiated in similar matters by the Bank against several defaulters have been held to be legal and valid.

5. The only submission made on behalf of the petitioners is that their land, being an agricultural land measuring less than four hectares, could not have been attached and sold for the recovery of dues as the attachment and sale of such land is not permissible under section 147 read with 154-A of the Madhya Pradesh Land Revenue Code (in short, "the Code"). According to their learned counsel, the recovery proceedings against the petitioners were, therefore, bad in law and deserved to be quashed. The learned counsel for Bank, on the other hand, justified the validity of the recovery proceedings

6. The object and purpose of the Adhiniyam is to provide for the speedy recovery of certain classes of dues payable to the State Government, Government Companies and certain categories of Corporations and Banking Companies. The respondent, Bank, admittedly falls within the meaning of "Banking Company" as defined under section 2(b) of the Adhiniyam and section 3 provides the procedure for recovery of dues of the Banking Company as arrear of land revenue under the Code. There is also a saving provision section 4 in the Adhiniyam which reads as under:

> **4. Savings.** - (1) Nothing in section 3 shall,-
>
> (a) affect any interest of the State Government, a Corporation, a Government company or any banking company in any property, created by any mortgage, charge, pledge or other encumbrance; or
>
> (b) affect any right or remedy against any person other than a person referred to in that section, in respect of a contract of indemnity or guarantee entered into in relation to an agreement referred to in that section or in respect of any interest referred to in clause (a).
>
> (2) Where the property of any person referred to in section 3 is subject to any mortgage, charge, pledge or other encumbrance in favour of the State Government, a Corporation, a Government company or a banking company, then-
>
> (a) in every case of a pledge or hypothecation of goods, proceedings shall first be taken for sale of goods pledged or hypothecated and if the proceeds of such sale are less than the sum due, then proceedings shall be taken for recovery of the balance as arrear of land revenue:
>
> Provided that where the Collector is of the opinion that it is necessary so to do for ensuring the recovery of the sum due to the State Government or to a Corporation a Government company or a banking company, as the case may be, he may for reasons to be recorded, direct proceedings to be taken for recovery of the sum due, as arrear of land revenue before or at the same time the proceedings to be taken for sale of the goods pledged;
>
> (b) in every case of a mortgage, charge or other encumbrance on immovable property, such property or, as the case may be, the interest of the defaulter therein, shall first be sold in proceedings for recovery of the sum due from that person as arrear of land revenue, and any other proceedings may be taken thereafter only if the Collector certifies that there is no prospect of realization of the entire sum due through the first mentioned process within a reasonable time."

7. Section 147 of the Code enumerates more than one process for recovery of arrear of land revenue. Under clause (b) the process provided for recovery is by attachment and sale of the holding but proviso to the section clearly states that process specified in clause (b) shall not permit attachment and sale of holding

where the defaulter holds less than six hectares of land in the scheduled area. Section 154-A was substituted in the Code by Madhya Pradesh Act No. 1 of 1971 and it provides where the arrear of land revenue is due in respect of a holding the Tahsildar, after attachment of holding under clause (b) of section 147, shall let out that holding to any person other than the defaulter for a period not exceeding ten years upon such terms and conditions as the Collector may fix.

8. A combined reading of sub-section (2) and clause (b) of the Saving section 4 of Adhiniyam makes it clear that where the property of any person (defaulter) referred to in section 3 is subject to any mortgage in favour of the State Government, a Corporation, a Government Company or a Banking Company then in every case of a mortgage on immovable property, such property, or the interest of the defaulter therein shall first be sold in proceedings for recovery of the sum due from that person as arrear of land revenue and any other proceedings would be taken thereafter only when the Collector certifies that there is no prospect of realization of the entire sum due through sale within a reasonable time. This provision especially deals with the recovery of dues as arrear of land revenue from a person whose immovable property is mortgaged with the State Government, a Corporation, a Government Company or a Banking Company by first direct sale of that immovable property. The Saving provision of section 4 of the Adhiniyam is, therefore, a special provision whereas the provisions of sections 147 and 154-A of the Code are general in nature. This is also obvious from the fact that sections 147 and 154-A do not deal, in any manner, with the recovery of dues of loan obtained by mortgaging the land in favour of the State Government, a Corporation, a Government Company or a Banking Company. The question now is which of the two conflicting provisions, one of the Adhiniyam and the other of Code, would apply in the case at hand. The rule of harmonious construction in this regard is well settled that out of the two apparently conflicting provisions, if a special provision is made on a certain matter, that matter is excluded from the general provision. The principle is expressed in the maxims *Generalia specialibus non derogant* (General things do not derogate from special things) and Generalibus specialia derogant (Special things derogate from general things). These principles have also been applied in resolving a conflict between two different Acts. (See Justice G. P. Singh's Principles of Statutory Interpretation, 11th Edition, pp. 141, 142). I have already held that the Saving provision of section 4 of the Adhiniyam is a special provision and, therefore, this provision would prevail over the general provisions of sections 147 and 154-A of the Code. Thus, since the agricultural land of petitioners was mortgaged with the Bank as a security for financial assistance, the recovery of sum due from them by selling the land through auction was neither illegal nor invalid.

9. A submission was also made on behalf of the Bank that the dues of the Bank were not arrear of land revenue but were recovered as arrear of land revenue under section 155 of the Code and that an arrear of land revenue is distinct and separate from money recoverable as arrear of land revenue. It is not necessary

to decide whether sections 147 and 154-A of the Code do not apply for recovery of any sum whatsoever recoverable as arrear of land revenue because I have held that it has no application for recovery as arrear of land revenue of loan secured by mortgage of immovable property in favour of the State Government, a Corporation, a Government Company or a Banking Company.

10. The petitions fail and are dismissed but without any order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 1735

APPELLATE CIVIL

Before Mr. Justice S. Samvatsar & Mr. Justice Sanjay Yadav

8 January, 2008*

COMMISSIONER OF INCOME TAX ... Appellant

Vs.

KRISHI UPAJ MANDI SAMITI, MORENA ... Respondent

A. Income Tax Act (43 of 1961), Sections 10(20) (Explanation), 10(29) [As amended w.e.f. 01.04.2003], 11, 12, 12A, 12AA(1)(b)(ii), Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Sections 7, 19, 38, 39 - ***Exemption from payment of Income Tax to Market Committee - Only those assessee are entitled to registration u/s 12A & 12AA of I.T. Act who are entitled to exemption u/s 11 & 12 of the I.T. Act - Marketing committees are not entitled for exemption u/s 12 after the amendment w.e.f. 01.04.2003 - However, marketing committees fulfill all the requirements of Section 11 to get exemption, therefore, are entitled to registration u/s 12A & 12AA of the I.T. Act.*** (Paras 9, 17 & 35)

क. आयकर अधिनियम (1961 का 43), धाराएँ 10(20)(स्पष्टीकरण), 10(29) [01.04.2003 से यथा संशोधित], 11,12,12क, 12कक (1)(बी)(ii),कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धाराएँ 7, 19, 38, 39 – विपणन समिति को आयकर के भुगतान से छूट – आयकर अधिनियम की धारा 11, 12 में छूट पाने वाले निर्धारिती ही धारा 12क व 12कक के अन्तर्गत पंजीयन पाने के अधिकारी हैं – 01.04.2003 के संशोधन प्रभावी होने के बाद विपणन समिति धारा 12 के अधीन छूट पाने की अधिकारी नहीं है – यद्यपि विपणन समिति छूट पाने के लिए धारा 11 की सभी आवश्यकताओं को पूरा करती है, अतः आयकर अधिनियम की धारा 12क, 12कक के अधीन पंजीयन की अधिकारी है।

B. Income Tax Act (43 of 1961), Sections 10(20)(Explanation), 10(29) [As amended w.e.f. 01.04.2003], Sections 11, 11A - ***Intention behind the amendment -Before amendment, Sections 10(2) & 10(29) of the I.T. Act provide for blanket exemption to all local authorities without fulfilling any condition - Section 11 provides for exemption on fulfillment of certain conditions - Thus, the intention behind the amendment was to remove blanket***

*MA (IT) No.12/2007 (Gwalior)

exemption to local authorities and provide exemption, only if they fulfill the conditions u/s 11A. (Para 30)

ख. आयकर अधिनियम (1961 का 43), धाराएँ 10(20)(स्पष्टीकरण), 10(29) [01.04.2003 से यथा संशोधित], धाराएँ 11, 11क – संशोधन का आशय – संशोधन के पहले आयकर अधिनियम की धारा 10(2) व 10(29) सभी स्थानीय प्राधिकारियों को बिना कोई शर्त पूरी किये व्यापक छूट प्रदान करती हैं – धारा 11 कुछ शर्तों को पूरा करने पर छूट प्रदान करती है – अतः संशोधन का आशय था कि स्थानीय प्राधिकारियों को प्राप्त व्यापक छूट को समाप्त करना और यदि वे धारा 11क की शर्तें पूर्ण करें तो ही छूट प्रदान करना।

Cases referred :

(2007) 294 ITR 563, (2007) 294 ITR 549, (2007) 210 CTR (Bom) 386, (2007) 295 ITR 561 (SC), (1998) 8 SCC 430, (1986) 159 ITR 1.

R.D. Jain with *DPS Bhadoriya & Rajmani Bansal*, for the appellant.

T.C. Singhal, MPS Raghuvanshi & S.P. Jain, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by **S. SAMVATSAR, J.** :–This common judgment shall govern the disposal of the following connected appeals. Misc.Appeal (IT) 12 of 2007 shall be the leading case.

Misc.Appeal (IT) 11/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Kailaras.

Misc.Appeal (IT) 13/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Ambah.

Misc.Appeal (IT) 14/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Porsa.

Misc.Appeal (IT) 15/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Sabalgarh.

Misc.Appeal (IT) 16/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Joura.

Misc.Appeal (IT) 17/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Mehgaon

Misc.Appeal (IT) 18/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Lahar.

Misc.Appeal (IT) 19/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Bhind.

Misc.Appeal (IT) 20/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Alampur.

Misc.Appeal (IT) 21/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Mau.

Misc.Appeal (IT) 22/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Gohad.

Misc.Appeal (IT) 23/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Rannod District Shivpuri.

Misc.Appeal (IT) 24/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Karera, District Shivpuri.

Misc.Appeal (IT) 25/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Shivpuri, District Shivpuri.

Misc.Appeal (IT) 26/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Vijaipur, District Sheopur Kalan.

Misc.Appeal (IT) 27/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Khaniyadhana, District Shivpuri.

Misc.Appeal (IT) 28/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Magroni, District Shivpuri.

Misc.Appeal (IT) 29/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Sheopur Kalan.

Misc.Appeal (IT) 30/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Khatora, District Shivpuri.

Misc.Appeal (IT) 31/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Kolaras, District Shivpuri.

Misc.Appeal (IT) 32/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Baroda, District Sheopur Kalan.

Misc.Appeal (IT) 33/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Pichhore, District Shivpuri.

Misc.Appeal (IT) 34/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Badarwas, District Shivpuri.

Misc.Appeal (IT) 35/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Bhander, District Datia.

Misc.Appeal (IT) 36/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Isagarh, District Guna.

Misc.Appeal (IT) 37/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Guna.

Misc.Appeal (IT) 38/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Binaganj.

Misc.Appeal (IT) 39/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Dabra, District Gwalior.

Misc Appeal (IT) 40/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Piprai

Misc.Appeal (IT) 41/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Mungaoli.

Misc.Appeal (IT) 42/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Maksudangarh.

Misc.Appeal (IT) 43/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Lashkar, District Gwalior.

Misc.Appeal (IT) 44/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Aron.

Misc.Appeal (IT) 45/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Pohri District Shivpuri.

Misc.Appeal (IT) 46/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Ashoknagar .

Misc.Appeal (IT) 47/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Datia.

Misc.Appeal (IT) 48/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Seondha, District Datia.

Misc.Appeal (IT) 49/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Raghogarh.

Misc.Appeal (IT) 50/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Shadora.

and

Misc.Appeal (IT) 51/2007 Commissioner of Income Tax vs. Krishi Upaj Mandi Samiti, Kumbhraj

2. The aforesaid appeals filed by the Income Tax Department under Section 260-A of the Income Tax Act, 1961 (in short "The IT Act) challenging the common order dated 29.3.2007 passed by the Income Tax Appellate Tribunal, Agra whereby the appeals filed by different Krishi Upaj Mandi Samities challenging the order of Commissioner, Income Tax refusing to grant exemption certificate under Section 12AA(1)(b)(ii) of the IT Act was allowed.

3. Brief facts of the case are that respondent, Krishi Upaj Mandi Samiti is established under Section 7 under the provisions of M.P. Krishi Upaj Mandi Adhiniyam, 1972. Powers and functions of the said Market Committees are under Section 19 of the said Adhiniyam which empowers the market committee to collect market fee from the agricultural produce brought and sold in the market area. The powers to levy market fee is provided under Section 19 of the Adhiniyam. Section 38 provides for constitution of Market Committee Fund, and all the moneys received by the Committee is paid into a fund called Market committee Fund. Section 39 of the Adhiniyam provides for application of the Committee fund and as per said provisions, the funds can be utilised only for the purposes laid down under Section 39, which are as under :

(i) the acquisition of a site or sites for the market yards;

(ii) the maintenance and improvement of the market yards;

(iii) the construction and repairs of buildings necessary for the purposes of the market and for convenience or safety of the persons using the market yard;

(iv) the maintenance of standard weights and measures;

(v) the meeting of establishment charges including payments and contributions towards provident fund, pension and gratuity of the officers and servants employed by a market committee ;

(vi) the payment of interest on the loans that may be raised for the purpose of the market and provisions of sinking fund in respect of such loans;

(vii) the collection and dissemination or information relating to crops statistics and marketing of agricultural produce;

(viii) (a) the expenses incurred in auditing the accounts of the market committee ;

(b) payment of honorarium to Chairman, travelling allowance of Chairman, Vice-Chairman and other members of the market committee and sitting fees payable to member for attending the meeting.

(c) contribution to State marketing development fund ;

(d) meeting any expenditure for carrying out order of the State Government and any other work entrusted to market committee under any other Act;

(e) contribution to any scheme for increasing agricultural production and scientific storage ;

(f) to develop necessary infrastructure within a radius of one kilometer from the market yard/sub-market yard for facilitating the flow of notified agricultural produce with the prior sanction of the Director and with the prior permission of the local authority concerned for using their land for this purpose;

(g) to provide for development of agricultural produce in the market area ;

(h) payment of expenses on elections under this Act.

(ix) any other purpose whereon the expenditure of the market committee fund is in the public interest, subject to the prior sanction of the State Government.

4. The respondent market committees filed applications for registration under Section 11A and 12 AA of the IT Act.

5. These market committees were exempted under Section 10, clause 20 of the IT Act which provides for exemption to the local authorities from payment of Income Tax. The market committee being a local authority by virtue of Section 7(3) of the Adhiniyam was exempted from payment of income tax by virtue of clause 20 of Section 10 and section 29 of the Act upto 1.4.2003. On 1.4.2003, an amendment was introduced and explanation to subsection 20 of Section 10 was added. By adding of the explanation, the word "local authority" was defined for the purpose of IT Act and as per the explanation, only 4 types of local authorities i.e. Panchayats, Municipalities, Municipal Committees and Cantonment Boards were included in the explanation. Thus, definition of local authority is restricted only for the aforesaid local authorities for the purpose of Section 20 of the IT Act.

6. Simultaneously, while adding same explanation, subsection 29 of Section 10 was omitted with effect from 1.4.2003. The said omitted subsection 29 reads as under :

> "In the case of an authority constituted under any law for the time being in force for the marketing of commodities, any income derived from the letting of go-downs or warehouses for storage, processing or facilitating the marketing of commodities."

7. Thus due to omission of sub clause 29, the exemption of market committee from payment of tax was withdrawn. In view of these amendments, the Commissioner rejected the application for registration under Section 12A and 12AA of the IT Act. This order was challenged by the Marketing Committees by filing an appeal before the tribunal and those appeals were allowed by the impugned judgment, hence the present appeal.

8. The present appeals are admitted for final hearing on the following substantial two questions of law :

> (1) "Whether Income Tax Appellate Tribunal was justified in directing Commissioner Income Tax to permit the registration of respondent/assessee under Section 12AA of the Income Tax without considering omission of sub-section 29 of Section 10 of the Income Tax Act with effect from 1/4/2003"?
>
> (2) "Whether in the light of omission of sub-section (29) of Section 10, respondent Krishi Upaj Mandi Samiti is entitled for exemption of certificate under Section 12AA of the Income Tax Act without examining whether the respondent Krishi Upaj Mandi Samiti falls within the definition of the "local authority" ?

9. Mr. R.D.Jain, senior counsel submitted that only those assesses are entitled to registration under Section 12A and 12 AA of IT Act who are entitled to exemption under Section 11 and 12 of the Act. For this purpose, he has referred to Section 12A and 12AA of the IT Act which read as under :

12A. Conditions as to registration of trusts, etc.-

The provisions of Section 11 and Section 12 shall not apply in relation to the income of any trust or institution unless the following conditions are fulfilled, namely :

(a) the person in receipt of the income has made an application for registration of the trust or institution in the prescribed form and in the prescribed manner to the Commissioner before the first date of July, 1973, or before the expiry of a period of one year from the date of the creation of the trust or the establishment of the institution, [whichever is later and such trust or institution is registered under Section 12AA] ;

[Provided that where an application for registration of the trust or institution is made after the expiry of the period aforesaid, the provisions of sections 11 and 12 shall apply in relation to the income of such trust or institution, -

(i) from the date of the creation of the trust or the establishment of the institution if the Commissioner is, for reasons to be recorded in writing, satisfied that the person in receipt of the income was prevented from making the application before the expiry of the period aforesaid for sufficient reason ;

(ii) from the first date of the financial year in which the application is made, if the Commissioner is not so satisfied :]

(b) Where the total income of the trust or institution as computed under this act without giving effect to the provisions of section 11 and section 12 exceeds (fifty) thousand rupees in any previous year, the accounts of the trust or institution for that year have been audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and the person in receipt of the income furnishes along with the return of income for the relevant assessment year the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed.]

12AA. Procedure for registration.-

(1) The Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) of Section 12A, shall --

(a) call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the trust or institution and may also make such inquiries as he may deem necessary in this behalf; and

(b) after satisfying himself about the objects of the trust or institution and the genuineness of its activities, he -

(i) shall pass an order in writing registering the trust or institution

(ii) shall, if he is not so satisfied, pass an order in writing refusing the trust or institution, and a copy of such order shall be sent to the applicant :

Provided that no order under sub-clause (ii) shall be passed unless the applicant has been given a reasonable opportunity of being heard.

(2) Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) of section 12A.]

[(3) Where a trust or an institution has been granted registration under clause (b) of sub-section (1) and subsequently the Commissioner is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution:

Provided that no order under this sub-section shall be passed unless such trust or institution has been given a reasonable opportunity of being heard.].

10. Mr. R.D.Jain, appearing for the appellant vehemently urged that impugned judgment passed by the tribunal is contrary to law. The tribunal has not properly considered the effect of amendment in Section 10(20) and omission of Section 10(29) of the Act. He submitted that prior to the amendment, the local authority included the word "market committee" and were no doubt entitled for exemption. but after the amendment they are neither entitled for exemption nor for registration under Section 12A or 12AA of the IT Act.

11. In reply to these arguments, Shri T.C.Singhal, learned counsel for market committees submitted that market committees are local authorities within the meaning of Section 7(3) of the Adhiniyam which lays down that:

> "Notwithstanding anything contained in any enactment for the time being in force, every Market Committee shall, for all purposes, be deemed to be a local authority."

12. He, therefore, contented that even after adding the explanation in sub clause 20, the market committee still continues to be local authority for all the purpose and is therefore entitled for exemption. In alternate, he contented that even if it is held that market committees are not entitled for exemption under Section 10, still the market committee is entitled for exemption under Section 11 and 12 or any other provisions of the IT Act and therefore merely because section 10 is amended, market committees cannot be deprived of the benefit available to it under Section 11 and 12 of the Act.

13. The Hon. Apex Court in case of *State of M.P. Vs. Krishi Upaj Mandi Samiti*, (1998) 8 SCC 430 after considering the provisions of Section 7(3) of the Adhiniyam rejected the contention of Market committee and held that – explanation

for all the purposes under Section 7(3) will apply to other Acts. In the aforesaid case the Apex Court was considering the liability of the marketing committee to pay tax under M.P. Nagriya Sthawar Sampatti Kar Adhiniyam, 1964.

14. Punjab and Haryana High Court has considered the said question in its judgment in the case of *CIT Vs. Market Committee,* (2007) 294 ITR 563, held that :-

> "It is not possible for us to accept that section 10(20) of the IT Act after the amendment so as to exclude local authority from the benefit of Tax exemption would render market committee eligible for exemption for other provisions of the IT Act. Although market committees are not entitled for tax exemption under Section 10(20) of the IT Act yet a claim of exemption is still open to consider other alternate provision if any made out."

15. Thus, Punjab and Haryana High Court has held that market committees are not entitled for exemption under section 10.

16. The another judgment on this issue is the judgment of Delhi High Court in the matter of *Agricultural Produce Market Committee Vs. CIT,* (2007) 294 ITR 549. In that case, Delhi High Court has held that section 10(20) of the IT Act 1961 was amended with effect from April 1, 2003 and explanation was added to. The most striking feature of the explanation is that it provides an exhaustive meaning of the expression "local authority". The word "means" used in the Explanation leaves no scope for addition of any other entity as a "local authority" to those listed in the Explanation.

17. Thus, it is clear that market committees are not entitled for exemption under Section 12 of the Act after 1st April, 2003.

18. Now the question is whether the market committee is entitled for exemption under some other provision of the IT Act ?

19. Learned counsel for the market committees submitted that they are entitled for exemption under Section 11(1)(a). Section 11(1)(a) reads as under :

> S.11:-Subject to the provisions of Section 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income -
>
> (a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of fifteen percent of the income from such property.

20. On bare perusal of said section, it is clear that for getting exemption under Section 11, three requirements must be fulfilled :

(i)income is derived from the property

(ii) Property held under trust

(iii)the income is applied wholly for charitable or religious purposes

21. The first question is whether the income of Krishi Upaj Mandi is derived from the property and is held under trust wholly for charitable or religious purpose.

22. Sub-section (2) of section 11 provides that for getting the exemption it is necessary that the income must be applied for charitable or religious purpose in India to the extent of 85% of the income derived during that year from the property held under trust. In the present case, the Commissioner while rejecting the application for registration has held that the committee charges 2% from the firm houses who come to Mandi for sale of their produce, as a Mandi fees and out of 2%, 1.2% is directly transferred to the State Govt. Thus, the committee is not applying 80% of its income towards charitable purposes. This finding is reversed by the tribunal.

23. The Punjab and Haryana High Court in the matter of CIT Vs. Market committee (supra) has held that by virtue of Section 28 of the Act of Punjab, the market committee is required to spend entire amount for public utility. Similar is the position with our Adhiniyam.

24. Section 39 of the Adhiniyam pertains to the purposes for which the amount can be spent by the market committees and the said amount is utilised only for public amenities. Section 2(15) of the IT Act defines charitable purposes which includes relief of the poor, education, medical relief and the advancement of any other object of general public utility.

25. Relying on this definition, the contention of learned counsel for respondent is that as the amount was spent only on public utility the Krishi Upaj Mandi committees are applying entire entire income towards charitable purposes and hence tribunal has rightly allowed the appeal and reversed the findings of the Commissioner.

26. Applying the entire income towards charitable purposes is not the sole requirement of the Act. The provision further requires that the income must be derived from a property held under trust.

27. Learned counsel for respondent relying on subsection 4 of Section 11 submits that for the purpose of section 11, the property held under trust includes a business undertaking and therefore it must be held that income is derived from the property. He also relied on Explanation of section 13(7) of the IT Act, which reads as under :

> "For the purposes of sections 11,12,12A and this section, "trust" includes any other legal obligation and for the purposes of this section "relative" in relation to an individual means :-
>
> (i)spouse of the individual ;

(ii) brother or sister of the individual;

(iii) brother or sister of the spouse of the individual;

(iv) any lineal ascendant or descendant of the individual;

(v) any lineal ascendant or descendant of the spouse of the individual;

(vi) spouse of a person referred to in sub-clause(ii), sub-clause(iii), sub-clause(iv) or sub-clause (v)

28. The another judgment relied on by the counsel for respondent is Commissioner of *Income Tax Vs. Agricultural Produce and Market Committee, Hinganghat,* (2007) 210 CTR (Bom) 386, wherein Bombay High Court has also taken a similar view.

29. After perusal of the judgment of Bombay High Court, we find that in that case one of the consideration of the High Court was that the committee was already registered under Section 12A and 12AA of the Act and therefore Bombay High Court held that unless and until that exemption is cancelled or set aside, it is not open for the CIT to hold that market committee is exempted from payment of tax. However, the Bombay High Court after considering the merits held that the market committees are entitled to exemption under Section 11 of the Act.

30. The first contention raised by the counsel for the appellant is that the intention of the Legislature in deleting clause (29) of Section 10 and introduction of Section 10 sub-clause (20) itself shows that the Legislature did not want to extend the benefit of exemption to Krishi Upaj Mandi Samiti. This argument is without any force because Sections 10(20) and 10(29) of the IT Act provide for exemption to all the local authorities and exemption under this section was a blanket exemption without fulfilling any condition. Section 11 provides for exemption on fulfillment of certain conditions. Thus, the intention behind the amendment was to remove the blanket exemption to the local authorities and provide exemption only if they fulfill the conditions under Section 11A. As per Section 11A, the exemption can be granted to the marketing committees provided that they spend amount for charitable purposes as required by sub-section (2) of Section 11. Marketing committees are bound to spend their income as per Section 39 of the 1972 Adhiniyam and as per said Section, the amount could be spent only for public amenities like construction of roads, market etc. Section 2 (15) of the IT Act provides that if the amount is spent towards public amenities, it will be deemed that the amount is spent for charitable purposes. Hence, by virtue of Section 2(15) of the IT Act, it will have to be deemed that the amount spent by the Marketing Committees is spent towards public purposes.

31. The Apex Court in the case of *CIT vs. AP Road Transport Corporation,* [1986] 159 ITR 1 has considered this aspect and held that by virtue of Section 2(15) of the IT Act, the amount spent by the Road Transport Corporation towards public amenities is a charitable purpose. In view of the aforesaid, we hold that the respondents assesses are applying their income for charitable purpose

32. The Apex Court in the case of *Commissioner of Income Tax vs. Gujrat Martime Board,* [2007] 295 ITR 561 (SC), has held that the expression "charitable purpose" has been defined by way of inclusive definition, so as to include relief to the poor, education, medical relief and other object of public utility. In the aforesaid judgment, the Apex Court has also held that Sections 10(20) and Section 11 of the IT Act operates in totally in different spheres and even if the Board has ceased to be a local authority, it cannot be precluded from claiming exemption under Section 11 (1) of IT Act.

33. So far as the ingredients of Section 11 (1) of the IT Act are concerned, the Apex Court in para 11 of the said judgment has held that the income of business undertaking held for charitable purpose falls under Section 11 subject to such income fulfills the required conditions of that section.

34. The Apex Court has interpreted the word "general public utility as under :

> "The said expression would prima facie include all objects which promote the welfare of the general public. It cannot be said that a purpose would cease to be charitable even if public welfare is intended to be served. If the primary purpose and the predominant object are to promote the welfare of the general public the purpose would be charitable purpose. When an object is to promote or protect the interest of a particular trade or industry that object becomes an object of public utility, but not so, if it seeks to promote the interest of those who conduct the said trade or industry....."

35. Thus, in view of the aforesaid judgment of the Apex Court in the cases of *Gujrat Maritime Board and AP Road Transport Corporation* (supra), we hold that the respondent Marketing Committees fulfil all the requirements of Section 11 to get exemption an therefore, are entitled to registration under Section 12 and Sections 12A and 12AA of the IT Act and hence, the Tribunal has rightly allowed the appeals filed by Krishi Upaj Mandi Samitis and set aside the orders passed by the Commissioner (Appeals).

36. Thus, all these appeals are without any merit and are dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 1746
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
21 January, 2008*

NARMADABAI CHOUHAN & ors. ... Appellants
Vs.
REGIONAL MANAGER, L.I.C. OF INDIA & ors. ... Respondents

A. Insurance Act (4 of 1938), Section 45 - *Insurance Policy* -

*F.A No.25/07 (Indore)

Appellants' claim repudiated by respondents on the ground that insured had concealed material facts and made some false statements regarding his health in proposal form - Held - No evidence on record to show that suppression of disease was fraudulent by insured - Insured was examined by Panel Doctor of respondents prior to issuance of policy and was found fit - No justification in dismissing the claim of appellants - Suit decreed - Appeal allowed.

(Para 16)

क. बीमा अधिनियम (1938 का 4), धारा 45 – बीमा पॉलिसी – अपीलार्थीगण का दावा प्रत्यर्थीगण द्वारा इस आधार पर अस्वीकार किया गया कि बीमाकृत ने प्रस्ताव प्रपत्र में तात्विक तथ्यों को छिपाया और अपने स्वास्थ्य के बारे में मिथ्या कथन किये थे – अभिनिर्धारित – अभिलेख पर यह दर्शाने के लिये कोई साक्ष्य नहीं कि बीमाकृत द्वारा बीमारी को छिपाना कपटपूर्ण था – पॉलिसी जारी करने के पूर्व बीमाकृत की जाँच प्रत्यर्थीगण के पैनल चिकित्सक द्वारा की गई थी और स्वस्थ्य पाया था – अपीलार्थीगण का दावा खारिज करने का कोई औचित्य नहीं – वाद डिक्री किया गया – अपील मंजूर।

B. Evidence Act (1 of 1872), Section 102, Insurance Act, 1938, Section 45 - *Burden of proof on insurer - Burden of proof that suppression was made fraudulently by the policy holder and the policy holder was knowing the fact that the statement which he was making is false on insurer.*

(Para 16)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 102, बीमा अधिनियम, 1938, धारा 45 – सबूत का भार बीमाकर्ता पर – सबूत का भार बीमाकर्ता पर है कि पॉलिसी धारक द्वारा छिपाव कपटपूर्वक किया गया और पॉलिसी धारक को इस तथ्य का ज्ञान था कि वह जो कथन कर रहा था, मिथ्या है।

Cases referred :

(2001)2 SCC 160 = AIR 2001 SC 549, 2006 ACJ 100, 2005 ACJ 122, AIR 1962 SC 814, C.R. No.262/06 decided on 24.07.07, AIR 1986 Kerala 201.

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

R.C. Chhazed with *Sameer Aathwale*, for the respondents.

ORDER

N.K. Mody, J.:–Being aggrieved by judgment and decree dated 29.09.2006 passed by 3rd Additional District Judge, (Fast track) Barwani in Civil Suit No. 22-B/05,whereby suit filed by appellants was dismissed, present appeal has been filed.

[2] Short facts of the case are that appellants filed a suit on 16.6.05 for realization of a sum of Rs.1,14,000/- alleging that appellants are widow and sons of deceased Radheshyam Chouhan who died on 4.8.04 at District Hospital, Barwani. It was alleged that in his life time, deceased Radheshyam got himself insured for a sum of Rs.1,00,000 vide policy Number 341807159 dated 28.06.2003. It was alleged that for the purpose of insurance deceased Radheshyam submitted a proposal form on 15.07.03 and after accepting the premium of Rs.9,295/- the policy was issued. It was alleged that policy issued by the respondents was endowment policy with benefits. Further case of the appellants was that after issuance of the policy

regular premium was paid by the deceased Radheshyam in his life time. It was alleged that after his death appellants submitted the claim form along with all relevant documents. Claim submitted by appellants, was repudiated by the respondent No.2 vide order dated 24.12.04 on the ground, that at the time of insurance, assured concealed the material facts and made some false statements regarding his health in the proposal form. It was also mentioned in the said order whereby claim was repudiated, that if the appellants are not satisfied with the decision of respondent No.2 then appellants are free to approach respondent No.1 for review of the order. It was alleged that thereafter appellants issued legal notice whereby appellants claimed for payment of compensation along with interest. In spite of notice the amount was not paid hence the suit was filed for a sum of Rs.1,14,000/-, out of it Rs.12000/- were claimed towards interest from the date of submission of claim form along with notice charges.

[3] The suit was contested by respondents by filing written statement wherein it was not disputed that the policy was issued by respondents. However, it was alleged that the Insurance Company is not liable for payment of compensation as the deceased has not given true and correct answers to the questionare put to insured. It was alleged that in the investigation, it was found that deceased Radheshyam, before submitting the proposal form for his insurance on 15th July,2003, was on leave from June,2000 to November,2000 for a period about 165 days in four installments. Out of which deceased Radheshyam was on leave from 7th August to 2nd Oct.2000 for about 57 days on medical leave on the ground that he was suffering from IDDMM with IHD disease. It was also alleged that again medical leave was granted to him from 3rd Sep.02 to 31st Oct.02. for a period of about 59 days on the account that the deceased was suffering with IDDMM with IHD. It was alleged that on 15th July 2003 when the proposal form was submitted the deceased was asked about his health which was answered by him as under :

> 1 व्यक्तिगत इतिव्रत : अ क्या आपने पिछले पांच वर्षों के भीतर किसी ऐसी बीमारी के लिए जिसमें एक सप्ताह से अधिक समय तक उपचार की आवश्यकता रही हो, किसी चिकित्सक से परामर्श किया है । नहीं ।
>
> ब क्या आपको कभी सामान्य जांच, देखभाल, उपचार या किसी प्रकार की शल्य चिकित्सा के लिए अस्पताल या सेवा ग्रह में दाखिल किया गया है 1 : नहीं ।
>
> स क्या आप पिछले पांच वर्षों के दौरान स्वास्थ्य के आधार पर अपने कार्य से अनुपस्थित रहे हैं 1 : नहीं ।
>
> द क्या आप जिगर, पेट, हृदय, फेफडे, गुर्दा, मस्तिष्क एवं स्नायुमंडल संबंधित किसी रोग से कभी पीडित रहे हैं या इस समय पीडित हैं 1 : नहीं ।

[4] It was alleged that in the facts and circumstances of the case since the material facts were concealed by the deceased relating to his health, therefore, the suit filed by the appellants was rightly dismissed. On the basis of the pleadings

Learned Court below framed the issues recorded the evidence and dismissed the suit, against which the present appeal has been filed.

[5] Learned counsel for appellants submit that learned Court below committed error in dismissing the suit filed by the appellants on the ground that the deceased concealed material facts in the proposal form Ex. D/2.It is submitted that proposal form Ex. D/2, was not filled in by the deceased, on the contrary, it was filled in by one Narendra Bhavsar, Insurance Agent who has been examined by appellants as PW 3. It is submitted that the deceased has signed the proposal form which was filled in by the agent on his own and for that deceased Radheshyam cannot be held liable. Learned counsel further submits that before acceptance of proposal form, deceased was examined by Dr. Rajesh Jain (DW 2) who happens to be the doctor of the Insurance Company. It is also submitted that the proposal form was submitted on 15th July, 2003 and the contract was completed on 9.7.03 while the death took place on 4.8.04 i.e. after more than a year. It is submitted that the ailment which is shown by respondents is also prior to three years from the date of submission of proposal form. Learned counsel submits that in the facts and circumstances of the case learned Court below committed error in dismissing the suit filed by appellants. For this contention learned counsel placed reliance on a decision in the matter of *Life Insurance Corporation of India v/s Asha Goel;* reported in (2001)2 SCC 160 wherein Hon'ble Apex Court has held that **S.45 of Insurance Act is restrictive in nature. Burden of proof lies on insurer to establish the circumstances mentioned in the Section."**

[6] Further reliance was placed on a decision in the matter of *L.I.C. Of India v/s District Permanent Lokadalat and another;* reported in 2006 ACJ 100 wherein Division Bench of Rajasthan High Court in a case where **L.I.C., contended that assured did not disclose material information regarding his health at the time of taking the policy, it was further held that L.I.C is duty bound to cross check the information furnished by the person intending to take the policy, failure to check information is a lapse or lacuna on the part of L.I.C. In this case it was held that L.I.C. is liable to pay the sum assured after the death of assured. It was also observed that LIC is not permitted to raise a plea that the deceased-assured had not disclosed about his illness at the time of taking the policy.**

[7] Further reliance was placed on a decision of Karnataka High Court in the matter of *Yashoda v/s Director, Karnataka Government Insurance Department and another* reported in 2005 ACJ 122 wherein Karnataka High Court in a claim for a death of assured after 9 months of taking the policy where **assured suffered from fever and was advised rest for a month for general weakness about 3 years prior to taking the policy was not disclosed, it was held that non mentioning of this fever by the assured is not amounting to fraudulent suppression or withholding material information which may result in non-issue of policy or altering the conditions of policy- It was also held that**

claim has not been repudiated on the ground of furnishing incorrect particulars at the time of taking the policy.

[8] Learned counsel for the appellants submits that in the facts and circumstances of the case appeal filed by the appellants be allowed and the judgment passed by the learned trial Court be set aside.

[9] Mr. R.C.Chhazed learned counsel for respondents submits that medical certificates Ex.D/2 to D/5 are on record which were submitted by the deceased before his employer. It is submitted that in the certificates, which are enclosed with the application for leave it has been mentioned that the deceased was suffering from NIDDM and H/TCDM. Learned counsel submits that respondent has examined Dr. Arun Kumar Sharma as DW 1 who has issued certificates Exhs.D/1 and D/2; Dr. Rajesh Jain as DW/2 and Dr. P.L. Patel as DW3 . It is submitted that from all this evidence it has been found proved that insured has suppressed the material facts relating to his health and gave false information, therefore, no illegality has been committed by the learned Court below in dismissing the suit.

[10] Mr. RC Chhazed learned counsel for respondent has also placed reliance on a decision in the matter of *Mithoolal Nayak v/s Life Insurance Corporation of India;* reported in 1962 SC 814 (V 49 C 117) wherein it was held that the **three conditions for the application of the second part of S.45 are**

a) The statement must be on a material matter or must suppress facts which it was material to disclose;

b) the suppression must be fraudulently made by the policy holder and

c) the policy holder must have known of the first time of making the statement that it was false or that it suppressed facts which it was material to disclose.

ci)

[11] Learned counsel submits that following the decision of Hon'ble Apex Court in the matter of Mithulal (Supra) in the matter of *LIC v/s Asha Goyal;* reported in 2001 SC 549 it was held by the Hon'ble Apex Court that **The burden of proof is on the insurer to establish these circumstances and unless the insurer is able to do so there is no question of the policy being avoided on ground of mis-statement of facts. The contracts of insurance including the contract of life assurance are contracts uberrima fides and every fact of material must be disclosed.**

[12] Further reliance was also placed on a decision of this Court in the matter of *Smt. Munni Devi v/s L.I.C.* (Civil Revision No.262/06 decided on 24.7.07, wherein a deceased insured was suffering from Nephritic Syndrome for a long time in the past. In this case it was held that Nephritic syndrome is a disorder where the kidneys have been damaged, causing them to leak protein from the blood into the

urine. It is characterized by puffiness around the eyes, characteristically in the morning, edema, and undue weight gain. The most common sign is excess fluid in the body. It is too far fetched to accept that either deceased was unaware of the illness or seriousness thereof when he took the policy." It was further held that since in answer to the question relating to health in the proposal form, the deceased did not only fail to disclose what was material for him to disclose but he made false statement to the effect that he was not suffering from any serious ailment or disorder, therefore, no illegality has been committed by the learned Court below in dismissing the claim filed by the appellants.

[13] Reliance was also placed on a decision of Kerala High Court in the matter of *P.Sarojam v/s LIC of India*, reported in A.I.R. 1986 Kerala 201; wherein it was held that false answers to the question in the proposal form given by the assured relating to the state of his health vitiate the contract of insurance and the Corporation is entitled to repudiate the policy and decline payment thereunder. In the aforesaid case it was held that medical officer of the Corporation had certified life assured as good is not material.

[14] From perusal of record and statement of DW 2 Dr. Rajesh Jain it is evident that the deceased was examined by him prior to insurance and the certificate about his fitness for the purpose of insurance was given by him. Deceased was working as supervisor in Primary Health Center at the time of death also. Dr. P.L. Patel DW 3 who has issued the certificate for grant of leave has stated that in examination it was found that deceased suffering from hypertension and diabetics. This has also come in evidence that since the deceased was in need of long leave on account of construction of house, therefore, he also applied for medical leave.

[15] From perusal of record it is evident that the date of submission of the proposal form was 15.7.03 which was accepted on 19.7.03 while the date of death is 4.8.04 i.e. more than a year after submission and issuance of policy. The alleged sufferings are of the year 2000 i.e. more than two years and a half prior to the date of submission of the proposal form.

S.45 of the Insurance Act reads as under:

"45.Policy not to be called in question on ground of mis-statement after two years -

No policy life insurance effected before commencement of this Act shall, after the expiry of 10 years from the date of commencement of this Act and no policy of life insurance effected after coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement

was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy holder and that policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose.

[16] Keeping in view the settled position of law it is not enough that the statement must be on a material mater or must supress the facts which was material to disclose, but it is also necessary to prove that suppression was made fraudulently by the policy holder and the policy holder must have known at the time of making the statement that it was false or that it suppressed the material facts. Burden of proof that the suppression was made fraudulently by the policy holder and the policy holder was knowing the fact that the statement which he was making is false on insurer. S.45 of the Insurance Act empowers the insurer to repudiate the claim on the ground that insured in the proposal form suppressed facts which were material to disclose and that it fraudulently made by the policy holder, if the claim is made within two years from the commencement of policy.

[17] In the present case, it has come in evidence that the deceased was working in the medical department as Assistant Supervisor and also that deceased took long leave from his duty from 12th August 2000 to last week of Dec.2000 and all type of leave were availed by him. As the law laid down by Hon'ble Apex Court in the matter of Mithulal (Supra) it is not enough to repudiate the claim of insured on the ground that insured has suppressed material facts which he was supposed to disclose, it is also necessary to establish on the part of LIC that suppression was fraudulently made by the policy holder. In the present case there is no evidence on record to show that suppression of Diabetics and Non insulin Dependent Diabetes Meuitvs (NIDDM) was fraudulent. The insured was examined by Dr. Rajesh Jain (DW 2) who was one of panel doctors of LIC, prior to issuance of policy and it was found that the deceased was fit for the policy and was in Government job . It is also not on record that why the information given by the deceased was not cross checked by the doctor or insurance corporation. Apart from this the information about the health is filled in the form by the agent and not by the insured who was a literate man. In the matter of *Life Insurance Corporation of India v/s Smt. Asha Goel* ;2001 SC 549, Hon'ble Apex Court has observed that

> **"In course of time the Corporation has grown in size and at present it is one of the largest public sector financial undertakings. The public in general and crores of policy-holders in particular look forward to prompt and efficient service from the Corporation. Therefore, the authorities in-charge of management of the affairs of the Corporation should bear in mind that its credibility and reputation depend on its prompt and efficient service. Therefore, the approach of the Corporation in the matter of repudiation of a policy admittedly**

issued by it should be one of extreme care and caution. It should not be dealt with in a mechanical and routine manner. Repudiation of claim by corporation merely on grounds that insured who died of acute Myocardial infarction and cardiac arrest had not disclosed correct information regarding his health at time of effecting insurance with corporation, is not proper."

[18] So far as the decision of this Court in the matter of Smt. *Smt. Munni Devi v/s L.I.C.*(Supra) in concerned, the matter before this Court was in revision where the civil suit and first appeal filed by the claimant was dismissed and this Court was examining judgment of two Courts below while exercising revisional jurisdiction wherein the scope of this Court is limited in comparison to first appeal. Keeping in view this position of law and the fact that deceased was in Government service and was examined by doctor of LIC and also looking to the disease mentioned in the certificate which were submitted for taking a long leave this Court is of the view that there was no fraudulent suppression of facts especially in the facts and circumstances of the case when the proposal form was filled in by the agent of the Life Insurance Corporation while deceased was a literate man and was in Government employment, and also was examined by doctor of LIC. In the circumstances,there was no justification in dismissing the claim of the appellants.

[19] In view of this, the appeal is allowed. Judgment and decree passed by learned Court below is set aside. Appellants shall be entitled for a sum of Rs.1,00,000/- along with interest @ 9% per annum from the date of submission of the claim form till realisation. Respondents shall also be liable for costs of both the Courts below.

Appeal allowed.

I.L.R. [2008] M. P., 1753

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava & Mr. Justice S.A. Naqvi

24 January, 2008*

PRASHANT KUMAR SAHU ... Appellant

Vs.

M/S OPTEL TELECOMMUNICATIONS LTD. & ors. ... Respondents

A. Arbitration and Conciliation Act (26 of 1996), Sections 21 & 43 - *Arbitration Tribunal decline to pass award in favour of appellant and held claim to be time barred - Application u/s 34 dismissed - Held - Arbitral proceedings in respect of a particular dispute would commence on the date on which a request for that dispute to be referred to Arbitration is made - Determining factor in computing the limitation is the date when notice was received by the respondent No.1 & 2 raising the arbitral dispute - Appeal allowed.* (Para 12)

क. माध्यस्थम् एवं सुलह अधिनियम (1996 का 26), धाराएँ 21 व 43 – माध्यस्थम्

*M.A. No.2066/2003 (Jabalpur)

अधिकरण ने अपीलार्थी के पक्ष में अधिनिर्णय पारित करने से इंकार किया और दावा समय वर्जित होना. अभिनिर्धारित किया – आवेदन अन्तर्गत धारा 34 खारिज – अभिनिर्धारित – माध्यस्थम् कार्यवाहियाँ किसी विशिष्ट विवाद के सम्बन्ध में उस तारीख को प्रारम्भ होंगी जिसको उस विवाद को माध्यस्थम् को निर्देशित करने के लिए प्रार्थना की गई हो – परिसीमा की संगणना करने में नियामक कारक वह दिनांक है जब माध्यस्थम् विवाद का सूचनापत्र प्रत्यर्थी क्रमांक 1 व 2 द्वारा प्राप्त किया गया – अपील मंजूर।

B. Interpretation of Statutes - *A statute must be read as a whole and one provision of the Act should be construed with the provisions in the same Act so as to make a consistent enactment of the whole statute - It is the duty of the Courts to avoid "head on clash" between two sections of the same Act and, whenever it is possible to do so to construe provisions which appear to conflict so that they harmonise.* (Para 13)

ख. कानूनों का निर्वचन – एक कानून को पूर्ण रूप से पढ़ा जाना चाहिए और अधिनियम के एक उपबंध का अर्थ उसी अधिनियम के उपबंधों से लगाना चाहिए ताकि पूरे कानून को संगत अधिनियमिति बनाया जा सके – यह न्यायालयों का कर्तव्य है कि एक ही अधिनियम की दो धाराओं के बीच में "हेड ऑन क्लैश" होने को टाले और जब भी ऐसा किया जाना संभव हो उपबंध परस्पर विरोधी प्रतीत हों तो उनका अर्थ समरूप होता हुआ निकाला जाए।

C. Words and Phrases - *Commence - Meaning - To begin, institute or start - Word 'commence' harmoniously used in Sections 21 & 43 - Meaning would be "to start".* (Para 15)

ग. शब्द और वाक्यांश – कमेंस – अर्थ – प्रारम्भ करना, संस्थित या शुरू करना – धारा 21 व 43 में 'कमेंस' शब्द का प्रयोग सामंजस्यपूर्ण किया गया है – अर्थ होगा "शुरू करना"।

Cases referred :

AIR 1997 SC 1006, Principles of Statutory Interpretation by Justice G.P. Singh Seventh Edition page 112.

R.P. Agrawal with *Praveen Dave*, for the appellant.

R.N. Shukla with *R.B. Tiwari*, for the respondent No.1 & 2.

ORDER

The Order of the Court was delivered by **A.K. Shrivastava, J.**:–Feeling aggrieved by the order and decree dated 19.8.2003 passed by learned District Judge, Satna in Misc. Civil Case No.18/2002 affirming the award dated 18.12.2002 passed by Arbitral Tribunal (in short 'Tribunal') Bhopal, this appeal has been filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as **'the Act'**).

2. No exhaustive statements of the facts are required to be stated for the disposal of this appeal. Suffice it to state that Rate Contract No. OTL : 15/10:1/ RC dated 25.8.1998 was executed between the appellant and respondents no. 1 and 2 for supply of wooden drums. The appellant deposited a sum of Rs.50,000/- as earnest money vide Draft No 419903 dated 13.4 98 of State Bank of India, Satna City. The price amount was to be paid within 60 days after the acceptance

of goods. It was agreed between the parties that if any dispute would arise, it will be referred to arbitration.

3. As per claim of appellant he had supplied goods as under :-

Sl.No.	Bill No.	Date of Bill	Amount
1.	2.	8/10/98	Rs.107926.00
2.	3.	27.10.98	Rs.118995.00
3.	4.	28.10.98	Rs. 90266.00
4.	6.	16.11.98	Rs.145210.00
		Total	Rs.4,62,361.00

Since the respondents 1 and 2 have failed to make payment despite notices and reminders were given by the appellant, according to him, he is entitled to get interest at the rate of 12% by way of damages. It is not in dispute that the appellant served two notices dated 6.8.2001 and 10.1.2002 to the respondents. The appellant hence filed an application before the District Judge, Satna on 30.4.2002 for appointment of the Arbitrators and also prayed as under :-

(1) Rs.50,000/- deposited as earnest money be paid;
(2) Rs.4,62,361/- as stated in para 5 of the application be paid;
(3) Interest @ 12 per cent after two months from the date of notice i.e. 6.8.2001 till final payment be paid;
(4) Notice charges Rs.1100/- be paid;
(5) Costs of the Arbitration proceedings.

4. It is not in dispute that respondents 1 and 2 have admitted most of the claims, but have raised plea of limitation that the claim is barred by time. According to respondents 1 and 2 goods were never supplied well in time and, therefore, they are not liable to pay damages as per Clause 14 of the agreement. The claim of Rs.4,46,308/- is, however, admitted by the respondents 1 and 2 subject to limitation.

5. The matter was referred to the Arbitral Tribunal where issues were framed and it was held by the Tribunal that claim of Rs.4,46,308/- has been admitted by the respondents 1 and 2, but, again since the claim is not within prescribed period of limitation, therefore, the Tribunal declined to pass any award of Rs.4,46,308/-. However, the Tribunal held that the appellant is entitled to get back amount of earnest money Rs.50,000/- with interest at the rate of 12% as well as notice charges Rs.1100/-.

6. The appellant challenged the award by filing application under section 34 of the Act and prayed to set aside the arbitral award. The learned District Judge decided the objections raised by the appellant under section 34 of the Act and categorically held that the dispute raised by the appellant before the Tribunal was barred by time and eventually dismissed the objections by affirming the award passed by the Tribunal.

7. In this manner the present appeal has been filed under section 37 of the Act.

8. The contention of Shri R.P. Agrarwal, learned senior counsel appearing for the appellant is that the Tribunal as well as learned District Judge erred in law by holding that the dispute raised by the appellant was barred by prescribed period of limitation. The contention of learned senior counsel is that provisions of sections 21 and 43 (2) of the Act have not been properly construed by the Tribunal as well as by learned District Judge. According to learned senior counsel if these two provisions are considered in proper perspective in the present factual scenario it would reveal that the claim of the appellant is not barred by prescribed period of limitation. It has also been contended that liability of making payment of Rs.4,46,308/- has been admitted by the respondents 1 and 2 and, if that is the position, since there is no hurdle of limitation, said amount be also awarded in addition to the award passed by the Tribunal.

9. On the other hand, Shri R.N. Shukla, learned senior counsel appearing for the respondents 1 and 2 argued in support of the impugned award as well as supported the impugned order of learned District Judge.

10. Having heard learned counsel for the parties, we are of the considered view that this appeal deserves to be allowed.

11. The moot question to be decided in this appeal is whether the dispute raised by the appellant is within time or is barred by prescribed period of limitation. If the dispute is within time, according to us, the appellant is entitled to get amount of Rs.4,46,308/- because the respondents 1 and 2 have admitted in their reply to the application that they are required to pay amount of Rs.4,46,308/-. The only objection for its payment which has been raised by the respondents 1 and 2 in their reply is that the same is barred by prescribed period of limitation. In order to appreciate the arguments advanced by learned counsel for the parties, we would like to advert ourselves to certain relevant dates which are as under :-

Sl.No.	Date	Events
(1)	25.8.98	Agreement entered into between appellant and respondents 1 and 2.
(2)	16.11.98	Last supply was made by appellant to respondents 1 and 2 and as per Clause 6 of the agreement the payment was to be made within 60 days.
(3)	16.1.99	60th day expired.
(4)	6.8.01	Notice to make payment was sent by appellant to respondents 1 and 2.
(5)	10.1.02	Notice by which resolution of dispute was demanded was sent by appellant to respondents 1 and 2.

(6)	30.4.02	Application u/s. 11 of the Act was filed by appellant before the District Judge.

12. The factum of giving notices dated 6.8.2001 and 10.1.2002 is not disputed in reply to the application. On the other hand, the same is admitted. If the notice dated 10.1.2002 sent by the appellant is said to have been received by the respondents on the same day, even then, according to learned senior counsel, the dispute which has been raised by the appellant cannot be said to be barred by time. In order to appreciate the said argument, we shall advert ourselves to section 21 of the Act which reads thus :-

> **"21. Commencement of arbitral proceedings.-** Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute **commence** on the date on which a request for that dispute to be referred to arbitration is received by the respondent."
>
> (Emphasis supplied)

On going through the above-said provision we find that it speaks about the commencement of arbitral proceedings. According to this section, the arbitral proceedings in respect of a particular dispute would commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent and, therefore, according to us, the determining factor in order to compute the limitation is the date when the notice was received by the respondents 1 and 2 raising the arbitral dispute. If we take it for consideration that earlier notice dated 6.8.2001 was received on the same day or within 2-3 days after 6.8.2001, even then the proceedings cannot be said to be barred by time in terms of section 21 of the Act.

Section 43 of the Act speaks about the "Limitation" and it would be condign to refer to sub-section (2) of section 43 which reads thus :-

> "43. (2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have **commenced** on the date referred in section 21." (Emphasis supplied)

If we keep section 21 and section 43 (2) of the Act in juxtaposition and read conjointly it becomes luminously clear like a noon day that limitation would commence from the date when the respondents 1 and 2 have received notice in respect to the request for the dispute raised by the appellant. On plain reading of the language of these two sections and interpreting these two provisions harmoniously there cannot be any other interpretation.

13. A statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency of repugnancy either within a section or between a section and other parts of the statute. It is the duty of the Courts to avoid "a head on clash" between two sections of the same Act and, whenever it is possible to do

so to construe provisions which appear to conflict so that they harmonise. (See : Principles of Statutory Interpretation by Justice G.P. Singh Seventh Edition page 112).

14. The Supreme Court in the case of *Sultana Begum v. Prem Chand Jain* AIR 1997 SC 1006 while considering the scope and interpreting Order XXI Rule 2 and section 47 CPC and by relying the decision of *Canada Sugar Refining Co.* v. R. (1898) AC 735 quoted the observation made by Lord Davy which reads thus :-

> "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

and thereafter by quoting various decisions laid down following principles :-

> "(1) It is the duty of the Courts to avoid a head on clash between two Sections of the Act and to construe to the provisions which appears to be in conflict with each other in such a manner as to harmonise them.
>
> (2) The provisions of one Section of a statue cannot be used to defeat the other provisions unless the Court, in spite of its efforts, finds if impossible to effect reconciliation between them.
>
> (3) It has to be borne in mind by all the Courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, is possible, effect should be given to both. This is the essence of the rule of "harmonious construction".
>
> (4) The Courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.
>
> (5) To hormonise is not to destroy any statutory provision or to render it otiose."

In the present case we do not find Sections 21 and 43(2) of the Act to be inconsistent or repugnant to each other and therefore, on the basis of the decision of *Sultana Begum* (supra) and the principles laid down by the Apex Court both these two Sections are to be construed harmoniously. We do not find any scintilla of doubt in our mind that these two provisions are not a head on clash to each other. Section 21 of the Act speaks about when the arbitral proceedings can be commenced and to enable the arbitral proceedings, what should be the period of limitation this has been prescribed in Section 43(2). Thus, according to us, if a party desires to commence arbitral proceeding, when right would accrue to him, this has been stated in Section 21 and in order to exercise the said right what should be the limitation, this has been prescribed in Section 43 (2) of the Act.

15. The word 'commence' has not been defined under the Act and, therefore, we would like to see dictionary meaning of this word. In Oxford Large Print

Dictionary, the meaning of word 'commence' is "to begin" and in Black's Law Dictionary its meaning is "To initiate by performing the first act or step. To begin, institute or start." Therefore, by construing the word 'commence' harmoniously used in sections 21 and 43 the meaning would be "to start" and if that is the position, according to us, the limitation would start from the date on which the request by way of said two notices, raising the arbitral dispute to be referred to the arbitration, were received by the respondents 1 and 2. Admittedly, notices dated 6.8.2001 and 10.1.2002 have been received by the respondents 1 and 2 and if that would be the position, according to us, the application which was filed by the appellant under section 11 of the Act on 30.4.2002 cannot be said to be barred by prescribed period of limitation.

16. For the reasons stated here-in-above, we hereby hold that application under section 11 of the Act filed by the appellant is within limitation and since respondents 1 and 2 have admitted the claim of Rs.4,46,308/-, according to us, the appellant is entitled to get the said amount apart from the amount as awarded by the Tribunal and affirmed by learned District Judge.

17. Resultantly, this appeal succeeds and is hereby allowed. Looking to the facts and circumstances, parties are directed to bear their own costs.

Appeal allowed.

I.L.R. [2008] M. P., 1759

APPELLATE CIVIL

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

7 February, 2008*

DULARI SINGH (Smt.) & ors. ... Appellants

Vs.

TRIBHUVAN MURARI DUBEY & anr. ... Respondents

A. Workmen's Compensation Act (8 of 1923), Section 3 - *Employer's liability to pay compensation - Deceased working as driver - He had taken the vehicle to Amarkantak and Chitrakoot at the direction of the owner - Dead body of deceased was found near river at Satna and vehicle was seized from Rewa - Held - Owner in written statement and deposition has not denied the fact that deceased was in his employment - Jeep was found at a different place and dead body was found at a different place - Murder of deceased was committed in the course of employment - Order passed by Commissioner for Workmen's Compensation dismissing claim petition set aside.* (Para 9)

क. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 3 – प्रतिकर देने का नियोजक का दायित्व – मृतक वाहन चालक का कार्य कर रहा था – वह वाहन मालिक के निर्देश पर वाहन को अमरकंटक व चित्रकूट ले गया – मृतक का शव सतना में नदी के पास मिला एवं वाहन रीवा से अभिग्रहीत किया – अभिनिर्धारित – वाहन मालिक ने वादोत्तर व कथन में इस तथ्य से इंकार नहीं

*M.A. No.2978/2005 (Jabalpur)

किया कि मृतक उसके नियोजन में था – जीप व शव अलग–अलग स्थान पर मिले – मृतक की हत्या नियोजन के अनुक्रम में की गई – कर्मकार प्रतिकर आयुक्त का दावा निरस्त करने का आदेश निरस्त।

B. Workmen's Compensation Act (8 of 1923), Section 4 - *Compensation - Monthly income of deceased assessed at Rs.3,000/- - Relevant factor is 213.57 - Compensation comes to Rs.3,20,355/- - Compensation shall carry interest at the rate of 12% p.a. - Appeal allowed.* (Para 10)

ख. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 4 – प्रतिकर – मृतक की मासिक आय रु. 3000/– आंकी गई – सुसंगत खण्ड 213.57 है – प्रतिकर रु. 3,20,355/– आता है – प्रतिकर पर 12 प्रतिवर्ष की दर से ब्याज देय होगा – अपील मंजूर।

Cases referred :

2000 AIR SCW 1579, 2007 ACJ 1126, 2007(3) MPHT 421.

Avinash Jargar, for the appellants.

Rakesh Jain, for the respondent No.2.

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 application filed u/s 33 of the Workmen's Compensation Act, 1923 before the Commissioner for Workmen Compensation (Labour Court) Satna. The application has been dismissed as per order dated 14.9.2005 passed in case no.17/04 WC Act, Fatal.

2. The claimants preferred claim petition claiming compensation on account of death of Santosh Singh, aged 27 years, who was a driver working with Tribhuvan Murari Dubey, he used to drive marshal jeep, owned by T.M. Dubey and insured with Oriental Insurance co. ltd. He used to ply the vehicle on Chitrakoot-Maihar occasionally as per direction of the owner on 3.4.2004 deceased had gone to Jaleshwar along with the owner and thereafter at his direction went to Amarkantak and Chitrakoot taking certain relatives of the deceased. The dead body of the deceased was found near Semrabal river on 4.4.2004 within the area of P.S. Kothi, Satna. The jeep was found abandoned near K.P. college at Rewa. The vehicle was seized on 13.4.2004 from Rewa. Offence was registered against the unknown accused persons at crime no.27/04. It was submitted that deceased used to earn Rs.2,000/- per month by way of salary and Rs.80/- by way of allowance.

3. The owner remained ex-parte.

4. The insurer in the reply contended that deceased was not holding the driving licence. The vehicle was being used for carrying the passengers for hire or reward, as such there was violation of terms & conditions of the policy. The death was not in the course of employment. The jeep was seized from a different place.

5. The Commissioner for Workmen Compensation has found that it has not been established that deceased died during the course of the employment.

6. Shri Avinash Jargar, learned counsel for the appellants, has submitted that death was arising out of and in the course of employment. The facts deposed by the widow and father of the deceased have not been rebutted by entering in the witness box or by the insurer, thus, ought to have been accepted, the dismissal of the claim petition is improper.

7. Shri Rakesh Jain, learned counsel for the insurer, has submitted that considering the evidence of the widow and father of deceased the tribunal has assessed the evidential value and has discarded the statement, as such no case for interference in the appeal is made out as no substantial question of law arises.

8. The main question for consideration is whether the finding recorded by the tribunal that deceased did not die during the course of employment is perverse ? The appeal has been admitted on the following substantial question of law :

> "Whether in the facts and circumstances of the case, the Commissioner for Workmen Compensation was justified in dismissing the claim petition of the appellants holding therein that deceased did not die during the course of employment ?"

9. We find on record that the claimants have submitted that deceased was in the employment and had taken the vehicle to Chitrakoot and Amarkantak at the direction of the owner; the owner did not controvert the aforesaid by filing of the written statement and by entering in the witness box. The tribunal has wrongly drawn adverse inference against the claimants for not examining the owner, it was not for the claimants to examine the owner, in case owner was interested in rebutting the evidence, it was for owner to enter in the witness box or for the insurer to examine the owner in rebuttal. Smt. Dulari Singh, the widow of the deceased, has clearly stated that deceased was in the employment of T.M. Dubey, he used to ply marshal jeep and used to draw salary of Rs.2,000/- per month and allowance of Rs.70-80/- per day. Ramratan, father of the deceased, has also stated that deceased was the driver of T.M. Dubey and at the direction of owner he had taken the vehicle on 3.4.2004. The dead body was found at the different place. The deceased was residing at village Gorela, Bilaspur, his dead body was found near Semrabal river in the district of Satna, thus, it is apparent that from the statement that deceased had taken the jeep towards Chitrakoot and thereafter his dead body was found; death arose out of and in the course of employment. There is absolutely nothing to disbelieve the version of the aforesaid witnesses that jeep was taken at the direction of the owner, jeep was found at a different place at Rewa and dead body was found at a different place at Satna, thus, it appears that murder was committed of the deceased in the course of employment, the death was clearly arising out of and in the course of his employment as held by the Apex Court in *Smt. Rita Devi and others v. New India Assurance Co. Ltd. and another,* 2000 AIR SCW 1579 and by this Court in similar circumstances in *Oriental Insurance Co. Ltd. v. Sheela Bai Jain and another,* 2007 ACJ 1126 and in *Smt.*

Laxmi and others v. Jai Karan Prasad Shukla and another, 2007 (3) MPHT 421. In *Smt. Rita Devi and others v. New India Assurance Co. Ltd. and another* (supra) it has been held thus:-

> " 14. Applying the principles laid down in the above cases to the facts of the in hand, we find that the deceased, a driver of the auto rickshaw, 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 auto rickshaw and in the course of achieving the said object of stealing the auto rickshaw, they had to eliminate the driver of the auto rickshaw then it cannot but be said that the death so caused to the driver of the auto rickshaw was an accidental murder. The stealing of the auto rickshaw was the object of the felony and the murder that was caused in the said process of stealing the auto rickshaw is only incidental to the act of stealing of the auto rickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing the theft of the auto rickshaw.
>
> 15. Learned counsel for the respondents contended before us that since the Motor Vehicles Act has not defined the word 'death' and the legal interpretations relied upon by us are with reference to definition of the word 'death' in Workmen's Compensation Act the same will not be applicable while interpreting the word 'Death' in Motor Vehicles Act because according to her, the objects of the two Acts are entirely different. She also contends on the facts of this case no proximity could be presumed between the murder of the driver and the stealing of the auto rickshaw. We are unable to accept this contention advanced on behalf of the respondents. We do not see how the object of the two Acts,namely, the Motor Vehicles Act and the Workmen's Compensation Act are in any way different. In our opinion, the relevant object of both the Acts are to provide compensation to the victims of accidents. The only difference between the two enactments is that so far as the Workmen's Compensation Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapters X to XII of the Motor Vehicles Act is available to all the victims of accidents involving a motor vehicle. In this conclusion of ours we are supported by Section 167 of the Motor Vehicles Act as per which provision, it is open to the claimants either to proceed to claim compensation under the Workmen's Compensation Act. A perusal of the objects of the two enactments clearly establishes that both the enactments are beneficial enactments operating in the same field, hence, judicially accepted interpretation of the work 'death' in Workmen's Compensation Act is, in our opinion, applicable to the interpretation of the word death in the Motor Vehicles Act also."

In view of the aforesaid, we have no hesitation in setting aside the order passed

by the Commissioner for Workmen's Compensation dismissing the claim petition and hold that the deceased was in the employment and his death was clearly caused during the course of the employment.

10. Coming to the question of quantum of compensation to be awarded, the widow has stated that deceased used to draw the salary of Rs.2,000/- per month and allowance of Rs.70-80/- per day. It would be reasonable to assess his income at Rs.3,000/- per month. Taking 50% i.e. Rs.1,500/- as per section 4 of the Workmen's Compensation Act, 1923 so as to arrive at the compensation the relevant factor is 213.57. Thus, the compensation comes to (1500 x 213.57) = Rs.3,20,355/- (Rs. Three Lacs Twenty Thousand Three Hundred Fifty Five Only). The compensation to carry interest at the rate of 12% per annum to be payable after one month from the date of accident.

11. Coming to the liability of the insurer as there is nothing on record to show that there was violation of the policy, the finding as to violation of policy is also not proper. Merely by the fact that the father of the deceased was unable to state the names of the persons taken in the jeep, it could not be inferred that jeep was being plied for hire or reward, the burden to prove the breach of the policy was upon the insurer. Ramesh (P.W.3) has also not stated that vehicle used to be plied for carrying passengers for hire or reward, he has stated that vehicle was used to be plied for personal use. There is nothing in the statement of Deepak (P.W.4) also to infer that there was violation of terms & conditions of the policy. The statement of Sunil Dharmadhikari (NAW-1) examined on behalf of insurer is not based on personal knowledge, thus, is of no avail so as to come to the conclusion that vehicle used to be plied for hire or reward.

12. Resultantly, the appeal is allowed to the aforesaid extent. The compensation of Rs.3,20,355/- (Rs. Three Lacs Twenty Thousand Three Hundred Fifty Five Only) is awarded to the claimants. The compensation to carry interest at the rate of 12% per annum to be payable after one month from the date of accident. No costs.

Appeal allowed.

I.L.R. [2008] M. P., 1763

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

28 February, 2008*

ANOOP CHOUDHARY ... Appellant

Vs.

SMT. USHA BHARGAVA ... Respondent

Civil Procedure Code (5 of 1908), Order 1 Rule 10, Order 22 Rule 4, 9 - *Substitution of Legal Heirs - Application under Order 22 Rule 4, 9 along with application under Section 5 of Limitation Act and setting aside*

*F.A. No.20/01 (Jabalpur)

abatement filed - Applications subsequently withdrawn with liberty to file application under Order 1 Rule 10 if law permits - Held - After withdrawal of applications filed under Order 22 Rule 4, 9 & 11, appellant has no authority to bring such heirs on record under Order 1 Rule 10 r/w Order 22 Rule 10 - Application under Order 1 Rule 10 dismissed - Appeal stands abated against dead defendant/respondent. (Para 22)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10, आदेश 22 नियम 4, 9 – वैध वारिसों का प्रतिस्थापन – आदेश 22 नियम 4, 9 के अधीन आवेदन के साथ धारा 5 परिसीमा अधिनियम के अधीन और उपशमन को अपास्त करने के लिए आवेदन पेश – तत्पश्चात् यदि कानून अनुमति देता है तो आदेश 1 नियम 10 के अधीन आवेदन पेश करने की स्वतंत्रता के साथ आवेदन वापस ले लिये गये – अभिनिर्धारित – आदेश 22 नियम 4, 9 व 11 के अधीन पेश किये गये आवेदनों को वापस लेने के उपरांत अपीलार्थी को ऐसे वारिसों को आदेश 1 नियम 10 सहपठित आदेश 22 नियम 10 के अधीन अभिलेख पर लाने का कोई अधिकार नहीं – आदेश 1 नियम 10 के अधीन आवेदन खारिज – प्रतिवादी/प्रत्यर्थी के विरुद्ध अपील का उपशमन हुआ।

Cases referred :

AIR 1961 Patna 178, AIR 1978 Calcutta 344, AIR 1986 Orissa 191, AIR 1954 SC 75, AIR 1962 SC 89, AIR 1973 SC 655, AIR 1974 All 422, AIR 1986 Orissa 191, AIR 1985 Patna 35, AIR 1982 AP 480.

A.K. Jain & Ku. Jailaxmi Aiyer, for the appellant.

Ashish Mishra, for the respondent No.1.

N.K. Patel with *S.L. Patel,* for proposed respondents.

ORDER

U. C. MAHESHWARI J.:–This order shall decide I. A. No 14251/07 filed by the appellant under Order 1 Rule 10 r/w Section 151 r/w Order 22 Rule 10 of CPC seeking permission to implead the legal heirs of deceased respondent No.4 as respondents on record.

2. The facts in brief of the case which are necessary to decide this I. A. are that the appellant initiated a suit for specific performance against respondent No.1 and 2 on the basis of an agreement to sale dated 18.8.1974 executed by Shri Pyarelal Sharma, the father of the respondent No.1 and 2. As per further contention after the death of Pyarelal Sharma the respondent No.1 and 2 being his legal heirs sold the disputed property through registered sale deed dated 17.12.1981 to the deceased respondent No.4 Sardar Harjinder Singh. Initially the suit was filed only against respondent No.1 and 2 but subsequently other respondents were impleaded as defendants in the case. The deceased respondent No.4 defended the suit as bonafide purchaser of the disputed property with consideration. After recording the evidence on appreciation by holding him the bonafide purchaser the appellant's suit was dismissed on merits by the trial court on which the present appeal is preferred.

3. In pendency of this appeal, the respondent No.4 Sardar Harjinder Singh

died on 5.1.2005, on which the necessary steps to bring his legal representatives on record was not taken by the appellant within limitation, but at belated stage on 13.8.2007, I. A. No.9285/07 under Order 22 Rule 4 r/w Rule 9 of CPC to bring his legal representatives on record and on dated 27.8.2007 I. A. No.9952/07 under Section 5 of Limitation Act for condoning the delay in filing the proceeding for setting aside the abatement of appeal in respect of such respondent while on 15.11.2007 an application I. A. No.13307/07, under Order 22 Rule 4 r/w 9 CPC for setting aside such abatement were filed. The same were seriously opposed on behalf of the proposed legal representatives of the deceased respondent contending that C. S. No.10-A/04 filed by the deceased Sardar Harjinder Singh for eviction against the appellant was decreed in his life time by Third Civil Judge, Class- II vide judgment and decree dated 5.2.2004, such decree was challenged by the appellant in Civil Appeal No.41-A/04, the same was pending on the death of Harjinder Singh in the court of Tenth Additional District Judge Jabalpur, where the present appellant brought his legal representatives on record within limitation but did not take any steps to bring the same on record in this appeal, resultantly the appeal had become abated automatically under the law. Thus there is no sufficient cause to condone such delay and setting aside the aforesaid abatement and prayer for dismissal of such applications was made. Subsequently on 3.12.2007 at the stage of hearing such I. As. were withdrawn by the appellant's counsel with liberty to file the appropriate application under Order 1 Rule 10 r/w Section 151 of CPC, if the same is permissible under the law.

4. Subsequent to aforesaid order the present application under order 1 Rule 10 of CPC is filed by the appellants to bring the same persons on record at the place of the deceased respondent No.4 contending that the impugned suit is to be decided between the appellants and respondent No.1 to 3, on the basis of the alleged agreement executed by the predecessor of such respondents in favour of the appellants at earlier point of time from the date of execution and registration of the sale deed in favour of the deceased Harjinder Singh by respondent No.1 and 2. Therefore, the presence of the proposed respondents the legal heirs of Harjinder Singh are not necessary for passing the effective decree in this appeal but their presence will be required as proper party at the time of executing the decree if the same is passed in favour of the appellant. It is also stated that to implead the person in such manner under Order 1 Rule 10 of CPC the limitation for the same is three years as provided under Article 113 of Limitation Act and the limitation prescribed for brining the legal representative on record is not applicable to the present case. With these averments the prayer for brining the legal heirs of the deceased respondent No.4 Harjinder Singh as respondents on record is made.

5. In reply of the proposed legal heirs of the deceased respondent, by admitting the death of respondent No.4 and acquirement of title by them in respect of the disputed property it is stated that after withdrawal of the applications filed u/o 22

r. 3, u/o 22 r. 9 CPC and Sec 5 of the Limitation Act for bringing the legal representatives of deceased on record, the appellant did not have any right or authority by circumventing such provision of CPC to bring them on record. Once the appeal has been abated against the deceased respondent and proceedings relating to set aside such abatement has been withdrawn by the appellants, thereafter the appellant does not have any right to bring the proposed legal representatives on record by way of this application and prayed for dismissal of the same.

6. Shri A. K. Jain, learned counsel for the appellants by referring the facts stated in I. A. said that even after withdrawal of the applications filed for bringing the legal representative of the deceased respondent No.4 on record under Order 22 Rule 4, 9 and 11 of CPC and Section 5 of Limitation Act, the proposed legal heirs of such respondent may be brought on record at his place by the appellant in the circumstances of the case. According to his submission their presence are not required to decide the validity of the alleged agreement, as such question is to be decided in between the appellants and respondent No.1 to 3 while the presence of such heirs shall be required as proper party only at the time of execution of decree if the same is passed in favour of the appellant on adjudication of this appeal. In such premises the appellants be permitted to bring them on record by allowing the I. A. He also placed his reliance on some reported cases of the Apex Court and also some of the case of other courts.

7. By responding the aforesaid argument Shri N. K. Patel, learned Senior Advocate has said that the provision of Order 1 Rule 10 of CPC is not available to the appellant after withdrawing the applications filed under Order 22 Rule 4, 9, and 11 of CPC and also under Section 5 of Limitation Act regarding bringing the legal representatives of deceased respondent on record. The appellant could not be permitted to circumvent the provision of Order 22 Rule 4, 9 and 11 of CPC by invoking the provision of Order 1 Rule 10 of CPC. The abatement of the appeal is automatic process, if the legal representatives of the deceased parties are not brought on record within the prescribed period then the abatement is occurred, which could not be set aside without any sufficient cause for condoning the delay and such applications have been disposed of by this court considering the request of the appellant to withdraw the same. He also placed his reliance on some reported cases and prayed for dismissal of this I. A.

8. Having heard the counsel I have carefully gone through the entire record with all the aforesaid applications, impugned judgment and the different order sheets of this appeal. It is apparent that impugned suit for specific performance was filed initially against respondent No.1 and 2 on 19.12.1989 contending that the alleged agreement was executed by their father Pyarelal, and after his death the disputed property was inherited by respondent No.1 to 3 and the same was transferred by them through registered sale deed dated 17.12.1981 to deceased respondent No.4. It is also apparent that impugned suit has been dismissed by the

trial court against all the respondents holding the deceased respondent No.4 Harjinder Singh acquired the title of disputed property as bonafide purchaser. In pendency of this appeal deceased respondent No.4 died on 5.1.2005, thereafter within limitation no steps were taken by the appellant to bring his legal representatives on record within prescribed limitation of 90 days. Subsequent to it at very belated stage an application under Order 22 Rule 4 read with Rule 9 of CPC was filed on 13.8.2007. Subsequent to it an application under Section 5 of Limitation for condoning the delay in filing the proceeding for setting aside the abatement of appeal in respect of deceased respondent was filed on 27.8.2007 and an application under Order 22 Rule 9 for setting aside such abatement was filed on 15.11.2007. The same were seriously opposed on behalf of the proposed legal representatives by filing their reply and during the course of argument on such applications the same were withdrawn by the appellants' counsel on dated 3.12.2007, on which the following order was passed:

> . . . . . .
>
> During the course of argument appellant's counsel seeks permission to withdraw I. A. No.9285/07, I. A. No.9952/07 and I. A. No.13307/07 as not pressed with liberty to file some appropriate application under Order 1 Rule 10 r/w Section 151 of CPC.
>
> Shri Patel has no objection in such withdrawal while Shri Sanghi said that same be permitted to withdraw without extending any liberty to the appellant.
>
> On consideration appellant is permitted to withdraw the aforesaid I. As. as not pressed with liberty to file the application, if the same is permissible under the law. On filing such application the same shall be dealt with in accordance with law.
>
> . . . . . .

9. Subsequent to aforesaid order this application u/o 1 R. 10 r/w O 22 R. 10 r/w Section 151 of CPC is preferred. The same is also seriously opposed by all the proposed legal representatives of the deceased in their reply. In such circumstance this court has to answer the following questions:

a. After withdrawal of the aforesaid applications by the appellant filed under Order 22 Rule, 4, 9 and 11 of CPC and under Section 5 of Limitation Act whether he may be permitted to bring such legal heirs of respondent No.4 on record at his place by invoking the provision of Order 1 Rule 10 r/w 151 of CPC. In case such application is dismissed then whether this appeal should be treated as abated in toto or only against the deceased respondent.

10. It is basic proposition of law that Order 22 Rule 10 of CPC is applicable to bring the person on record with leave of the court who acquires the rights in the disputed property during pendency of the suit by assignment, creation or devolution, such person may come or bring on record with leave of the court at the place of

such party of the suit from whom he acquired such rights in the aforesaid manners. But in any case such provision and the provision of Order 1 Rule 10 of CPC could not be invoked to defeat the provision of Order 22 Rule 3, 4, 9 and 11 of CPC. On other words by defeating the provisions of Order 22 Rule 4, 9 and 11 of CPC the person like appellant could not be permitted to circumvent such provision by invoking the provision of Order 22 Rule 10 r/w Order 1 Rule 10 of CPC.

11. On earlier occasion this question was answered by the Hon'ble Division Bench of Patna High in the matter of *Jamuna Rai and others Vs. Chandradip Rai and others* reported in AIR 1961 Patna 178 in which in was held as under:

> "85. In this view of the matter, it must be held as mentioned earlier also that the appeal has abated as against the heir of the deceased appellant No.13.
>
> 86. Because of my above decision that the appeal has abated as against the heirs of the deceased appellant, his legal representatives cannot now be added as parties to the appeal under Rule 10, O. 1, as prayed for by circumventing the provision of R.3, O. 22, and, therefore, the application made under R.10, O 1, is also rejected."

12. Thereafter such question was also answered by the High Court of Calcutta in the matter of *Surendra Nath Sarkar and others, v. Manatab Monian and others,* reported in AIR 1978 CALCUTTA 344 with the following findings:

> 6. It appears that such power can be exercised when a party, whose presence before the court may be considered necessary, is not joined at all as a party in the proceedings. The provisions do not in my opinion apply when by operation of other provisions of the Code the suit has abated in respect of a party properly joined and attempt to bring his heirs and legal representatives on record has failed by an order of court. It cannot be said that provisions of R. 10 (2) override other provisions of the Code. The decisions refer to the case where there has been an abatement but no steps have been taken for setting aside abatement by inaction of the plaintiff, and not to cases where the court has refused to set aside abatement on merits.
>
> 7. ..... In this proceeding, we have already noted that the applications for substitution after setting aside abatement was made and rejected as a result whereof the suit was bound to abate in respect of the deceased persons. The court did not find any sufficient reason for setting aside the abatement caused by the deaths of the aforesaid parties in rejecting the applications for substitution after setting aside the abatement. If the plaintiffs are now permitted to bring on record the legal representatives of the deceased persons on the face of such rejection in this suit, it will not be a proper or fair exercise of the jurisdiction but an exercise of jurisdiction with material irregularity on the part of the court to allow such application in exercise of its power either under S. 151 of the Civil P. C or under O. 1 R.

10 (2) of the Civil P. C. Further there may be serious questions of limitation involved in respect of the claims for declaration as made in the suit. I am accordingly of the opinion that in such circumstances when once the application for substitution after setting aside abatement caused by the deaths of some parties in a suit is rejected on merits the plaintiff will not be permitted to circumvent the position caused by operation of law to add them as parties by invoking the aid of O.1.R. 10 (2) of the Civil P.C. or of S.151 of the Code.

13. Subsequent to it Hon'ble Orissa High Court has also given the verdict on this question in the matter of *Kanhu Gauda, Petitioner v. D. Kodandi Dora and others* reported in AIR 1986 ORISSA 191 in which it was held as under:

6. . . . . AIR 1974 All 422: Khalil Ahmad v. Addl. District Judge, Gorakhpur was cited by the counsel for the petitioner. It lays down that where an application under Order 22, Rule 4 to bring the legal representative of a deceased party on record has been dismissed, the court can in exercise of power under Order 1, Rule 10, sub-rule (2) implead the legal representative. I cannot agree with this view and I get support from a decision of this Court reported in (1974) 40 Cut LT 885,Durga Charan Parida v. Basanta Kumar Parida, wherein it has been held :

"It can never be the intention of the Code to take away this valuable right accrued to the legal representatives of the deceased defendant by taking resort to the provision contained in Order 1, Rule 10, Civil Procedure Code. To hold otherwise would amount to going against the scheme of the Code and would put the litigants to great hardship and prejudice. Therefore, I am of the opinion that the trial Court having dismissed the plaintiff's application for substitution, it had no jurisdiction to entertain an application under Order 1 Rule 10, Civil Procedure Code and to allow the same.". . . . . .

14. All the aforesaid cases have been decided after taking into consideration the relevant provisions Order 22 Rule 3 or 4 and Order 1 Rule 10 of CPC and it was held that party cannot be permitted to circumvent the provision of Order 22. Rule 3, 4, 9 and 11 of CPC by invoking the provision of Order 1 Rue 10 of CPC. I am also with the agreement of such principle and in that way the aforesaid cases are directly applicable to the present case for holding that after withdrawing the applications filed under Order 22 Rule 4, 5, 9 and 11 of CPC to bring the legal heirs of the deceased respondent No.4 on record, the appellants did not have any such right or authority to bring such person on record by circumventing such provisions by invoking the provision of O. 1 R. 10 of CPC.

15. The appellant counsel also cited some case laws the same are taken into consideration one by one in following paragraphs;

16. In the matter of *Durga Prasad and another, v. Deep Chand and others* reported in AIR 1954 SC 75 in which it was held as under

37. The practice of the courts in India has not been uniform and three distinct lines of thought emerge. (We are of course confining our attention to a 'purchaser's suit for specific performance.) According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchase alone.

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in - Kafiladdin v. Samiraddin', A. I. R. 1931 Cal 67 (C), and appears to be the English practice. See Fry on specific Performance, 6th Edn. page 90, paragraph 207; also - 'Poter v. Sanders', (1846) 67 ER 1057 (D). We direct accordingly.

17. The aforesaid case was decided by the Apex Court in presence of the subsequent transferee and directing the manner in which the decree should be passed in the suit for specific performance where the subsequent transferee on record. Although this Court did not have any dispute regarding principle announced in this case, it does not give the answer of the question involved in this appeal. Hence, the same is not applicable to the appellant.

18. So far the matter of *State of Punjab, Appellant v. Nathu Ram* reported in AIR 1962 S.C.89 is concerned the same was decided on the back ground of joint decree relating to the compensation of the land acquition matter and the concerned appeal was held to be abated in toto but the question of circumventing the provision of O. 22 R.3, or 4 by invoking the provision of O.1 R. 10 of CPC has not been answered in it, hence, the same is not helping to the appellant.

19. In the mater of *Dwarka Prasad Singh and others, v. Harikant Prasad Singh and others* reported in AIR 1973 S. C. 655, it was held that in a suit for specific performance against a purchaser with notice of a prior agreement of sale the vendor is a necessary party in the suit. Such question is not involved in the present matter; hence, this case law is also not helping to the appellant.

20. The case law in the matter of *Khalil Ahmad & Ors Vs. Additional District Judge, Gorakhpur* reported in AIR 1974 All 422, is concerned, although the identical question was answered in this decision but subsequently this case was considered and discarded by the Orissa High Court with convincing and sufficient reasons in the matter of *Kanhu Gauda's case* (Supra) reported in AIR 1986 Orissa 191. Thus this case is also not helping to the appellant.

21. So for the matters of *Smt. Manni Devi Vs. Ramayan Singh* reported in

AIR 1985 Patna 35 and of *Pulikutia Papanna and others, v. Pulikuntla Gangulamma and others,* reported in AIR 1982 A P 480 are concerned the proposed persons were directed to be brought on record under Order 1 Rule 10 (2) of CPC on the basis of their some independent rights with the property and not on the basis of the right inherited by them from the deceased party on whose death the appeal was abated. Such situation is not here, as in the present matter appellant wants to bring the proposed persons as legal heirs of the deceased respondent on record. Thus, these citations are also not helping to the appellant.

22. Under the aforesaid premises it is held that this appeal has already been abated against the deceased respondent No.4 on non-brining his legal representatives on record with in 90 days from the date of his death i. e. 5.1.05 and after withdrawing the proceedings filed u/o 22 Rule 4,9 and 11 of CPC along with application u/s 5 of Limitation Act in that regard the appellant has no authority to bring such heirs on record under Order 1 Rule 10 r/w Order 22 Rule 10 r/w Section 151 of CPC. Now the appellant did not have any right to sue against the proposed respondents the legal heirs of deceased respondent No.4; as they acquired the valuable right on abatement of the appeal; as the findings of the trial court relating to the deceased respondent No.4 could not be interfered in this appeal and in such premises the application of the appellant deserves to be dismissed.

23. So far the question regarding abatement of this appeal is concerned, I am of the view that this appeal has not become abated in toto, the same shall proceed further against the other existing respondents to adjudicate the question regarding refund of the alleged earnest money as alleged given to Pyarelal Sharma by the appellant as mentioned in the agreement.

24. In the aforesaid premises by holding that this appeal has become abated against the deceased respondent No.4 and appellant did not have any right to bring his legal heirs on record at this stage under Order 1 Rule 10 r/w Order 22 Rule 10 r/w Section 151 CPC by circumventing the provision of Order 22 Rule 3, 9 and 11 of CPC, the appellant's I.A.No.14251/07, is hereby dismissed.

Order accordingly.

I.L.R. [2008] M. P., 1771

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

31 March, 2008*

LORDS WEAR PVT. LTD., NAGPUR ... Appellant

Vs.

M/S ANANDKUMAR DEVENDRA KUMAR & anr. ... Respondents

Arbitration and Conciliation Act (26 of 1996), Sections 16, 34, 37 - ***Territorial Jurisdiction - Arbitrator is under an obligation to decide the plea***

*Ar. A. No.1/2007 (Indore)

of jurisdiction - Appellant carrying on business at Nagpur and order was also placed at Nagpur - Objection regarding territorial jurisdiction not decided by Arbitral Tribunal and also by Court - Held - Whole action of Arbitral Tribunal without jurisdiction - Award set-aside - Appellant directed to appear before Arbitral Tribunal - Appeal allowed. (Para 8)

माध्यस्थम् एवं सुलह अधिनियम (1996 का 26), धारायें 16, 34, 37 – क्षेत्रीय क्षेत्राधिकार – मध्यस्थ क्षेत्राधिकार का प्रश्न निर्णीत करने को बाध्य है – अपीलार्थी नागपुर में व्यवसाय कर रहा था एवं आदेश भी नागपुर में दिया गया था – माध्यस्थम् अधिकरण एवं न्यायालय द्वारा क्षेत्रीय क्षेत्राधिकार की आपत्ति निराकृत नहीं की – अभिनिर्धारित – माध्यस्थम् अधिकरण की सम्पूर्ण कार्यवाही अधिकारिता विहीन – अवार्ड अपास्त – अपीलार्थी को माध्यस्थम् अधिकरण के समक्ष उपस्थित होने का निदेश दिया – अपील मंजूर।

Case referred :

2002 (2) LHM 171.

Subodh Abhyankar, for the appellant.

R.C. Mehra, for the respondent No.1.

J U D G M E N T

N.K. Modi, J. :–This judgment shall also govern disposal of AA No.2/2007 and AA No. 3/2007 as in all the appeals the point involved is one and the same and in all the appeals the appellant is one and the same. All the appeals are being filed against the order dated 26.2.2007 passed in Arbitration Case No.14/2005, 15/2005 and 13/2005 passed by XI ADJ Indore. In all the appeals appellant is one and the same but the respondent No.1 is different. In AA No. 1/2007 respondent No.1 is M/s Anandkumar Devendra Kumar, in AA No.2007 respondent No.1 is Hukumchand Munnalal Patni while in AA No.3/2007 respondent No.1 is Hemantkumar Patni. In all the cases the claim case was filed by respondent No.1 before respondent No.2 Arbitration Tribunal, (Shrimant Maharaja Tukojirao Cloth Market Merchants Association, MT Cloth Market, Indore.) The amount which was claimed in all the three appeals were as under:

AA No. 1/2007	**Rs.2,33,938.85 paise**
AA No.2/2007	**Rs.2,04,369.90 paise**
AA No.3/2007	**Rs.2,07,854.00 paise**

2. After giving repeated notice to the appellant the matter was finally disposed of by the respondent No.2 by passing award in favour of respondent No.1 against which the objections were filed by the appellant before the learned Court below for setting aside the award. The objections submitted by appellant were dismissed by the impugned order against which the present appeal has been filed.

3. Mr. Subodh Abhyankar, learned counsel for the appellant submits that the learned Court below committed error in dismissing the objections filed by appellant. Learned counsel submits that the award passed by respondent No.2 and the impugned order passed by learned Court below are nulity and non est in the eye

of law as the same has been filed by playing fraud and by suppression of material evidence from the adjudicating authority i.e. Respondent No.2. Learned counsel submits that the bills on which reliance is placed by respondent No.2 are not originals. It is submitted that in number of documents it is mentioned that the account is settled and full and final payment of bills has been made. It is submitted that this aspect of the matter has not been taken into consideration by learned court below while passing the impugned award.

4. Learned counsel further submits that at the initial stage the appellant took the plea that respondent No.2 is not having territorial jurisdiction to decide the dispute between the parties. It is submitted that no order was passed on the preliminary objection raised by the appellant.

5. Learned counsel placed reliance on Section 16 of the Act which relates to the jurisdiction and lays down that the objection that Arbitral tribunal does not have jurisdiction, has to be raised not later that the submission of the statement of defence, however, a party shall not be precluded from raising such a plea merely because that he has appointed or participated in the appointment of an arbitrator and the plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. Learned counsel submits that sub-section (5) of Section 16 of the Act lays down that arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and when the arbitral tribunal takes a decision rejecting the plea continue with the arbitral proceedings and make an arbitral award.

6. Learned counsel placed reliance on a decision in the matter of *Arati Dhun v/s S.K. Dutta;* 2002 (3) LHM 171 where it was held that it is clear from the conjoint reading of the aforesaid three sub-sections of Section 16 of the Act, 1996 that the arbitrator is under an obligation to decide the plea of jurisdiction and his authority to continue the arbitration depends on his decision rejecting the plea about his jurisdiction. In other words, sub-section (5) of Section 16 envisages that the Arbitrator may reject the plea about jurisdiction and then to continue with the proceedings and make an award. It was further observed that in the instant case, without rejecting the question to his jurisdiction the aribtrator has proceeded with the award and as such committed grave error of law. Reliance was also placed on a decision in the matter of *National Insurance Co.Ltd. v/s Siemens Atkeingesellschanft* reported in 2007 (4) SCC 451, wherein Hon'ble Apex Court has held that under Section 16(5) the Arbitral Tribunal has the obligation to decide the plea referred to in Ss.16(2) or (3) and when it rejects the plea, it could continue with the arbitral proceedings and make the award.

7. Mr. R.C.Mehra, learned counsel for respondent submits that respondent has supplied the goods to the appellant and no payment has been made by the appellant to respondent. Notices were sent to the appellant but the appellant remained absent and before learned Court below also inspite of giving number of

opportunities to adduce evidence no evidence was adduced. It is submitted that in the facts and circumstances of the case the appeal deserves to be dismissed.

8. From perusal of record it is evident that after receipt of notice from the tribunal objections were filed by the appellant which were sent through post and in the said objections the appellant submitted that learned tribunal is having no territorial jurisdiction as the appellant was carrying on business at Nagpur and the order was placed at Nagpur itself. From perusal of record it is also evident that after making such objections the appellant remained absent and no decision was taken by the learned tribunal on the said objection. Keeping in view sub-section (2) of Sections 16 of the Act and also keeping in view the law laid down by the Hon'ble Apex Court, it was duty of respondent No.2 to decide the issue relating to territorial jurisdiction. After deciding the question of jurisdiction in favour of respondent only the tribunal was empowered to proceed with the case. Since the objection raised by the appellant was not decided and the respondent No.2 proceeded with the case without deciding the objection which goes to show that whole action of respondent No.2 was without jurisdiction. In the facts and circumstances of the case, learned Court below committed error in not deciding the objection filed by the appellant. However, appellant was absent before the learned tribunal. If the appellant would have remained present before the tribunal, then the objection relating to territorial jurisdiction would have been decided finally at that stage only. In the facts and circumstances of the case, the appeal stands allowed. The impugned order passed by the learned court below and the award passed by the learned tribunal stand set aside subject to payment of cost of Rs.10,000/- in all the three cases and also upon furnishing solvent security for a sum of Rs. 5 lacs before the learned court below on or before 16.6.08 to the effect that in case final award is passed by the respondent No.2 against the appellant, the same, shall be satisfied by the appellant. Appellant shall remain present before the learned tribunal on 16.06.08. No order as to costs.

Copy of this order be placed in connected appeals.

Order accordingly.

I.L.R. [2008] M. P., 1774

APPELLATE CRIMINAL

Before Mr. Justice Abhay Gohil & Mr. Justice Abhay M. Naik

14 March, 2008*

GANGA PRASAD & ors. ... Appellants

Vs.

STATE OF M.P. ... Respondent

A. **Evidence Act (1 of 1872), Section 3** - *Appreciation of evidence of relative witness - Evidence of relatives cannot be discarded simply on the ground that they are interested witnesses - As according to case diary*

*Cr.A No.384 1996 (Gwalior)

statements they were not the eye witnesses and in the court they have improved their version and became the eye witnesses of the incident - Their evidence is not reliable. (Para 16)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – रिश्तेदार साक्षी के साक्ष्य का अधिमूल्यन – रिश्तेदारों की साक्ष्य केवल इस आधार पर अमान्य नहीं की जा सकती कि वे हितबद्ध साक्षी हैं – अनुसंधान दैनंदिनी के कथनों के अनुसार वे प्रत्यक्षदर्शी साक्षी नहीं थे और न्यायालय में उन्होंने अपने बयान में सुधार किया और घटना के प्रत्यक्षदर्शी साक्षी बन गये – उनकी साक्ष्य विश्वसनीय नहीं।

B. Evidence Act (1 of 1872), Section 32(1) - *Dying Declaration - Provision of Section 32(1) of the Act is an exception to the rule against admissibility of hearsay rule and if the dying declaration is reliable, conviction can be based thereon.* (Para 17)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32(1) – मृत्युकालिक कथन – अधिनियम की धारा 32(1) का उपबंध अनुश्रुत नियम की ग्राह्यता के विरुद्ध नियम का अपवाद है और यदि मृत्युकालिक कथन विश्वसनीय है, दोषसिद्धि उस पर आधारित हो सकती है।

C. Penal Code (45 of 1860), Ss. 302/149, 148, 147 - *Appellant Deewan Singh convicted u/s 302/149 & 148 IPC and remaining appellants convicted u/s 302/149 & 147 IPC - Conviction challenged in appeal - Held - Prosecution has come with two contradictory stories - One as per the dying declaration and other as per eye witnesses - Dying declaration was recorded by Naib Tahsildar on the certificate of Doctor - Dying declaration is more reliable in comparison to the eye witness account - In the light of that 'Dehati Nalishi' was not recorded timely and it is an afterthought document and there is no proof that it was forwarded to the Court immediately as required u/s 157 Cr.P.C. - Evidence of eye witnesses is not reliable as not supported by medical evidence as well - Therefore, the eye witness account is cooked up - Prosecution has failed to prove the charges beyond reasonable doubt - Court has acquitted the appellants.* (Para 18)

ग. दण्ड संहिता (1860 का 45), धारा 302/149, 148, 147 – अपीलार्थी दीवान सिंह भा.द.सं. की धारा 302/149 व 148 के अन्तर्गत दोषसिद्ध और शेष अपीलार्थीगण भा.द.सं. की धारा 302/149 व 147 के अन्तर्गत दोषसिद्ध – दोषसिद्धि को अपील में चुनौती – अभिनिर्धारित – अभियोजन दो विरोधाभाषी कहानियों के साथ आया है – एक मृत्युकालिक कथन के आधार पर और दूसरा प्रत्यक्षदर्शी साक्ष्य के आधार पर – मृत्युकालिक कथन नायब तहसीलदार द्वारा चिकित्सक के प्रमाण–पत्र पर अभिलिखित किया – प्रत्यक्षदर्शी साक्षी के विवरण की तुलना में मृत्युकालिक कथन अधिक विश्वसनीय है – इस आलोक में कि देहाती नालिशी यथासमय अभिलिखित नहीं की गई और यह एक पश्चाद्विचार दस्तावेज है और इसका कोई प्रमाण नहीं है कि धारा 157 द.प्र.सं. की अपेक्षानुसार उसे तुरन्त न्यायालय को अग्रेषित किया गया – प्रत्यक्षदर्शी साक्षियों का साक्ष्य विश्वसनीय नहीं है क्योंकि उसे चिकित्सकीय साक्ष्य का समर्थन नहीं है – इसलिये प्रत्यक्षदर्शी साक्षी का विवरण तैयार कराया गया (cooked up) – अभियोजन आरोपों को युक्तियुक्त शंका से परे सिद्ध करने में असफल रहा – न्यायालय ने अपीलार्थीगण को दोषमुक्त किया।

Cases referred :

1976 JLJ 599, AIR 1962 SC 130, AIR 1971 SC 953, (2004) 13 SCC 264.

Madhukar Kulshrestha, for the appellants.

V.S. Chaturvedi, G.A., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by ABHAY GOHIL, J. :–This judgment shall govern the disposal of Criminal Appeals No.384/1996 and 28/1997.

2. Vide judgment dated 18.11.1996 in Sessions Trial No.1/94 all the appellants of both the appeals were tried and convicted by First Additional Sessions Judge, Camp Sironj, District Vidisha under sections 302, 149 and sentenced to life imprisonment. Appellant Deewan Singh has also been convicted additionally under Section 148 IPC and sentenced to six months R.I.. All the appellants except appellant-Deewan Singh have also been convicted under Section 147 IPC and sentenced to three months R.I. each, against which they have filed these appeals under Section 374 Cr.P.C. and have challenged their aforesaid conviction and sentence.

3. Brief facts of the case are that one Balak Das Bairagi was resident of village Rusiya. He was having enmity with the appellants. On 4.8.1993 in the evening the complainant Balak Das came back to his house and after sometime when he was going away, Deewan Singh carrying Ballam in his hand and his brothers Ramcharan and Raghuveer carrying lathis came and surrounded him. Deewan Singh abused him and said – he be killed. Deewan Singh gave one Ballam blow in the right forearm which started bleeding. When Balak Das tried to run away from the spot, all other accused persons gave lathi blows on his legs. He fell down and thereafter he was beaten by all of them by lathis. Hearing noise Ramvati, wife of Balak Das and his brothers Bhaiyalal, Ratan Das etc. came on spot. Seeing them all the appellants ran away from the spot. On the same day at about 21.00 hrs. in the night Balak Das reported the matter to police and 'Dehati Nalishi' was written by Mr.K.K.Bhargava, In-charge Police Station Murwas. Injured Balak Das was referred to Sironj Hospital for treatment, where his dying declaration was recorded by Basantilal Malviya, Naib Tehsildar. Next day Balak Das succumbed to the injuries. Crime was registered, matter was investigated and charge sheet was filed. After considering the prosecution evidence, trial Court convicted the appellants and sentenced them as aforesaid, against which they have preferred these appeals.

4. We have heard the learned counsel for the parties. Learned counsel for the appellants vehemently argued and submitted that the conviction of the appellants under the aforesaid Section is bad in law. The independent witnesses have not supported the prosecution story. The conviction is simply based on the evidence of the wife, daughter and brothers of the deceased. The so-called eye-witnesses

were not present on the spot. In the dying declaration(Ext.P/12) name of Parasram Patel alone was mentioned as an assailant and name of Hemraj was mentioned as present but both the persons Parasram Patel and Hemraj have not been made as accused in the case. Therefore, it is clear that Dehati Nalisi has been recorded by the Investigating Officer without any basis and he has falsely implicated the appellants due to enmity. It was further argued that as per prosecution story there were eight assailants but the deceased was having only six injuries. As per the evidence of eye-witnesses, they reached the spot after receiving information from one Kallu Chamar, but prosecution has not examined Kallu as eye-witness and he was examined as DW1. Therefore, it was argued that the evidence of Bhaiyalal (P.W.1) and Ratan Das (P.W.2) is not at all reliable and it was also argued that even Ramwati (P.W.6), wife of the deceased is also cooked up witness. In the statement of Ramwati and Ratan Das recorded under Section 161 Cr.P.C. the names of the appellants have not been mentioned but they have made improvement in their Court statement and trial Court has wrongly placed reliance thereon. It was further argued that prosecution itself has proved the dying declaration (Ext.P/12) by producing Basantilal Malaviya, Naib Tehsildar as P.W.14. It is supported by Mr. K.K.Bhargava (P.W.17) and from this dying declaration the prosecution story is totally false and the trial Court has overlooked the dying declaration and material contradictions in the prosecution case and has wrongly convicted the appellants. It was further argued that the trial Court has deliberately discarded the evidence of Kallu (D.W.1), who was the natural witness of the incident. All the eye-witnesses are interested eye-witnesses, their evidence is not corroborated by medical evidence. No ballam injury was found on the body of the deceased. He submitted that all the appellants have been implicated falsely on the basis of concocted evidence on account of enmity. Therefore, it was argued that the appellants are entitled for acquittal, as no clinching evidence is available against them to uphold the conviction.

5. In reply, learned Public Prosecutor supported the judgment and findings recorded by the trial Court and argued that the conviction of the appellant is proper and the evidence of the eye-witnesses is fully reliable and prayed for the dismissal of the appeal.

6. After hearing the rival contentions of the learned counsel for the parties, we have analysed the evidence on record.

7. Ishaq (P.W.4), Badan Singh (P.W.5), Sehjad Khan(P.W.8), Mohammad Ali (P.W.11), Lallu (P.W.15) and Chhaganlal(P.W.16), who were cited as independent eye witnesses, have not supported the prosecution story and were declared hostile. Kumari Sobha Bai (P.W.7) and Saroj (P.W.13) both are minor daughters of the deceased. Bhaiyalal (P.W.1) is brother and Ramwati (P.W.6) is widow of the deceased.

8. Dr. S.S.Thakur(P.W.10) had performed the autopsy of the deceased and found following injuries on the body of the deceased.

1. Incised wound size 2"x ½"x11 over right upper arm and lat. Aspect, margin clean cut; clotted blood present.

2. Bruise size 3"x2" over right side of chest, axillary region in direction, bony crepitation present. Subcutaneous emphysema present. Reddish in colour.

3. Incised wound size 2"x 1½" x 1½" over left leg lower 1/3, margin clean cut, clotted blood + bony deformity present.

4. Bruise size 4" x 2" over right leg anterior aspect, swelling and tenderness present, bony deformity present. Reddish in colour.

5. Bruise size 3"x2" over left leg anterior aspect, swelling and tenderness + bony deformity present. Reddish in colour.

6. Incised would size 1" x 1½"x 1½" over right leg ant. Aspect, just below the injury No.4, margin clear cut,

9. As per the evidence all the injuries were ante-mortem in nature. Injuries No.1, 3 & 6 were caused by sharp aged weapon and remaining injuries were caused by hard and blunt object. Injury No.1 was simple and injury No.2 was fatal. Rest of the injuries were of grievous nature. Duration of the death was 24 hours. On internal examination, fractures were found in the 5th & 6th ribs. Pleura was ruptured, there was laceration in the middle lob of right lung. Undigested food was also found in the stomach. Fractures were also found in both the right and left tibia and fibula bones. Cause of death was shock due to internal haemorrhage.

10. The pertinent question for consideration in this appeal is whether the evidence of Naib Tehsildar (P.W.14) who recorded dying declaration, is reliable and more weighty in comparison to the eye-witness account of the daughters, brothers and wife, as the evidence of dying declaration is contradictory to them. Admittedly dying declaration Ext.P/12 was recorded by Basantilal Malaviya, Naib Tehsildar after taking certificate of fitness from the doctor. The dying declaration was recorded on the same day at about 11.45 p.m. whereas 'Dehati Nalishi' was recorded at about 9.00 p.m.(21.00 hours) and on both the documents thumb impression of Balak Das was obtained. Basantilal Malaviya, Naib Tehsildar is also an independent witness and being independent witness the evidence of Naib Tehsildar, normally is being relied and in this case he has clearly deposed that on the written instructions of the S.D.O. he had recorded the dying declaration of the deceased in the hospital and before recording the statement he had also obtained certificate from the doctor about the fitness and he had also obtained thumb impression of the deceased thereon and after recording the statement again certificate of fitness was obtained that he remained fully conscious during recording of his statement, therefore, the evidence of Basantilal Malaviya, Naib Tehsildar(P.W.14) is fully reliable.

11. What is material in this case is that in the dying declaration names of all the appellants have not been mentioned. Only two names of Parasram Patel, who assaulted by Farsa and Hemraj, son of Tulsiram, who was present, have been mentioned and both these persons have not been made as accused in the case, which is a very serious contradiction in the prosecution case. Mr. K.K.Bhargava(P.W.17), Investigation Officer has admitted that Naib Tehsildar had recorded dying declaration, which shows that the aforesaid evidence of dying declaration recorded by Naib Tehsildar is very material and cannot be discarded. Prosecution has also placed reliance thereon and Mr. K.K.Bhargava(P.W.17) was not declared hostile.

12. We have also considered the evidence of eye-witnesses. Bhaiyalal(P.W.1) has admitted in the cross-examination that he has received information from Kallua Chamar and he has also narrated the names of these persons to the police, who had gone on spot with him but why the police has not written those names in his case diary statement Ext.D/1, he cannot give any reason. Though in the police statement, it is written that Sobhabai had informed him about the incident, but Sobhabai says that she had not informed him.

13. Ratandas (PW2) is the brother of deceased. In the cross-examination he has stated that his brother has told him about the incident and when he reached the spot, at that time Chaganlal, Shahjad Miyan and Bali Mohammad were present and he had not seen Tulsi, Ramlal, Sunderlal and Virendra on spot. Kalua had narrated the incident to him. Shobha had not informed about the incident but it was written in his case diary statement Ex.D/2. He had stated to the police that the accused persons have committed the incident but if it is not mentioned, he cannot give any reason and other suggestions he has denied.

14. Gopilal (PW3) has stated that he himself he had not seen the incident but the doctor and Tehsildar had recorded the statement of the deceased. Ramwati (PW6), wife of deceased Balak Das, has stated that Kalua had informed her about the incident. When she reached the spot, she had seen all the appellants beating her husband. In the cross-examination she has stated that Deewan Singh was having ballam and all remaining other persons were carrying lathi. She had narrated the names of all the assailants to the police but if the names are not mentioned in her case diary statement Ex.D/3, she cannot give any reason. Ishaq was also present on spot. Shobha Bai (PW7), who is child witness of aged 15 years and daughter of deceased, has stated that when she was present in the house along with other family members, Kalua Chamar had informed that her father is being beaten by the appellants and when she went on the spot, had seen that all the persons were beating her father. In the cross-examination she has admitted that when Kallu gave information, Tau Bhaiyalal alone was present. When she reached the spot, Gopi Chowkidar, Shahjad, Mohd.Ali and Chhagan were also present there and darkness was increasing. The police had not recorded her statement; she has given statement first time in the Court. She has admitted

that her father was working as a driver and used to drink. She had seen that Deewan Singh was carrying ballam and rest of the accused were carrying lathis and there was no enmity with the assailants. Another child witness Saroj (PW13), aged 13 years, has also narrated the same story. In cross-examination she has admitted that Shobha had informed her that her father is being beaten by the appellants. Kallu had not directly informed her. Police had not recorded her statement. She was not aware whether Chhagan, Shahjad Miyan, Ishaq and Gopilal were present. She has admitted that when she reached the spot, at the same time Thanedar had also come on spot.

15. From the aforesaid statements it is clear that two child witnesses (PW7 and PW13) were not the eye witnesses of the incident; their statements under section 161 Cr.P.C. were not recorded by police and they had not seen the assailants. So far as the evidence of Bhaiyalal (PW1) and Ratandas (PW2) is concerned, that is not of clinching nature and is not sufficient to maintain the conviction for following reasons – firstly, that they received information from Kalua Chamar, who has not supported the prosecution case and who was examined by defence as DW1. In defence he has stated that the deceased was lying unconscious at the door of Parasram Patel. Chhaganlal, Mohd. Ali and Ishaq were standing there. Chhaganlal told him to inform the family members that Balak Das is lying here and he had intimated to Shobha. At that time wife of the deceased was also present and it was raining. He has denied the suggestion that he is telling lie or is not supporting the prosecution. Secondly, that all the eye witnesses have stated that Deewan Singh was carrying ballam and all others were carrying lathis in their hands. From the injuries received by the deceased it is clear that the deceased had not received any penetrating wound. He was having three injuries by sharp edged weapon but the eye-witnesses have not assigned any sharp edged weapon in the hand of any of the appellants, from which it is clear that they had not seen the incident and their evidence is not much reliable and if seven persons had assaulted by lathi, the deceased was having only three contusions – one on the right chest, second on right leg and third on left leg. In the opinion of the doctor, contusion on right chest was dangerous and other injuries were grievous hurt and the doctor has not opined that which injury or cumulative effect of all injuries was sufficient to cause death in the ordinary course of nature. Therefore, it is clear that the eye-witness account is not tallying from the injuries received by the deceased and in the light of the dying declaration, which has been found proved, the evidence of eye witnesses having omissions and contradictions is not at all reliable, as it is not clinching in nature. Thirdly, as per prosecution story and the case diary statement of Bhaiyalal (PW1), Ratandas (PW2) and Ramwati (PW6), they had not seen the incident and they were not the eye-witnesses. They had given statement only on the basis of information given to them by Kallu (DW1), but in the Court they have made improvements in their statements and became eye-witnesses, therefore, it is true that the evidence of all three eye-witnesses is

full of contradictions, omissions and is not reliable at all. Thus, in our considered opinion, it is clear from the evidence that the trial Court has committed illegality in convicting the appellants.

16. It is settled position under the law that the evidence of relatives cannot be discarded simply on the ground that they are interested witnesses but in this case their evidence is not reliable, as according to case-diary statements they were not the eye-witnesses and in the Court they have improved their version and became the eye-witnesses of the incident. The other independent witnesses those who were present on spot as per the eye-witnesses, have also not supported the prosecution case. This improvement in the statement of Ramwati (PW6) that all the appellants were beating Balakdas by farsa is also contrary to the evidence of other witnesses and medical evidence.

17. In the matter of dying declaration it is the settled position under the law that the same is admissible in evidence. Even the corroboration is not necessary unless suffers from any kind of infirmity. In case of *Munnu Raja v. State of Madhya Pradesh*, reported in 1976 JLJ 599 (SC) Supreme Court has held as under:-

> **" It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination. There is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be accepted upon unless it is corroborated. Thus, Court must not look out for corroboration unless it comes to the conclusion that the dying declaration suffered from any infirmity by reason of which it was necessary to look out for corroboration."**

and followed the view taken by the Constitutional Bench of the Hon'ble Supreme Court in case of *Tarachand Damu Sutar v. State of Maharashtra*, reported in AIR 1962 SC 130. In this case, sufficient time was available to call the Magistrate for recording the dying declaration, as held in the case of *Keshav v. State of Maharashtra*, reported in AIR 1971 SC 953. If the medical opinion was sought from the doctor about the mental condition of the deceased then the evidence of dying declaration is fully reliable and conviction can be based thereon. Provision of Section 32(1) of Evidence Act 1872 is an exception to rule against admissibility of hearsay rule and if the dying declaration is reliable, conviction can be based thereon. See, *Narain Singh and another v. State of Haryana* {(2004) 13 SCC 264}. In the case in hand what we found that the evidence of dying declaration is available, the same is admissible and acceptable. Therefore, the other story put forth by the eye-witnesses is not reliable and cannot be the basis for conviction.

18. Admittedly, in this case the prosecution has come with two contradictory stories – one as per the dying declaration and other as per eye-witnesses, because the dying declaration was recorded by Naib Tehsildar, who is the independent

witness on the certificate of doctor, therefore the dying declaration is more reliable in comparison to the eye-witness account and in the light of the aforesaid evidence, this argument of the learned counsel for the appellants carries weight that 'Dehati Nalishi' was not recorded timely and it is an after thought document and there is no proof that it was forwarded to the Court immediately as required under Section 157 of the Code of Criminal Procedure. Therefore, it appears that the eye-witness account is cooked up. In such circumstances it is clear that the prosecution has failed to prove the charges and allegations by producing the evidence beyond reasonable doubt. Thus, it is also clear that the trial Court has not properly appreciated the evidence. There is no clinching evidence against the appellants on record to connect them with the incident.

19. Thus, both the appeals(Criminal Appeals No.384/96 & 28/97) deserve to be allowed and are hereby allowed. Judgment of conviction and sentence of the appellants is set aside and the appellants are acquitted from the charges after giving them benefit of doubt. The appellants are on bail, their bail bonds be discharged.

Appeal allowed.

I.L.R. [2008] M. P., 1782

APPELLATE CRIMINAL

Before Mr. Justice S.K. Kulshrestha & Mr. Justice S.A. Naqvi

22 April, 2008*

NANDU AHIR ... Appellant

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 302 - Murder - *Child of appellant was earlier treated by deceased as he was indisposed since long - Again the child was taken to deceased who subjected him to treatment (witchcraft) - No improvement was shown and child died in the morning - Appellant on the next day entered the house of deceased and assaulted him with an axe - Held - Suddenness which is important constituent to bring case within Exception 1 to Section 300 is missing - Case of appellant does not fall within Exception 1 to Section 300 - Appellant rightly convicted for said offence - Appeal dismissed.* (Para 10)

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थी के बालक का उपचार पूर्व में मृतक द्वारा किया गया चूंकि वह काफी समय से अस्वस्थ था – बालक को फिर से मृतक के पास ले जाया गया जिसने जादू टोना के अधीन होकर उसका उपचार किया – कोई सुधार नहीं दिखा और बालक की मृत्यु प्रातःकाल में हो गयी – अपीलार्थी ने दूसरे दिन मृतक के मकान में प्रवेश किया और उस पर कुल्हाड़ी से हमला किया – अभिनिर्धारित – आकस्मिकता, जो कि मामले को धारा 300 के अपवाद 1 में लाने के लिए महत्वपूर्ण घटक है, का अभाव है – अपीलार्थी का मामला धारा 300 के अपवाद 1 में नही आता – अपीलार्थी कथित अपराध के लिये सही रूप में दोषसिद्ध किया गया – अपील खारिज।

*Cr.A. No.856/1993 (Jabalpur)

None, for the parties as lawyers are on strike.

JUDGMENT

The Judgment of the Court was delivered by S.K. KULSHRESTHA, J. :–THIS appeal is directed against the judgment dated gth June, 1993 of the learned Sessions Judge, Mandia, in Sessions Trial No. 163/91 by which the learned Sessions Judge has convicted the appellant under Sections 449 and 302 of the Indian Penal Code and respectively sentenced him thereunder to rigorous imprisonment for 10 years and imprisonment for life.

2. The accused was prosecuted for the said offence on the ground that on 24.8.1991 he had voluntarily caused the death of Gondu Panda. It was alleged that the son of the accused Bhagwat, aged about 5 years, was indisposed since long and earlier he had been treated by the deceased and he had become well. Again on 24.8.1991, Bhagwat came to Bhanpur, though Nisha Bimte (PW 12) advised him to take the boy for treatment to Ghughri Hospital, the child was taken to the deceased who subjected him to treatment (witchcraft) during the night, but there was no improvement. At about 4:00 a.m., the child died. On the next day the appellant entered the house of the deceased and assaulted him with an axe. Many people were present on the spot. Report was lodged on 25.8.1991 at about 10.25 a.m. to the said effect. The inquest memo Ex.P/1 was prepared. Vide requisition Ex.P/3, the dead body was sent to the hospital for post-mortem examination. The autopsy was conducted by Dr. J.P.Mujwar (PW 3) on 28.8.1991. According to Dr. J.P.Mujwar (PW 3) and his report Ex.P/3, the body was in a highly decomposed stage. Maggots were crawling all over the body and the surrounding area. Both the nostrils were eaten up by the Maggots and eye-balls were absent, the socket of the eyes were full of Maggots. Maggots were coming out from mouth, bridge of nose and both ears. The lower joint was in two pieces and full of Maggots. Pieces of skull were not present, skin pealed off easily and the underneath bone exposed easily. The skull was only intact posteriorly. There was a fine cut mark over the 3rd cervical vertebrae which was separated and skull could be moved all round. According to the opinion of the Autopsy Surgeon, the cause of death might have been shock due to profuse haemorrhage from vital organ like blood vessels and suggestive fracture of third cervical vertebrae.

3. In further sequel of investigation, the accused was arrested and as per disclosure made by him vide Ex.P/2, a blood stained axe was recovered at his instance as per seizure memo Ex.P/8. A Shirt was also seized vide Ex.P/9. Sample of blood stained and control earth were taken from the spot and panchnama Ex.P/10 was prepared. The clothes of the deceased were seized vide Ex.P/11. Spot Map (Ex.P/14) was prepared and seized articles were sent to Forensic Science Laboratory, vide Ex.P/16. After completion of investigation, the accused were prosecuted. The accused denied having committed any offence and stated that he was innocent and had been falsely implicated. However, on trial, he was convicted and sentenced, as stated hereinabove.

4. As regards death of Gondu Panda, there is ample evidence on record. The witnesses have deposed to the said fact and the testimony finds confirmation for inquest held by the police and subsequent post-mortem examination conducted by Dr. J. P. Mujwar (PW 3). The question that, therefore, arises for our consideration is whether the appellant was the perpetrator of the offence in question.

5. The prosecution has examined in all 14 witnesses to prove its case. Dumra Singh (PW 1) has been examined as regards the extra-judicial confession made by the accused, Jangli Singh (PW 2) has stated that accused had run away, Dr. J.P.Mujwar (PW 3) had conducted autopsy and reference to his testimony has already been made, Goharlal (PW 4) is witness to extra-judicial confession and so also Dumra Singh (PW 1). Baddu Lal (PW 5) came later and saw the wife of the accused wailing, Jhanaklal (PW 6) has deposed about the conduct of the accused on learning about the death of his son, Arjun Singh (PW 8) and Sukhdeo (PW 9) panch witnesses, have deposed about the seizure of the axe. Smt. Nisha Bimte (PW 10) is Doctor and Bhagwati Bai (PW 10) is the witness to extra-judicial confession, while Arjun Uike (PW 14) conducted the investigation.

6. Insofar as the witnesses are concerned, they have confirmed that contrary to the advice of Nisha Bimte (PW 10), the accused had taken his son to the house of the deceased for treatment. It was only when it was declared thal his son has died in the morning at about 4.00 p.m., that the accused brought an axe and assaulted the deceased. Baddu Lal (PW 5) deposed that when wife of the accused started wailing, he proceeded to the house of the deceased and saw that dead body of the child was lying. The accused proceeded to chop wood and on return assaulted the deceased on his neck. Jhanaklal (PW 6) has also stated that after learning about the death of his child, the accused went and brought an axe and without saying anything, he assaulted the deceased on his neck as a result of which he died. Jangli Singh (PW 2) corroborates the testimony of the above eye-witnesses Baddu Lal (PW 5) and Jhanaklal (PW 6) and states that he saw the accused running away after having assaulted the deceased with an axe.

7. We have already gone through the testimony of Dumra Singh (PW 1) and Goharlal (PW 4) with regard to the extra-judicial confession. Even if the extra-judicial confession is kept aside for the sake of argument, there appears no reason to disbelieve the testimony of Baddu Lal (PW 5) and Jhanaklal (PW 6).

8. The axe was seized from the accused and sent to the Forensic Science Laboratory along with Shirt and other articles seized. According to the Forensic Science Laboratory (Ex.P/17), these articles were stained with blood. Since report of the Serologist has not been received, it is not confirmed that articles were stained with human blood. Under these circumstances, these articles lose their incriminating value.

9. On conspectus of the aforesaid evidence, it is apparent that not only witnesses Baddu Lal (PW 5) and Jhanaklal (PW 6) have stated about the axe having been

used by the accused, there is evidence of extra-judicial confession deposed to by Dumra Singh (PW 1) and Gohar Lal (PW 4). Though, a part of the confession is missing in Ex.D/1, Section 161 of CrPC statement, yet the FIR lodged by Jangli Singh (PW 2), coupled with the testimony of eye witnesses and the other circumstances on record and extra-judicial confession, it is clear that the accused caused injury to the deceased to which the deceased succumbed.

10. We have also examined the case of the accused in the light of Exception I to Sec. 300 of the IPC since counsel for the accused has not appeared on account of Strike. Exception I to Sec. 300 states that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or the death of any other person by mistake or accident. Even if we accept hypothetically that death of the child of the accused constituted provocation, the fact that accused went to Jungle and chopped would and brought the same to the house of the deceased, and thereafter suddenly struck him with an axe, shows that suddenness which is an important constituent to bring the case within the said Exception, was not present in the case. We are, therefore, of the view that the case of the appellant does not fall within Exception I to Sec. 300 and he has rightly been convicted for the said offences.

11. Consequently, this appeal is sans merit and is hereby dismissed. The appellant is on bail. He shall surrender to his bail bond. Simultaneously, warrant of arrest be issued for his production before the trial Court for being sent to Jail to serve out his remaining sentence.

Appeal dismissed.

I.L.R. [2008] M. P., 1785
APPELLATE CRIMINAL
Before Mr. Justice A.P. Shrivastava
23 April, 2008*

DINESH ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 306, Evidence Act, 1872, Section 113-A - ***When presumption would be applicable*** - *Wife committed suicide within a year from marriage due to demand of dowry and cruelty - Letter found near body shows that she terminated life due to suspicion made by husband regarding her character - Trial Court held that demand of dowry and cruelty not proved however convicted on the basis of letter - Held - Letter was not admitted by defence - It was also not proved that it was written by deceased - It was not the case of prosecution that as husband suspected her character*

*Cr.A. 319/1995 (Indore)

therefore due to mental cruelty she committed suicide - As cruelty was not proved therefore, presumption of Section 113-A would not be applicable - Appellant acquitted - Appeal allowed. (Para 14)

दण्ड संहिता (1860 का 45), धारा 306, साक्ष्य अधिनियम, 1872, धारा 113.ए – कब उपधारणा लागू होगी – पत्नी ने विवाह के एक वर्ष के भीतर दहेज की मांग और क्रूरता की वजह से आत्महत्या की – उसके शरीर के पास मिला पत्र दर्शाता है कि पति द्वारा उसके चरित्र पर शक करने की वजह से उसने अपना जीवन समाप्त कर लिया – विचारण न्यायालय ने यह अभिनिर्धारित किया कि दहेज की मांग और क्रूरता सिद्ध नहीं फिर भी पत्र के आधार पर दोषी पाया – अभिनिर्धारित – बचाव पक्ष द्वारा पत्र स्वीकार नहीं किया गया -- यह भी सिद्ध नही हुआ था कि पत्र मृतक द्वारा लिखा गया था – अभियोजन का यह मामला नहीं था कि पति उसके चरित्र पर शक करता था इसलिये उसने मानसिक क्रूरता के कारण आत्महत्या की – चूंकि क्रूरता सिद्ध नहीं हुई थी, इसलिए धारा 113.ए की उपधारणा लागू नहीं होगी – अपीलार्थी दोषमुक्त – अपील मंजूर।

Cases referred :

1995 Cr.L.J. 2472, 2000 Cr.L.J. 794, 1998 Cr.L.J. 2724, (2004) 12 SCC 257, 2007 (1) MPLJ 195.

Sunil Jain, for the appellant.

Mukesh Parwal, for the respondent/State.

JUDGMENT

A. P. SHRIVASTAVA, J.:–This appeal is directed by the appellant against the judgment of conviction and sentence dated 17.04.95 passed by the IIIrd Additional Sessions Judge, Ratlam (M.P.) passed in Sessions Trial No.250 of 1992, by which the appellant has been convicted by the trial Court under Section 306 of the IPC and sentence to undergo rigorous imprisonment for seven years and pay a fine of Rs.1000/- with default stipulation.

2. As per the prosecution story, the marriage of deceased Nirmalabai with the appellant took place on 31.01.91 and she was residing with the appellant at Ratlam where the relatives of the appellant were also residing in the same house and they torture the deceased due to demand of dowry. In the intervening night of 17-18th May 1991, the deceased committed suicide by hanging. The intimation was given to the police station on the basis of which marg intimation was registered and the investigation was started. During the investigation, a letter and a pen were found near the dead body of the deceased which were seized by the police. After completion of the investigation, charge-sheet was filed and the case was committed to the Sessions Court. The Sessions Court framed charges under Sections 147, 306 read with Section 149 of the IPC against the appellant and other co-accused. After conclusion of trial, trial Court convicted and sentenced the present appellant under Section 306 of the IPC as stated in para one of this judgment, while the remaining co-accused were acquitted of all the charges by learned trial Court.

3. Being aggrieved by the judgment of conviction, this appeal has been preferred by the appellant on the ground that learned trial Court has not appreciated the

evidence properly and further on the same set of evidence other co-accused were acquitted by the trial Court. Therefore, the essential ingredients of Section 306 of the IPC are not proved against the appellant. It is further submitted that except the letter (Ex.P.2) there is no other circumstantial evidence against the appellant and it is not established that the letter (Ex.P.2) has written by the deceased herself.

4. Counsel for the respondent-State supported the judgment of the trial Court and submitted that death of the deceased was caused in suspicious circumstances. Therefore, from the letter (Ex.P.2), it appears that the appellant suspected the character of the deceased so she committed suicide and, therefore, the appellant abated the deceased for commitment of suicide.

5. It is not in dispute that the deceased died in suspicious circumstances and as per the postmortem report (Ex.P.3), the cause of death of the deceased was asphyxia.

6. Pradeep Kumar (P.W.1) stated that he visited the place where the incident occurred and also described the position of the body and also stated that on the body no external injury was found, but the letter alone with a sketch pen was seized from near the dead body. The report was given by the witness as Ex.P.1. From the evidence, it is apparent that the deceased died in suspicious circumstances and her death was not normal and she committed suicide by hanging.

7. The question is whether the appellant abated the deceased to commit suicide? In this regard, Maya (P.W.4) stated that when the deceased came to her parents house she deposed that there were demands of VCR, Colour TV and Freeze from the in-laws of the deceased. After the demand of dowry, nearly one-and-a-half months latter, she got information about the condition of the deceased and when she arrived at Ratlam, Nirmala Bai was dead. But in her cross examination the witness admitted that the talk of demand of dowry was not made in her presence. At the time of marriage there was no dispute about the dowry. She also admitted that no demand for dowry was made prior to the date of marriage of the deceased.

8. Rampyari Bai (PW-5), who is mother of the deceased, deposed that her daughter informed her that appellant and his relatives demanded dowry from her daughter, otherwise they would kill her. The witness also stated that she had seen some sign of burning on the body of the deceased. But this fact has not corroborated by the medical evidence. Besides this Dharmendra(P.W.8) and Ganga Bai (P.W.9) have not supported the prosecution case and they denied that there was any demand made by the appellant or his relatives for dowry.

9. From the side of defence, D.W.1 Vishnu Bairagi, D.W.2 Pannalal and D.W.3 Pradeepsingh Ranawat were examined and they denied that there was any demand of dowry made by the appellant and the co-accused from the deceased. The learned trial Court in para 34 gave its finding that from the evidence which is produced by the prosecution, is not proved beyond reasonable doubt that there was any demand made by the appellant or the co-accused or she was subjected to cruelty.

10. But the learned trial Court relied the letter Ex.P/2 which was seized by the

police near the dead body of the deceased in which the contents show that she terminated her life due to suspicion made by the appellant regarding her character and the learned trial Court found that the deceased suffered from mental cruelty and, therefore, ended her life. The Trial Court found that the Act of the appellant came within the purview of abatement as defined u/S.113-A of the Evidence Act.

11. The main contention of the appellant's counsel is that the trial Court based his conviction solely on the letter Ex.P/2. It is not admitted by the defence nor it was the case of prosecution that the deceased died due to suspicion raised by the appellant about her character. He submits that defence also filed a letter Ex.D/1 but the trial Court neither made any comparison of the writing nor prosecution examined the letter Ex.P/2 by any handwriting expert or the father of the deceased that it was written by the deceased. The trial Court has acquitted the appellant against the charge of dowry demand and cruelty. When cruelty is not established the question of abatement to committed suicide does not arise and no presumption can be assumed on the basis of evidence on record. In support of this contention he cited various citations which was passed in the case of *Nilakantha Pati v. State of Orissa* reported in 1995 Criminal Law Journal 2472. He relied on para 29 of the Judgment in which the Court observed that:

> **"Coming to the conviction u/s.306 IPC it is seen that the learned Additional Sessions Judge has convicted the accused thereunder by applying the presumption available u/s.113-A of the Evidence Act after holding that cruelty on the deceased by the accused has been amply proved. U/S.113-A when a question is raised whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. Explanation to the Sections says that cruelty shall have the same meaning as in S.498-A of the IPC. The presumption available to be raised under the section is rebuttable and such wife committed suicide within a period of seven years from the date of her marriage and that her husband and such relative of her husband had subjected her to cruelty. In this case, admittedly, the suicide of the deceased took place within seven years from the date of her marriage with the accused. But, in view of my aforesaid discussion cruelty had not been meted out to the deceased either by the accused or any of his relative, within the meaning of presumption is not available to the prosecution. The Court in having recourse to the legal presumption must be circumspect. It is evident that the Parliament was extremely careful in drafting the provisions of the said Section i.e. S.113-A".**

He also relied on the decision of this Court in the case of *Nandlal v. State of M.P.* reported in 2000 Criminal Law Journal 794. He relied on para 9 of the Judgment in which the Court observed that:

> **"Once the commission of the offence u/S.498-A of the IPC is proved, while trying the case, the Court may draw a presumption having regard to all the relevant facts given in the section and the other circumstances of the case, that the suicide was abetted by the accused. It is imperative and the mandate of law that before drawing the presumption the Court would not only hold the accused guilty for his cruel treatment but the Court has to take into consideration all the other circumstances of the case. The law clearly says that where the very offence u/S.498-A is not proved, the presumption shall not be available".**

In case of *State of M.P. v. Geetabai* reported in 1998 Criminal Law Journal 2724 it was held in para 20 of the Judgment that:

> **"As discussed above, the prosecution could not prove that Rekha was subjected to cruelty by the respondent, therefore, no presumption u/s.113-A of the Evidence Act that she was abetted by her husband's mother, the respondent Geetabai to commit suicide, could be raised though she committed suicide within 7 years of her marriage. As observed earlier, it could not be established by direct evidence that the respondent abetted Rekha to commit suicide. It appears that Rekha was very sensitive and sentimental girl. She was not happy in her in-law's house, her parents were not writing letters to her, they were not taking her to Dewas. Her husband was living away from her, these factors drove Rekha to commit suicide".**

12. Besides the above cases he also relied on the provisions of S.107 of IPC. The act of abatement is not proved by the evidence and the prosecution. In this regard he relied on the Judgment in the case of *Hansraj v. State of Haryana* [reported in 2004(12) SCC 257] and *Hariom v. State of M.P.* [reported in 2007(1) MPLJ 195].

13. Counsel for the respondent admitted that the case of prosecution was that the deceased was subjected to cruelty due to demand of dowry by the appellant. But this fact has not been proved by the prosecution and on this count the Trial Court has acquitted the appellant. No appeal has been filed by the State against the acquittal. But he submitted that the letter Ex.P/2 has not been challenged by the defence and therefore the Trial Court's finding cannot be said to be erroneous. Section 113-A of the Evidence Act based on that:

> **"When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such**

relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. For the purpose of this Section, 'cruelty' shall have the same meaning as in Section 498-A of the Indian Penal Code".

14. In this case conviction was solely based on the letter Ex.P/2 which is not a conclusive evidence. According to the cause of suicide the letter was not admitted by the defence nor it is established beyond reasonable doubt that it was written by the deceased before her death. Further the case of prosecution was not that the appellant suspected the character of the deceased and due to mental cruelty she committed suicide. In these circumstances the presumption of S.113-A of the Evidence Act would not be attracted because the cruelty is not proved by the prosecution in the evidence and in view of the aforesaid prepositions as cited above. The Court made presumption that it is established that the deceased was subjected to cruelty as the demand of dowry and cruelty was established and there is no evidence led by the prosecution that there was any suspicion on the character of the deceased prior to her suicide. In these circumstances the essential ingredients of S.306 are not attracted. Hence the finding of the trial Court deserves to be set aside.

15. In the result the appeal is allowed. The conviction and sentence awarded by the Trial Court to the appellant is hereby set aside and the appellant is acquitted of the charge levelled against him. His bail bonds shall stands discharged. The fine amount if deposited, shall be refunded to the appellant.

Appeal allowed.

I.L.R. [2008] M. P., 1790

CIVIL REVISION

Before Mr. Justice A.K. Shrivastava

19 February, 2008*

SHYAMA BAI ... Applicant

Vs.

MURLIDHAR ... Non-applicant

A. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - *Perpetual Lease Deed - Application for eviction opposed on the ground that lease was till the pleasure of tenant - Held - There is non-obstante clause which is having meaning to nullify any contract to contrary - Even if any agreement contrary to section is executed between landlord and tenant the same would not have any sanctity - Application for eviction maintainable.* (Para 17)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–क – शाश्वत पट्टा विलेख – बेदखली के आवेदन का विरोध इस आधार पर किया गया कि पट्टा (लीज) किरायेदार की इच्छा रहने तक था – अभिनिर्धारित – प्रतिकूल संविदा को अकृत करने के अर्थ वाला सर्वोपरि खण्ड

*C.R. No.916/2003 (Jabalpur)

मौजूद है – फिर भी धारा के प्रतिकूल कोई अनुबन्ध मकान मालिक एवं किरायेदार के बीच निष्पादित होता है तो उसकी कोई अहमियत नहीं होगी – बेदखली का आवेदन पोषणीय।

B. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - *Owner - Tenant admitting that suit shop is of applicant - Ownership of applicant stood proved.* (Para 19)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–क – स्वामी – किरायेदार ने स्वीकार किया कि वादग्रस्त दुकान आवेदक की है – आवेदक का स्वामित्व साबित हुआ।

C. Accommodation Control Act, M.P. (41 of 1961), Section 23-A *-Bonafide requirement - Application filed for eviction from non-residential premises for opening a cosmetic shop along with her married daughter - Applicant aged about 70 years.- Old age ipso facto would not mean that need is not bonafide - Nature of business is required to be seen - No experience is required for doing this type of business - Even if it is held that her business would fail in absence of experience it cannot be a ground to hold that need of applicant is not bonafide.* (Para 21)

स. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–क – सद्भावी आवश्यकता – गैर रिहायशी परिसर में अपनी विवाहित पुत्री के साथ श्रृंगार के सामान की दुकान खोलने हेतु बेदखली का आवेदन पेश किया – आवेदक की आयु लगभग 70 वर्ष – अधिक आयु से स्वमेव यह अर्थ नहीं निकलता कि आवश्यकता सद्भावी नहीं है – व्यवसाय की प्रकृति को देखा जाना अपेक्षित – इस प्रकार के व्यापार को करने के लिए किसी तरह का अनुभव अपेक्षित नहीं – फिर भी यदि यह अभिनिर्धारित किया जाता है कि उसका व्यापार अनुभव के अभाव में असफल हो जाएगा, इस आधार पर यह अभिनिर्धारित नहीं किया जा सकता है कि आवेदक की आवश्यकता सद्भावी नहीं है।

D. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - ***Bonafide Requirement*** *- Income of applicant - Applicant receiving income from family pension and rent - Bonafide requirement cannot be dismissed merely on the ground that she is receiving some income which is sufficient to satisfy her daily need.* (Para 22)

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–क – सद्भावी आवश्यकता – आवेदक की आय – आवेदक परिवार पेंशन व किराया प्राप्त कर रही है – सद्भावी आवश्यकता केवल इस आधार पर खारिज नहीं की जा सकती है कि उसे कुछ आय हो रही है जो उसकी दैनिक आवश्यकताओं की पूर्ति के लिए पर्याप्त है।

Cases referred :

(1994) 4 SCC 250, 2002(3) MPLJ 62, 1997(1) MPLJ 23, 1991 (1) MPLJ 121, 1985 MPRCJ Note 20, AIR 2005 SC 578, 1979 JLJ 230, AIR 1996 SC 1643, C.R. No. 458/1987 decided on 9-3-1990, (1992) 2 SCC 535, 1991 MPLJ 303.

Pranay Verma, for the applicant.

P.N. Pathak, for the non-applicant.

ORDER

A. K. SHRIVASTAVA,J.:– The land lady, being dissatisfied by the impugned

order dated 19/6/2003 passed by Rent Controlling Authority, Shahdol in case No.3/A 90/92-93 dismissing her application of eviction against the respondent, has filed this revision application under Section 23-A of M.P. Accommodation Control Act, 1961 (in short 'the Act').

2. The present applicant, being landlord of special category as defined under Section 23-J of Chapter III-A of the Act, filed an application before Rent Controlling Authority for eviction of respondent from the suit accommodation which is non-residential on the ground of her bona fide need as envisaged under Section 23-A(b) of the Act.

3. The application for eviction was filed by applicant-Shyama Bai against her tenant Shobhraj Ahuja who died during the pendency of the application before the Rent Controlling Authority and present respondent-Murlidhar was brought on record as his legal representative.

4. The pleadings of the applicant in her application for eviction is that she is the owner of the suit accommodation along with her daughter Smt. Kanta Jain. Defendant-Dr. Shobhraj Ahuja is the tenant at the rate of Rs.230/- per month in the suit accommodation which is non-residential and the respondent is carrying on the business of medical store. The suit accommodation is required by the applicant to start the business of cosmetic store which she will do along with her daughter who is also co-owner of the suit property. The applicant is not having any reasonably suitable non-residential accommodation of her own in which she can start the business of selling the cosmetic items.

5. Further it has been pleaded by the applicant that respondent obtained the suit accommodation for non-residential purposes on rental basis from her late husband Mulayam Chand Jain who was a freedom fighter and who died on 7/5/1991. On these premised submissions a prayer has been made by the applicant to pass a decree of eviction against the respondent.

6. Original defendant-Shobhraj Ahuja, who died during the pendency of the application before the Rent Controlling Authority, filed written statement and admitted the tenancy. According to him, deceased husband of applicant namely Mulayam Chand Jain gave the suit accommodation in the year 1950 at the rate of Rs.25/- per month on tenancy basis to him to carry on the business of medical shop. The suit accommodation which has been built on the land is of Government and the same did not belong either to deceased Mulayam Chand Jain or to present applicant who is widow of deceased-Mulayam Chand Jain.

7. It has also been pleaded by the defendant that vide agreement dated 1/11/1956 on the basis of permanent lease at the rate of Rs.45/- per month the suit accommodation was given to him by Mulayam Chand Jain and it was agreed between the parties that till the pleasure of the tenant, he may continue to carry on the business. Neither the deceased landlord Mulayam Chand Jain nor his heirs shall be entitled to get the suit accommodation vacated. After executing the said

agreement in presence of the witnesses, a copy thereof was given to original defendant. It has also been pleaded that from time to time the rent was enhanced by the respondent and in the month of November, 1990 the rate of rent was enhanced to Rs.230/- per month which is the current rate of rent.

8. It has also been pleaded that Mulayam Chand Jain died on 7/5/1991 and after his death in the month of January, 1992 the present applicant pressurized respondent to enhance the rent up to Rs.500/- per month which was not accepted by him, as a result of which this frivolous application has been filed which is ex-facie mala fide.

9. It has also been pleaded by the defendant that the applicant is old aged lady having age of 75 years and she had no experience to carry on the business. She is having only one daughter namely Smt. Kanta Jain having age of 41 years and who had been married in village Dhana, Distt. Sagar in the year 1971-72 with one Sumer Chand Jain who is a Lecturer in Government School. It has also been pleaded that said Smt. Kanta Jain is an agent of Life Insurance corporation as well as of the post office and she is not a member of the family of applicant nor she is dependent on her. According to the respondent, applicant is not having any bona fide need and her real intention is to enhance the rent.

10. In a special plea it has been pleaded that in order to get the suit accommodation vacated, mala fidely an application under Section 133, Cr.P.C. was filed before the Sub Divisional Officer, Sohagpur, Distt. Shahdol which is pending. The applicant is getting handsome family pension after the death of her husband who was drawing the pension of freedom fighter. The land on which suit accommodation is built, is Government land and since the accommodation is constructed on government land, therefore, the agreement which was made between the defendant and Mulayam Chand Jain is null and void. It has also been pleaded that applicant has applied before the Collector to obtain permanent lease and that matter is pending before the said authority. A plea of adverse possession has also been raised by the defendant in the written statement. On these premised pleadings it has been prayed that the application be dismissed.

11. Rent Controlling Authority after framing necessary issues and recording the evidence of the parties, dismissed the application by the impugned order holding that the bona fide need of the applicant is not proved because she is drawing family pension of freedom fighter after the death of her husband Mulayam Chand Jain who was a freedom fighter and she is also getting the rent of the suit accommodation and the total amount which she is getting is sufficient to satisfy the livelihood of the applicant and, therefore, the need of bona fide is not objective. The application for eviction has also been dismissed on another reason that on 1/11/1956 a perpetual lease was executed between Mulayam Chand Jain and original defendant-Dr. Shobhraj Ahuja that till the pleasure of tenant, he shall enjoy the suit accommodation on the tenancy basis and this agreement will be binding on

the heirs of the landlord also. According to Rent Controlling Authority, the said agreement is binding upon the present applicant being the heir of deceased landlord Mulayam Chand Jain.

12. In this manner, this revision application has been filed by the landlady under Section 23-E of the Act before this Court.

13. The contention of Shri Pranay Verma, learned counsel for the applicant, is that there is a non-obstante clause in Section 23-A of the Act and, therefore, even if there was an agreement to the effect that suit accommodation would not be vacated by the defendant and he shall enjoy the same on tenancy basis in perpetuity, the same will not come in the way of applicant if she has filed an application to evict the respondent on the ground of bona fide need to start the business. Further it has been contended that issue No.6 was framed in respect to the ownership by the Rent Controlling Authority and the same was decided against the respondent in view of the order passed by this Court in Civil Revision No.442/1998 decided on 30/1/2002. Even otherwise by placing reliance on the decision of Supreme Court *Anar Devi (Smt) v. Nathu Ram,* (1994) 4 SCC 250, it has been argued that applicant is not required to prove her absolute title. By attacking the finding of Rent Controlling Authority that applicant is obtaining the family pension of freedom fighter and also receiving the rent which is being paid by the defendant to her, which would satisfy the need of her livelihood and, therefore, the suit accommodation is not required bona fidely by the landlady, it has been contended that defendant is not having any authority to ask and direct applicant to live on the limited income only. By placing reliance on the decisions *Sudhir Tiwari v. Bhagwanti Devi Issrani,* 2002(3) MPLJ 62, and *Harvilas Shivhare V. Jahoor Khan,* 1997(1) MPLJ 23, it has been contended that the old age of widow will not be a bar to her if the need is bona fide. On these premised submissions it has been submitted by learned counsel that by setting aside the impugned order of Rent Controlling Authority, the application for eviction of landlady be allowed by passing a decree of eviction.

14. On the other hand, Shri P.N. Pathak, learned counsel for the respondent, submits that a perpetual lease was executed between original landlord- Mulayam Chand Jain and defendant-Dr. Shobhraj Ahuja whose legal representative is present respondent. The suit was given on tenancy basis to Dr. Shobhraj Ahuja and since it was agreed that the same would not be vacated and the agreement would be applicable to the heirs of Mulayam Chand Jain also, therefore, the suit accommodation cannot be vacated and the defendant is entitled to use the suit accommodation on tenancy basis till his pleasure and, therefore, learned Rent Controlling Authority did not commit any error in dismissing the application for eviction. It has also been put forth by him that looking to the advance age of the landlady and since she is getting sufficient funds in order to meet the need of her livelihood, the filing of application of eviction is nothing but out come of mala fide because when the defendant did not agree to enhance the rent up to Rs.500/-per

month, mala fidely this application for eviction has been filed and hence, the Rent Controlling Authority did not commit any error in dismissing the application of eviction. In support of his contention, learned counsel has placed reliance *Shyam Lal Vyas V. Inderchand Jain,* 1999(1) MPLJ 121, *Keshar Singh V. Mst. Sohadradevi,* 1985 MPRCJ Note 20 and *Indrasen Jain V. Ramesh Wardas,* AIR 2005 SC 578.

15. It has also been contended by learned counsel for the respondent that if the pleadings mentioned in the application are considered in proper perspective, it would reveal that the alleged need has been shown to be of her married daughter also and since the daughter is married, the suit accommodation cannot be evicted for the need of her married daughter under clause (b) of Section 23-A of the Act.

16. Having heard learned counsel for the parties, I am of the view that this revision application deserves to be allowed.

17. I shall first deal with the ground in respect of perpetual lease deed in favour of tenant and thereby holding the application of eviction is liable to be dismissed by the Rent Controlling Authority. Shri Pathak, learned counsel for respondent/ tenant, has also supported the said finding. I have no scintilla of doubt in my mind that on the said ground the application of eviction filed by applicant under clause (b) of Section 23-A of the Act cannot be dismissed because there is a non-obstante clause in this section. In the opening sentence of Section 23-A of the Act there is non-obstante clause which is having a meaning to nullify any contract to the contrary. Otherwise, legislating the non-obstante clause in this section would have no meaning and it would become otious. This non-obstante clause clearly override all the contract which runs contrary to the section and any contract to the contrary will loose its significance on account of this statutory provision and, therefore, I am of the view that even if there was any agreement contrary to the section, which was executed between landlord Mulayam Chand Jain in favour of defendant-Dr. Shobhraj Ahuja, the same would not have any sanctity in the eye of law and, therefore, the application filed by applicant cannot be thrown like a waste paper on this ground and is not liable to be dismissed. In this context I may profitably placed reliance on the decision of this Court *Panjumal Daulatram (Firm) V. Sakhi Gopal Thakurdin Agrawal,* 1979 JLJ 230.

18. A clause beginning with "notwithstanding anything contained in any other law for the time being in force or contract to the contrary," appended to Section 23-A in the beginning is to give the enactment part of the Section in case of conflict on override effect over any other agreement or even any law for time being force mentioned in the non-obstante clause. In *T.R.Thkandur V. Union of India and others*, AIR 1996 SC 1643 (Para-8), the Supreme Court while examining Section 20 of the Urban Land (Ceiling and Regulation) Act held that non-obstante clause in the said section clearly indicates that Section 20 overrides the provisions of Chapter III of the said Urban Land (Ceiling and Regulation) Act. In Section

23-A of the present Act, also non-obstante clause would override not only any law for the time being in force but also the contract which is contrary to the said section. In the case of *Panjumal Daulat Ram* (supra), the Single Bench of this Court while examining the scope of Section 12(1) of the present Act has held that the non-obstante clause in this section gives an overriding effect over all other laws including the transfer of Property Act and, therefore, according to me, the same principle is also applicable to Section 23-A of the Act. Thus, I do not find any substance in the finding of Rent Controlling Authority holding the perpetual lease deed executed by Mulayam Chand Jain in favour of defendant- Dr. Shobhraj Ahuja is binding upon the parties which is contrary to the statutory provision and, therefore, the contention of learned counsel for the respondent in this behalf cannot be accepted.

19. I am also not impressed by the submission of learned counsel for the respondent that because applicant has not proved her ownership on the suit accommodation, therefore, the application is liable to be dismissed. The applicant assailed an order passed against her on 20/1/1998 by Rent Controlling Authority by filing Civil Revision No.442/98 (Smt. Shyama Bai V. Dr. Shobhraj Ahuja) before this Court which was decided on 30/1/2002 holding that Rent Controlling Authority is unnecessarily entering into the question of title of land and further held that tenant is estopped from denying the title of the landlord. The Rent Controlling Authority decided issue No.6 in favour of applicant and against defendant/respondent and has categorically held that plaintiff is the owner of the suit accommodation. Even otherwise the plaintiff is not required to prove absolute ownership as held by the Supreme Court in the case of *Anar Devi* (supra). At this juncture, I may further add that defendant himself admitted the ownership of the applicant. Murlidhar Ahuja (NAW 1) who is son of deceased defendant- Dr. Shobhraj Ahuja has specifically admitted in para-1 that the suit shop is of applicant-Shyama Bai and, therefore, it is held that applicant has proved her ownership as required under clause (b) of Section 23-A of the Act. In the case of *Anar Devi* (supra), the Supreme Court in para-18 has held that since the title of ownership is acknowledged by the tenant, he was not entitled to deny even the title of the applicant to the accommodation. Admittedly, the applicant is a widow and she is protected landlord as defined under Section 23-J of the Act mentioning the special category of the landlord.

20. I do not find any merit in the contention of learned counsel for the respondent that indeed the need is for her married daughter also and, therefore, the application by invoking special provision envisaged under Section 23-A of the Act is liable to be dismissed. True in the application it has been pleaded by the applicant that she would start the business along with her daughter. It is also true that Smt. Kanta Jain (A.W.2) is a married daughter of the applicant. But, if the pleading made in para-16-A of the application and the evidence of the landlady Smt. Shyama Bai and the statement of her daughter Smt. Kamta Jain is considered in proper perspective, it is revealed that indeed bona fide need is only for the applicant Shyama Bai and her daughter Smt. Kanta Jain would only assist her in carrying

on the business and, therefore, even if it is stated in the application that applicant would do the business along with her daughter Smt. Kanta Jain it should be given objective attitude because it has been specifically pleaded by the applicant that she is having bona fide need to start the business. It has come in the evidence of applicant that her daughter is residing with her and, therefore, if the applicant would take assistance of her daughter to carry on the business, for no rhyme or reason it can be said that the need is not of the applicant. For carrying on a business of selling cosmetic items, it is a matter of common experience that some helpful hands are required. Some time the service of a servant is being taken by giving employment to him and in that situation by no stretch of imagination it can be said that the need is for the servant and, therefore, by applying the same analogy, it can safely be said that if the assistance of the daughter would be taken by the applicant, it cannot be said that the actual bona fide need is for the daughter and not of the landlady. The service of daughter to assist in the business is only a service though having nexus with the business but the said service of assistance cannot be said to be the actual bona fide need of the daughter but the same would be of the applicant only who is a widow.

21. Merely because, the applicant is having old age, ipso facto, would not mean that the need is not bona fide. In this context, the nature of business is required to be seen. In the present case the suit accommodation is needed bona fidely by the applicant to start the business of cosmetic items which can easily be performed by anybody irrespective whatever the age he or she is having. In this business a customer would come and ask to purchase a particular cosmetic item and the seller is required to take out that item from the showcase or where the same is kept and give it to the customer after obtaining the price of that particular item. Easily, this can be performed by the applicant though she is having advance age near about 70 years. In doing this type of business, no experience is required. Even for the sake of argument, it is held that some experience is required to conduct the business which the applicant is not having, therefore, at the most, the result would be that her business would fail. But, this cannot be a ground to hold that need of applicant/widow is not bona fide though other requirements of clause (b) of Section 23-A of the Act are proved. The Division Bench of this Court in *Sudhir Tiwari* (supra), has held that the old age will not come in the way to start the business of tailoring and dress designing. In the case of *Harvilas Shivhare* (supra), a retired government servant having age of 75 years filed suit to set up the business of floor mill. In that case it was held by this Court that the need of landlord is genuine and bona fide despite he is having age of 75 years or the fact that he has no experience of running the floor mill which will not be a ground for not granting him the relief. Hence, the old age of the applicant would also not come in her way in order to dis-entitle the relief of eviction which she has claimed. The decision of *Singhai Batti Bai V. Ramkdas*, C.R. No.458 of 1987 decided on 9/3/1990 (Jabalpur), placed reliance by respondent is not at all applicable in the

present case for the simple reason in that case the widow was a Pardanashin lady and, therefore, it was held that she could not start the business in the open market.

22. I am also not impressed by the submission of learned counsel for the respondent that the applicant is receiving the monthly family pension amount as well as the rent at the rate of Rs.230/- per month which will be more than sufficient to satisfy her daily need and, therefore, the alleged need is not bona fide. If the applicant wants to earn more income by starting the business, she cannot be forced to live with the limited income which she is receiving and the application cannot be dismissed merely on this ground if the bona fide need is otherwise found to be proved. The Supreme Court in the case of *Vishwanath and another V. Hidayatt Ullah*, (1999) 2 SCC 535, has categorically held while deciding the case under Section 23-A (b) of the Act that there is no presumption that a pensioner who had adequate pension, cannot have bona fide need to start the business after his retirement. I have already held herein above that the bona fide need as envisaged under Clause (b) of Section 23-A of the Act has been proved.

23. The decision of *Azizunnisha Wd/o Mohd. Yasin Hyder V. Channanlal S/ o Kishan Chkandra and others*, 1991 MPLJ 303, placed reliance by learned counsel for the respondent, is not applicable in the presence case because in the present case this Court is not deciding the matter on assumptions and irrelevant considerations. Indeed, the bona fide need of plaintiff has been found to be proved. The decision of *Keshar Singh* (supra) is also not applicable in the present case because in that case the married daughter was residing separately and she was not the member of the family and, therefore, it was held that the decree of eviction cannot be passed on the ground of her requirement. I have already held herein above that the need is not for the daughter but the same is for plaintiff herself and, therefore, the decision of *Keshar Singh* (supra) is not applicable. The decision of *Indrasen Jain* (supra) is also not applicable in the present case because in that case the plaintiff was a retired servant of Government aided institution and, therefore, he was not found to be landlord of special category, as defined in Section 23-J of the Act and, therefore, this decision is also not applicable.

24. The Rent Controlling Authority by rejecting the application has totally deviated from the well settled principles of law which I have enumerated herein above and, therefore, the said order cannot be allowed to stand and the same is hereby set aside.

25. Resultantly, this revision application stands allowed, the application of eviction filed by applicant against respondent is hereby allowed and respondent is hereby directed to vacate the suit premises. The respondent shall also bear the costs of the applicant of the trial Court as well as of this Court. Counsel fee Rs.2,000/-, if pre-certified.

Revision allowed.

I.L.R. [2008] M. P., 1799

CIVIL REVISION

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

14 February, 2008*

AGGYARAM & CO (M/s.). ... Applicant

Vs.

M.P. PUBLIC WORKS DEPARTMENT & ors . ... Non-applicants

A. **Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), *Section 7-B - Limitation*** - *Contract terminated on 23.03.90 - Demand notice to recover extra amount served on appellant on 22.01.93 - Subsequent notice served on 16.06.94 - Appellant should have approached S.E. within one month from 22.01.93 - Appellant approached S.E. in the year 1994 - S.E. neither decided the dispute within 60 days nor time was extended mutually by parties - Appellant approached Chief Engineer in the year 1999 - Reference petition filed before Tribunal dismissed as barred by time - Held - Appellant had not approached the authorities within time and failed to take recourse within period stipulated in clause 29 of agreement - Reference petition filed before Tribunal in 1999 was not maintainable - Revision dismissed.* (Para 7)

क. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–बी – परिसीमा – संविदा 23.03.90 को समाप्त की गई – अतिरिक्त राशि वसूली हेतु मांग का सूचनापत्र 22.01.93 को अपीलार्थी पर तामील किया गया – पश्चात्वर्ती सूचनापत्र 16.06.94 को तामील किया गया – अपीलार्थी को अधीक्षण यंत्री को 22.01.93 से एक माह के भीतर निवेदन करना था – अपीलार्थी वर्ष 1994 में अधीक्षण यंत्री के समक्ष पहुंचा – अधीक्षण यंत्री ने न तो विवाद 60 दिनों के भीतर निर्णीत किया और न पक्षकारों द्वारा परस्पर अवधि बढ़ाई गई – अपीलार्थी मुख्य अभियंता के समक्ष वर्ष 1999 में पहुँचा – अधिकरण के समक्ष प्रस्तुत निर्देश याचिका समय वर्जित होने से खारिज की गई – अभिनिर्णीत – अपीलार्थी अधिकारियों के समक्ष अवधि के भीतर नहीं पहुँचा था और अनुबन्ध के खण्ड 29 में नियत कालावधि में आश्रय लेने में असफल रहा – अधिकरण के समक्ष वर्ष 1999 में प्रस्तुत निर्देश याचिका पोषणीय नहीं थी – पुनरीक्षण खारिज।

B. **Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7-B - *Limitation*** - *Once limitation has commenced and comes to an end, it would not be revived by rendering a decision on an incompetent reference.* (Para 8)

ख. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7–बी – परिसीमा – एक बार परिसीमा प्रारम्भ हो कर समाप्ति पर पहुंचती है, एक अक्षम निर्देश पर दिए निर्णय द्वारा वह पुनर्जीवित नहीं हो सकेगी।

Cases referred :

2006(4) MPLJ 34, 2006(2) MPLJ 113, 2006(2) MPLJ 299.

R.D. Hundikar, for the applicant.

Sudesh Verma, G.A., for the non-applicants.

*C.R. No.1622/2000 (Jabalpur)

ORDER

The Order of the Court was delivered by ARUN MISHRA, J.:–The petitioner assails the order dated 5-4-2000 passed by the M.P. Arbitration Tribunal, Bhopal in reference Case No. 44/99 dismissing the application as barred by limitation.

2. The petitioner/Contractor was given a work for construction of Government Higher Secondary School building at Shamshabad. The date of completion of the work was 17-2-89, though the petitioner was allowed to complete the work by 11-5-90 by letter dated 30-4-90 of the Superintending Engineer. The contract was terminated on 23-3-90. The remaining work was given to other agency. Notices were served on 22-1-93 and on 16-6-94.

3. The petitioner referred the quantified claims to the Superintending Engineer on 25-7-94 and he rejected the reference on 15-1-99. The petitioner preferred the reference case before the Arbitration Tribunal on 15-3-99 and during the pendency of the reference case, the petitioner preferred an appeal before the Chief-Engineer on 14-6-99. No decision was taken by the Chief Engineer on the appeal. The Arbitration Tribunal has held that limitation came to end on 7-2-96, the reference was preferred before the Tribunal on 15-3-99. There was delay of more than three years. The reference case has been dismissed as barred by limitation, considering Section 7B (1)(a) and Section 7B(1) (b) of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as 'the Adhiniyam'). Dissatisfied with the order passed by the Arbitration Tribunal, the revision has been preferred by the contractor.

4. Shri R.D. Hundikar, learned counsel appearing on behalf of the petitioner has submitted that the Superintending Engineer has rejected the reference on 15-1-99. The application filed before the Tribunal was within the period of one year from that date thus, it was within limitation. He has relied upon the Division Bench decision of this court in *Ram Niwas Shukla Vs. State of M.P and another* 2006(4) MPLJ 34.

5. Shri Sudesh Verma, learned counsel appearing on behalf of the respondents has submitted that the petitioner has failed to take recourse of clause 29 of the agreement, thus it was not open for him to prefer claim petition before the Arbitration Tribunal beside that it was hopelessly barred by limitation. Once the period of limitation came to an end, it would not be revived by rendering a decision by the Superintending Engineer beyond the period of limitation i.e,15-1-99. He has also relied upon Section 9 of the limitation Act, 1963 to contend that once the limitation starts running, it cannot be checked. Thus, in the instant case, limitation came to an end, the fresh period of limitation would not be available, would not start on rendering of decision by Superintending Engineer.

6. First, we deem it appropriate to consider Clause 29 of the agreement whether the petitioner has taken steps as per the agreement entered into between the

parties which is necessary in order to maintain reference petition before the tribunal. The relevant portion of Clause 29 containing the Arbitration Clause is quoted below:

ARBITRATION CLAUSE

Clause 29- Except as otherwise provided in this contract all question and dispute relating to the meaning of the specifications and instruction hereinbefore mentioned and as to the thing whatsoever in any way rising out or relating to contract designs drawings specifications estimates concerning the works or the execution of failure to executive the some whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the Superintending Engineer in writing for his decision within a period of 30 days of such occurrence, thereupon the Superintending Engineer shall give his written instruction/or decision with on a period of 60 days of 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 instructions or decision. If the Superintending Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested of if the parties are aggrieved against the decision of the S.E., the parties may within 30 days prefer an appeal to the Chief Engineer who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The Chief Engineer will give his decision within 90 days. If any party is not satisfied with the decision of the Chief Engineer be can refer such dispute for arbitration by at Arbitration Board to be constituted by State Government which shall consist of three members of whom one shall be chosen from among the officers belonging to the Department not below the rank of S.E. one Retired Chief Engineer of any Technical Department & one serving officer not below the rank of S.E. belonging to another technical Department.

The aforesaid Clause 29 clearly provides that the dispute shall be referred to the Superintending Engineer in writing for his decision within a period of 30 days of accrual of cause of action thereafter the Superintending Engineer shall give his writing instructions/decision within a period of 60 days. This period can be extended by mutual consent of the parties. If the Superintending Engineer fails to give his decision in writing within a period of 60 days or mutually agreed extended time after being requested if the parties are aggrieved against the decision, may prefer an appeal to the Chief Engineer within 30 days and the Chief Engineer will give his decision within 90 days.

7. Clause 29 provides for time-frame within which Superintending Engineer and Chief Engineer have to be approached and also the time within which they

will take a decision on the dispute or appeal as the case may be. In the instant case, the contract was undisputedly terminated on 23-3-90. The first demand notice to recover the extra-amount incurred due to the employment of debitable agency was served to the contractor on 22-1-93, subsequent notice was served on 16-6-94. It was necessary for the contractor to approach the Superintending Engineer to assail the termination of the contract by the Executive Engineer within 30 days of the date of termination of the contract which took place on 23-3-90 on the ground of purported illegality. As, first demand notice with respect to the recovery of extra-amount incurred due to the employment of debitable agency was served on 22-1-93, he should have approached the Superintending Engineer within a period of one month to assail the same i.e, upto 22-2-93. Even, second demand notice was served on 16-6-94, even if it is taken that fresh cause of action accrued on service of second demand notice, though infact it did not accrue, the contractor again failed to approach within 30 days, he preferred claim before the Superintending Engineer on 25-7-94, beyond the period of thirty days. Thus, the petitioner has miserably failed to invoke Clause 29 of the agreement. It was necessary for him to strictly follow the procedure prescribed under Clause 29 in order to maintain reference petition before the Tribunal under the Adhiniyam. He again approached the Chief Engineer in the year 1999 on 14-6-99 whereas when the Superintending Engineer has failed to take a decision within 60 days on the claim made by the petitioner on 25-7-94. It was incumbent upon the petitioner on failure of the Superintending Engineer to take a decision within a period of 60 days to approach the Chief Engineer within 30 days after the expiry of the 60 days period on 25-9-94. Thus, the Chief Engineer was not approached within the prescribed period by the contractor. Thus, he has failed to take recourse of the period stipulated in Clause 29 of the agreement and it is not the case of the petitioner that time was extended by mutual consent of the parties, before the Superintending Engineer to take a decision in the year 1999. Thus, reference petition before the Tribunal was not maintainable as per the decision rendered by the Full Bench of this Court in *State of M.P. and another Vs. Kamal Kishore Sharma* 2006 (2) MPLJ 113, in which considering the clause 29, the Full Bench has laid down thus:

> "7. On bare perusal of the provision it is apparent that changes have been made vide amendment of the year 1995 and earlier period of limitation of one year was prescribed after the decision of final authority under the agreement. Now the Act is modified and it is mandatory to refer the dispute for decision of the final authority under the terms of works contract. The amendment in the Act was brought by Act No. 36 of 95 and the statement and objects and reasons for the said amendment was that in order to enable the arbitration tribunal to function more effectively it has become essential to amend the Act and it is further provided that since the verbiage of sub-section (1) of section 7-B is defective, this section has been modified suitably.

The meaning of word 'verbiage' as defined in the Oxford Dictionary is "needless accumulation of words" or the section is expressed in more words than are needed. Thereby tribunal has clarified the provisions of section 7-B of the Adhiniyam. Since the language of section 7-B is simplified which is now clear and unambiguous contention of counsel for the respondent cannot be accepted that the words occurring in section that "decision of final authority under the terms of works contract" would mean that party must approach final authority under the works contract before filing the dispute. He submitted that only requirement is that the dispute must be first referred to the final authority under th terms of the works contract and party is not required to approach final authority as per terms of clause 29 of the works contract after approaching Superintending Engineer. Thus, if a particular manner is prescribed under the works contract for referring the dispute to the final authority, the procedure laid down in the contract must be followed. Reference should be made to the final authority in terms of the agreement for works contract and not otherwise. Since unnecessary words have been reduced in section 7-B vide amendment by Act 36 of 95, the real meaning can be drawn from the unamended provision. Thus, it is clear that before admitting the reference Tribunal must satisfy itself that the dispute has been referred for the decision of the final authority strictly as per the terms of the works contract. It may be further clarified that after the judgment in *Lachmandas* (supra) was delivered legislature has further amended the Act vide notification dated 5th January, 2005 and added sub-section (2-A) to section 7-B in the Adhiniyam. In order to clarify the position of limitation, it is further provided that the Tribunal shall not admit a reference petition unless it is made within three years from the date on which the works contract is terminated, foreclosed, abandoned or comes to an end in any other manner or when a dispute arises during the pendency of the works contract.

11. In the present case final authority is mentioned in Clause 29 of the agreement. Clause 29 provides that if the Superintending Engineer fails to decide the dispute within sixty days or mutually agreed time after being requested,if the parties are aggrieved against the decision of the Superintending Engineer, the parties may within 30 days prefer ;an appeal to the Chief Engineer who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The chief Engineer will give his decision within six months. It further provides that if any party is not satisfied with the decision of Chief Engineer, he can refer such dispute for arbitration by an Arbitration Board. Now when the question of referring the dispute to the Arbitration Tribunal is concerned, it will mean reference to the Tribunal. Therefore, final authority under the works contract will be the Chief Engineer and the dispute must be referred to him under the terms

of the contract as both the parties had agreed to refer the dispute to the Chief Engineer and if any of the party is not satisfied with the decision of the Chief Engineer, then they can seek recourse of decision by the Arbitrator. Thus, dispute can only be entertained by the tribunal after dispute is referred for the decision of the final authority under the terms of the works contract. Therefore, we are of the opinion that the language of section 7-B(1) is clear and specific which provides that dispute must be referred to the Arbitrator under the terms of the contract. Even if we peruse the original text in Hindi, the language used in section 7-B(1) is reproduced as under :

"(1) अधिकरण कोई निर्देश उस दशा में ग्रहण नहीं करेगा, जब तक कि –

(क) विवाद पहले संकर्म संविदा के निबंधनों के अधीन अंतिम प्राधिकारी के विनिश्चय के लिए निर्देशित नहीं किया जाता है, और

(ख) याचिका, अंतिम प्राधिकारी के विनिश्चय के संसूचित किए जाने की तारीख से एक वर्ष के भीतर अधिकरण को नहीं कि जाती है:

परंतु यदि अंतिम प्राधिकारी उसे निर्देश किए जाने की तारीख से छह मास की कालावधि के भीतर विवाद का विनिश्चय करने में असफल रहता है वहां याचिका छह मास की उक्त कालावधि का अवसान होने से एक वर्ष के भीतर अधिकरण को की जाएगी 1"

and the aims and object in Hindi at para (3) is reproduced below :-

"चूंकि धारा 7–ख की उपधारा (1) की शब्दावली त्रूटिपूर्ण है, अतः इस उपधारा को यथोचित रूप से उपान्तरित किया गया है1"

As per aims and object amendment is brought because wordings of section is defective and has been properly clarified by the amendment.

16. Considering the provision of section 7-B(1)(a) we are of the opinion that on interpreting the provisions of section 7-B(1) it is crystal clear that no reference shall be admitted by the Tribunal unless dispute is first referred for the decision of the final authority in a manner as provided under the terms of the contract. Thus right of contractor to approach Tribunal arises after he has approached final authority after decision of Superintending Engineer in terms of the contract. If the contractor has failed to approach the final authority as provided under the terms and conditions of the works contract, petition will not be admitted by the Tribunal. Dispute to the final authority should be preferred in the manner prescribed under the works contract. Since in the present case it is provided that in the case of abandonment or cancellation or in any dispute of works contract, the dispute must be raised before the Superintending Engineer within a period of 30 days. On his failure to decide the dispute within 60 days or after decision of the dispute, appeal must be preferred within 30 days, which shall be decided by chief Engineer within 90 days. Therefore, if appeal has not been preferred to the final authority in accordance with the terms of the works contract, petition will not be maintainable before the Tribunal."

It was laid down in the Full Bench that as appeal has not been preferred in accordance with the relevant clause of agreement of the works contract, the reference petition will not be maintainable before the Tribunal. Same is the factual scenario which emerges in the instant case, consequently, reference petition preferred before the Tribunal cannot be said to be maintainable. Another Full Bench of this court in *Ravikant Bansal Vs. M.P. Audyogik Kendra Vikas Nigam (Gwalior) Ltd* 2006(2) MPLJ 299 has laid down that it is necessary to entertain a counter-claim before tribunal to refer it to the final authority in terms of the works contract. The court held thus:-

> "11. We are therefore, of the considered opinion that the Tribunal cannot entertain or admit a counter-claim if the dispute raised in the counter-claim filed by the opposite party has not been referred to the final authority in terms of the works contract or where it has been referred to the final authority but the counter-claim claim has not been filed before the Tribunal within the period of limitation as provided in Clause (b) or the proviso to clause (b) of sub-section (1) of Section 7B of the Adhiniyam."

Thus, the petition before the Tribunal was clearly not maintainable.

8. Coming to the question of limitation. It has to be considered in view of the fact that the petitioner has not taken recourse to Clause 29 of the agreement as provided within the period fixed, neither the Superintending Engineer nor the Chief Engineer were approached within the stipulated period under Clause 29 of the agreement. In *Ram Niwas Shukla* (supra), the Division Bench of this Court has opined that even if the decision is referred to the final authority beyond 1-1/2 year that would give a fresh cause of action and period of limitation of one year would start from that date. Section 7-B was inserted by M.P. Act No.9/1990 w.e.f. 24.4.1990, it was substituted by M.P. Act No.36/1995 w.e.f. 15.12.1995. Section 7-B as it was inserted in 1990 read thus :

> **"7-B. Limitation.-** (1) The Tribunal shall not admit a reference-
>
> (a) in a case where a decision has been made in connection with a dispute under the terms of the agreement for a works-contract by the final authority under the agreement unless the reference petition is made within one year from the date of communication of such decision, if any.
>
> (b) in a case where a dispute has been referred to the final authority under the agreement and such authority fails to decide it within a period of six months from the date of reference to it unless the reference petition is made within one year from the date of expiry of the said period of six months.
>
> (c) Notwithstanding anything contained in sub-section (1) where no proceeding has been commenced at all before any Court preceding the date of commencement of this Act or after such commencement but before the commencement of the Madhya Pradesh Madhyastham Adhikaran

(Sanshodhan) Adhiniyam, 1990 a reference petition shall be entertained within one year of the date of commencement of Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 irrespective of the fact whether a decision has or has not been made by the final authority under the agreement."

Section 7-B after its substitution in the year 1995 as per Act No.36 of 1995 reads thus :

"7-B. Limitation.- (1) The Tribunal shall not admit a reference petition unless-

(a) the dispute is first referred for the decision of the final authority under the terms of the works contract; and

(b) the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority :

Provided that if the final authority fails to decide the dispute within a period of six months from the date of reference to it, the petition to the tribunal shall be made within one year of the expiry of the said period of six months.

(2) Notwithstanding anything contained in sub-section (1), where no proceeding has been commenced at all before any Court preceding the date of commencement of this Act,or after such commencement but before the commencement of the Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990, a reference petition shall be entertained within one year of the date of commencement of Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 irrespective of the fact whether a decision has or has not been made by the final authority under the agreement."

Sub-Section (2-A) of section 7-B was inserted by M.P. Act No.19 of 2003 w.e.f. 29.4.2003, which was published in extra-ordinary Gazette dated 5th January, 2003 to the following effect :

"(2-A) Notwithstanding anything contained in sub-section (1),the Tribunal shall not admit a reference petition unless it is made within three years from the date on which the works contract is terminated, foreclosed, abandoned or comes to an end in any other manner or when a dispute arises during the pendency of the works contract."

It was further amended by Act No.1 of 2004 to the following effect :

"Substituted by M.P. Act No.1 of 2004 (w.e.f. 5.1.2004).

[(2A) Notwithstanding anything contained in sub-section (1), the Tribunal shall not admit a reference petition unless it is made within three years from the date on which the works contract is terminated, foreclosed, abandoned or comes to an end in any other manner or when a dispute arises during the pendency of the works contract.]"

After the amendment made by the Act No. 1 of 2004, position has been made clear. However, in the instant case, authority as per agreement were not approached within time the limitation had come to an end as provided under Section 7B (1)(a) and Section 7B(1) (b) much before the decision was rendered by the Superintending Engineer. The Superintending Engineer was not approached within the time stipulated under Clause 29 of the agreement, any decision rendered by him on an invalid reference was not to give fresh cause of action. It is also settled proposition of law that once limitation has commenced and comes to an end, it would not be revived by rendering a decision on an incompetent reference. In *Ram Niwas Shukla* (supra), the relevant clause of the agreement providing for raising of dispute was not the question agitated and limitation u/s 7-B of Adhiniyam depends upon approaching the final authority as per the agreement. Thus, no assistance can be drawn by the decision of this court in *Ram Niwas Shukla* (supra).

9. Resultantly, the revision is devoid of merit and the same deserves dismissal. The revision is hereby dismissed. However, parties to bear costs as incurred of the revision.

Revision dismissed.

I.L.R. [2008] M. P., 1807

CIVIL REVISION

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

20 February, 2008*

STATE OF M.P. ... Applicant

Vs.

M/S BHARAT CONSTRUCTION CO. ... Non-applicant

Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 16 - ***Award - Escalation in price - Tribunal awarded Rs.2,41,008/- by way of escalation and interest thereon - Held - There was delay on the part of department in carrying out its obligations - Period was extended without any penalty - Contract did not remain contract for period of 12 months - Clause 32 of agreement that no claim for price escalation rendered ineffective - Escalation rightly granted - Revision dismissed.*** (Para 6)

माध्यस्थम अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 16 – पंचाट – मूल्यवृद्धि – अधिकरण ने मूल्यवृद्धि और उस पर ब्याज के रूप में रु. 2,41,008/– का अवार्ड दिया –अभिनिर्धारित–विभाग की ओर से अपने दायित्वों को पूरा करने में विलम्ब किया गया था – कालावधि बिना किसी शास्ती के बढ़ाई गई – संविदा 12 माह की कालावधि का संविदा नहीं रहा – अनुबन्ध का खण्ड 32 कि मूल्यवृद्धि के लिए कोई दावा नहीं, निष्प्रभावी हो गया – मूल्यवृद्धि दिलाया जाना सही – पुनरीक्षण खारिज।

Case referred :

1992 ATLR 439.

Sudesh Verma, G.A., for the applicant.

Ashok Chakravarty, for the non-applicant.

*C.R. No.1284/2002 (Jabalpur)

ORDER

The Order of the Court was delivered by ARUN MISHRA, J.:–The revision has been preferred by the State aggrieved by award dated 28.5.2002 passed by M.P. Arbitration Tribunal, Bhopal in Reference Case No. 196/91.

2. The facts in short giving rise to the revision indicates that M/s Bharat Construction Company was given contract for construction of 52 units of non-residential buildings. The agreement was executed on 24.2.1983 and work order was issued, it was to be completed within 12 months including the rainy season. The contractor was unable to complete the work, time was extended on four occasions, last extension was given till 30.6.1986. Work was completed on 30.9.1986. The Tribunal has awarded amount of Rs. 2,41,008/- by way of escalation and interest thereon. Aggrieved thereby the revision has been preferred.

3. Shri Sudesh Verma, learned Govt. Advocate has submitted that there was no escalation clause as period of contract was 12 months, hence grant of escalation is against the agreement. He has relied upon clause 32 of the agreement, which provides that no claim for price escalation on account of any cause whatever shall be entertained as construction period was not more than 12 months.

4. Shri Ashok Chakravarty, learned counsel appearing for respondent has submitted that there was delay on the part of the State to carry out his obligation. The time was extended on four occasions due to fault of the State. Lay out was also given belatedly beside drawings and designs were also not given timely, thus period of contract in fact extended more than 12 months, thus the clause debarring escalation due to contract being of short duration became inoperative as the fault was on the part of the State. The finding recorded by the Tribunal is proper. No case for interference in the revision is made out.

5. The Division Bench of this Court in *Abdul Hafeez Vs. Secy. to the Govt. of M.P.* - 1992 ATLR 439 has considered similar clause providing no escalation as contract was of short duration, however period was extended due to fault of the department. The Division Bench has held that the claim of escalation cannot be rejected in the circumstances of the case. It was laid down thus :-

> 15. The next claim was towards escalation in labour charges and P.O.L. It was pointed out that the Tribunal in working out claim towards escalation of labour charges on fixed principles under P.W.D. Manual, committed with metical mistake. The amount towards escalation of labour charges comes to Rs. 43,376.00 which has been wrongly worked out as Rs. 36,324.00 The learned counsel for the department accepted that there is a calculation mistake. The award under this head of escalation towards labour charges deserves to be increased by Rs. 7,143.00 Learned counsel for the department challenged the above award towards escalation of labour charges stating that there was no escalating clause in the contract and, therefore this claim could not have been awarded. The above contention of the department

cannot be accepted, since it was initially a short duration contract, there was no escalation clause contained in it, but as there was a breach on the part of the department in handing over the site, the claim for escalation cannot be rejected only because of the omission of the escalation clause in the contract. A claim towards escalation can arise irrespective of any clause to the effect in the contract or not more so where the employer is guilty of a breach of a fundamental term of the contract.

6. Coming to the facts of the instant case in the light of the aforesaid decision. It is apparent that there was delay of 10 months in handing over the site as found by the Tribunal in Para 12 of the award, lay out was also not given timely. Lay out was not given together, lay out were given between 1.5.83 and 8.1.84, there was delay in furnishing the drawings and designs also as apparent from various correspondence relied upon in Para 15 by the Tribunal, thus there was fundamental breach on the part of the State in allowing the completion of work within 12 months. It was clearly contemplated to be contract of short duration of 12 months, hence escalation was not to be granted but there was delay on the part of the department itself in carrying out its obligation, consequently period was extended effectively without any penalty clause for 40 months, thus contract did not remain contract for a period of short duration of 12 months, thus clause 32 of the agreement which provides no price escalation to be granted on any count as the period of contract was not more than 12 months was rendered ineffective due to extension of time made by the State there was extension made by the State for the period up to 40 months. The clause makes it clear that in case duration be more escalation to be permissible, due to short duration it was not stipulated as contract period was 40 months due to fault on part of department, escalation has been rightly awarded. In the circumstances the escalation of labour charges that has been allowed by the Tribunal on the basis of evidence is found to be proper. There is no illegality in the award, consequently we find no merit in the submission raised.

7. Resultantly, revision being devoid of merit, is hereby dismissed. Parties to bear their own costs as incurred of this revision.

Revision dismissed.

I.L.R. [2008] M. P., 1809

CIVIL REVISION

Before Mr. Justice K.K. Lahoti

26 June, 2008*

KAMLA BAI PATEL (Smt.) ... Applicant

Vs.

VIDHYAWATI PATEL & ors. ... Non-applicants

A. Civil Procedure Code (5 of 1908), Order 20 Rule 18 - *Final Decree proceedings - Limitation - Proceedings for final decree can be initiated at any time - No limitation is provided therefor.* (Paras 10 & 11)

*C.R. No. 933/2002 (Jabalpur)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 20 नियम 18 – अंतिम डिक्री की कार्यवाहियाँ – परिसीमा – अंतिम डिक्री के लिए कार्यवाहियाँ किसी भी समय प्रारम्भ की जा सकती हैं – उसके लिए कोई परिसीमा उपबंधित नहीं है।

B. Civil Procedure Code (5 of 1908), Order 20 Rule 18 - *Final Decree - Preliminary decree passed in a suit for partition - Applicants filed an application for execution of decree - Commissioner was appointed to give effect to preliminary decree - Report submitted by Commissioner and objections were filed by parties - Application for execution may be treated as final decree proceedings.* (Paras 13 & 14)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 20 नियम 18 – अंतिम डिक्री – विभाजन के लिए वाद में प्रारम्भिक डिक्री पारित – आवेदकगण ने डिक्री के निष्पादन के लिए आवेदन पत्र पेश किया – प्रारम्भिक डिक्री को प्रभावी करने के लिए कमिश्नर नियुक्त किया गया – कमिश्नर द्वारा रिपोर्ट प्रस्तुत की गई और पक्षकारों द्वारा आपत्तियाँ पेश की गई – निष्पादन के लिए आवेदन अंतिम डिक्री की कार्यवाहियाँ मानी जा सकती हैं।

Cases referred :

(2007) 2 SCC 355, (1995) 5 SCC 631, AIR 1965 Mysore 73

S.K. Verma, for the applicant.

P.N. Patel, for the non-applicants.

ORDER

K.K. Lahoti, J. :–The applicant has challenged order dated 1.3.2002 passed by 3rd Additional District Judge, Jabalpur in execution Case No. 127-A/85 by which the execution application filed by the petitioner was dismissed on the following grounds :-

a. That after the preliminary decree the applicant had not taken steps for final decree proceedings as required under Order 20 Rule 18 of Civil Procedure Code, 1908 (hereinafter referred to as the "Code") .

b. That even if the application filed by the applicant is treated as an application for final decree then it was not filed within a period of 3 years from the date of preliminary decree dated 7.9.1987 and was filed on 18.1.1996 which was beyond a period of 3 years as provided by Art. 137 of the Limitation Act, 1963.

2. On the aforesaid ground, the Court below rejected the application. The order has been assailed by the applicant on the ground that on 4.9.1987 a preliminary decree was passed. On 21.10.87 an execution of decree was filed but it was dismissed in default on 22.12.1995. On 17.1.1996, 2nd application was filed in which a Commissioner was appointed on 22.9.1999 to give affect to the preliminary decree. The Commissioner submitted his report on which on 22.11.2000 objections were filed and the trial Court again on 24.7.2001 directed the Commissioner to file report. The judgment debtor filed two applications dated 3.8.2001 and 4.9.2001

seeking review of the earlier orders but the executing Court rejected the applications and fixed the case for Commissioner's report. Thereafter, various applications were decided by the impugned order.

3. It was submitted by Shri Verma, learned counsel for the applicant that Art.137 of the Limitation Act does not apply in the final decree proceedings. Final decree proceedings may be initiated at any point of time. Reliance is placed to a recent judgment of the Apex Court in *Hasham Abbas Sayyad vs. Usman Abbas Sayyad and ors.* [2007(2) SCC 355]. It is submitted that the preliminary decree finalises the matter relating to declaration of rights and interest and final decree works out those rights so the final decree concludes the proceedings before the Court and suit comes to an end for all practical purposes, till then the proceedings of the suit continues. In these circumstances, there was no question of applicability of Art. 137 of the Limitation Act as held by the trial Court.

4. That though the proceedings were initiated by the applicant as an execution preceding but in fact these proceedings were none less but the proceedings for final decree. The trial Court appointed a Commissioner to give effect to the preliminary decree and proceeded in the matter. The other party on the commissioner's report submitted objections which were considered by the trial Court and again the trial Court on 24.7.2001 directed the Commissioner to submit his report. These proceedings are infact steps for the preparation of the final decree and the proceedings before the trial Court may be treated as proceedings for final decree. Reliance was placed to the Apex Court judgment in *Mool Chand & others vs. Dy. Director, Consolidation and ors.* [(1995) 5 SCC 631]. That the impugned order dismissing the proceedings may be set aside and the trial Court be directed to conclude the proceedings treating the proceeding as final decree proceedings and to conclude it by passing a final decree in the matter.

5. Shri Patel, learned counsel appearing for the non-applicant/judgment debtor submitted that the impugned order is in accordance with law. The applicant ought to have filed an application for preparation of final decree and an application for execution of the decree was not maintainable. Before the trial Court an application for execution was filed which has been rightly dismissed by the trial Court . The preliminary decree was passed under Order 20 Rule 18 of the Code which requires an application for final decree, in the absence of which the trial Court passed the impugned order in which there was no error. In the alternative Shri Patel submitted that if proceedings before the trial Court are treated as proceedings for final decree then the non-applicant be permitted to raise objections because the preliminary decree itself was not in accordance with law and the aforesaid objection deserves to be considered by the trial Court.

6. To appreciate the aforesaid contention, firstly factual aspect of the matter may be looked into. The applicant Kamla Bai filed a suit against the respondent for partition and possession. A preliminary decree was passed by the trial Court in civil Suit No. 127-A/05 on 4.9.1987 by which plaintiff's 1/5th share was found

in respect of the houses and she was found entitled for the possession after partition. The aforesaid decree was put to an execution by the plaintiff decree holder on 27.10.1985 but the application was dismissed in default on 22.12.1995. Thereafter another application was filed that too for the execution of the decree on 18.1.1996 in which the proceedings were initiated. A notice was issued to the judgment debtor and the record of earlier execution was sent for. During the pendency of the execution, judgment debtor No.1 Diwakar Patel passed away and his legal heirs were directed to be brought on record on 6.9.99. On 22.9.99, the executing Court found that decree was for partition of the immovable property in which the properties were to be divided in five equal share and each one was entitled for 1/5th share and Shri Subhash Gupta was appointed as the Commissioner to give effect to the decree. A writ of commission was issued in the matter. The Commissioner submitted his report on 22.2.2000 and the parties were extended opportunity to submit their objections. The decree holder filed the objections. The aforesaid objections were decided on 20.12.2000 and the executing Court appointed another Commissioner Shri Shailendra Shrivastava and directed to submit his report. The Commissioner submitted his report on 15.2.2001. On 14.3.2001 the Commissioner submitted that the sons of judgment debtor were creating hurdle in the measurement of the properties so Police help be provided to him. On 4.7.2001, the Commissioner, Shailendra Shrivastava was directed to execute the commission by the help of Police.

7. In the meantime the judgment debtor filed an application under Order 47 read with Section 151 of the Code. The executing Court rejected the objection by an order dated 22.9.2001. Thereafter the judgment debtor filed an objection on the Commissioner's report and on 1.3.2002 the impugned order was passed by which the execution application was rejected.

8. Now in the background of these facts some provisions may be referred. In this case a preliminary decree was passed under Order 20 Rule 18 of the Code. For ready reference Rule 18 is referred thus :-

> **Order 20 Rule 18. Decree in suit for partition of property or separate possession of a share therein**
>
> **18. Decree in suit for partition of property or separate possession of a share therein.**-Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-
>
> (1) if and insofar as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;
>
> (2) if and insofar as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot

be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

9. The aforesaid provision specifically provides that where the partition and separation cannot be conveniently made without further inquiry the court shall pass a preliminary decree declaring the rights of the several parties interested in the property and issue such further directions as may be required.The judgment and decree dated 4.9.1987 was under Order 20 Rule 18(2) of the Code. So the aforesaid judgment and decree were preliminary in nature.

10. For final decree no limitation is provided and final decree proceedings may be initiated at any point of time. The Apex Court in *Hasham Abbas Sayyad* (supra) considering this question held thus :-

> "9. A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree."

11. In view of the settled law by the Apex Court, it is found that the trial Court erred in arriving at a finding that the present application was barred by limitation and such application ought to have filed within a period of 3 years as required under Art.137 of the Limitation Act. The aforesaid findings of the trial Court are hereby set aside.

12. In so far as initiating the proceedings for final decree are concerned, the aforesaid proceedings could have been initiated at any point of time. The Apex Court in *Mool Chand* (supra) considering the question held that a preliminary decree in a partition suit is steps in the suit which continues until the final decree is passed. So the proceedings shall continued to be pending before the Court until and unless a final decree is passed in the matter. The trial Court can therefore, pass a final decree either suo motu or on an application by any of the parties such order as is necessary for giving effect to the preliminary decree and to conclude the proceedings. As no procedure is prescribed in the Code of Civil Procedure, hence the Court can proceed in the matter for drawing a final decree in the suit. In these circumstances if any such application was filed by the applicant then it cannot be treated as barred by limitation. See *A. Manjundappa vs. Sonnappa and ors.* [AIR 1965 Mysore 73].

13. In this case, on filing of the application by the applicant though in the shape of execution, the trial Court proceeded further in the matter, appointed a Commissioner to give affect the preliminary decree. The Commissioner report was filed in the matter in which objections were filed by the parties.

14. Looking to the entire nature of the proceedings before the trial Court, these proceedings may be treated as final decree proceedings though the application was filed as an execution of preliminary decree.

15. The learned counsel for the respondents submitted that in case order passed by the trial is set aside then the respondents are entitled to submit their objections which may be directed to be decided by the trial Court. It was also submitted that in this regard the non-applicant be permitted to submit their objections which may be directed to be decided by the trial Court.

16. Considering the facts as stated hereinabove, impugned order is set aside and the matter is remitted back to the trial Court with an opportunity to the non-applicant to submit their objection before the trial Court. If any objections are filed by the non-applicant, the trial Court shall be free to consider the aforesaid objections in accordance with law.

17. In the result, this revision is allowed and following directions are issued :-

i) The impugned order dated 1.3.2002 passed by the executing Court is hereby set aside.

ii) The execution application filed by the applicant shall be treated by the trial Court as an application for final decree and accordingly the trial Court shall precede in the matter.

iii) The trial Court after considering the objections on the Commissioner's report shall proceed in the matter in accordance with law.

(iv) The non-applicants shall be entitled to submit their objections before the trial Court and if any objections are filed by the non-applicant, the trial Court shall consider the aforesaid objections in accordance with law after extending due opportunity of hearing to both the parties. Both the parties present herein are directed to remain present before the trial Court on 21.7.2008 for which date no fresh notice shall be necessary to the parties. On the aforesaid date, the trial Court shall restore the file and proceed in the matter in accordance with law.

Considering the peculiar facts of the case, there shall be no order as to costs.

Order accordingly.

I.L.R. [2008] M. P., 1814

CRIMINAL REVISION

Before Mr. Justice S.C. Vyas

26 February, 2008*

MURLIDHAR ... Applicant

Vs.

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

Excise Act, M.P. (2 of 1915), Sections 34(1)(A), 49A(1)(A) - ***Liquor seized from applicant - On chemical examination sample found unfit for human consumption - No evidence available regarding sealing of sample and sending***

*Cr.R. No.855 1998 (Jabalpur)

the same for chemical examination - Held - Conviction u/s 49A(1)(A) set-aside - However, liquor found from applicant - Applicant covicted under converted Section 34(1)(A) - Revision Partly allowed. (Para 4)

आबकारी अधिनियम, म.प्र. (1915 का 2), धाराएँ 34(1)(ए), 49ए(1)(ए) – आवेदक से मदिरा अभिग्रहित की गई – रासायनिक परीक्षण पर नमूना मानव उपभोग के लिए अनुपयुक्त पाया गया – नमूने को सीलबन्द करने और उसे रासायनिक परीक्षण के लिए भेजने के सम्बन्ध में कोई साक्ष्य उपलब्ध नहीं – अभिनिर्धारित – धारा 49ए(1)(ए) के अधीन दोषसिद्धि अपास्त – तथापि आवेदक के पास से मदिरा पाई गई – आवेदक परिवर्तित धारा 34(1)(ए) के अधीन दोषसिद्ध – पुनरीक्षण आंशिक मंजूर।

Rajkamal Chaturvedi, Amicus Curie for the applicant.
Vijaya Bhatnagar, Panel Lawyer, for the non-applicant.

JUDGMENT

S.C. VYAS, J. :–This is a criminal revision filed under Section 397/401 of the Criminal Procedure Code challenging the legality of the conviction of the present applicant under Section 49(A)(1)(A) of the M.P. Excise Act and order of sentence of one year rigorous imprisonment and fine of Rs.500/-.

2. The case of the prosecution is that on 10.12.96 when Excise Inspector Vidyaprakash Tiwari (P.W.3) along with his subordinate staff was taking a round of the area then he found present applicant coming with a plastic cane. When he was checked , it was found that cane was containing some liquor. That substance was seized by the Excise Inspector and was examined. Sample of the liquor was also sent for chemical examination to forensic science laboratory, Sagar. The report received from that laboratory mentions that the liquor contained in the cane is unfit for human consumption. Then the applicant was prosecuted. He was tried by learned Magistrate for the offence punishable under Section 49(A) (1)(A) of the M.P Excise Act and was found guilty and then convicted and sentenced as aforesaid.

3. The learned counsel for the applicant raised only one point in this Criminal revision. He submitted that as per the case of prosecution the sample of alleged material was collected by Excise Inspector on 10.12.96 and the same was sent for chemical examination on 14.1.97. It has been submitted that as per the report of chemical examination it was received in laboratory on 21.1.97. Learned counsel submitted that there is nothing on record to show that the sample was stored in some safe place and was remained intact during the period of one month. It has also been argued that seizure memo Exhibit P/4 does not contain any details of the seal, as to what type of seal was used, for sealing the sample and there is no sealing impression on this seizure memo.

4. I have considered the aforesaid arguments and perused the record of the trial court. Exhibit P/4 is the seizure memo of the alleged article. This document only shows that the cane were seized on the spot. Sample were taken. But no impression of that seal which was used for the purpose of sealing the sample is

available on the seizure memo. From the statement of witness Vidyaprakash Tiwari (P.W.3) it is also clear that he has not provided any explanation for not putting the impression of the seal on the seizure memo. It is also clear from his statement that he has not proved any information regarding the fact that the sample was intact before the same was sent to the forensic science laboratory. Nothing has been stated by him to indicate as to what was the place where the samples were stored. There is nothing to rule out the possibility of tampering with the sample. The samples were in the possession of this witness for more than a month. Before sending the same to the forensic science laboratory and during that period of one month anybody could have tampered with the seal of the sample as impression of the seal is not available and no seal impression has been filed along with the charge sheet. Therefore it is doubtful as to whether the same sample has been sent for chemical examination which was drawn from the article which has been seized from the present applicant.

5. In view of this situation inspite of report Exhibit P/7 indicating that the liquor is unfit for human consumption, it is not safe to hold that this report is pertaining to the substance which was recovered from the present applicant. Therefore, the finding of guilt and conviction of applicant under Section 49(A)(1)(A) is not sustainable and is hereby set aside.

6. But it does not end the matter. There is sufficient evidence of the Excise Inspector as well as other witness which shows that the substance which was recovered from the possession of the present applicant was examined on the spot itself by the Excise Inspector and it was found containing liquor. There is nothing to disbelieve this portion of evidence. Therefore, considering this evidence I find that the offence punishable under Section 34(A) of the M.P. Excise Act is fully made out against the present applicant.

7. Therefore, the revision is partly allowed. The conviction of the present applicant under Section 49(A)(1)(A) of the M.P. Excise Act is set aside but in its place he is found guilty for the offence punishable under Section 34(1)(A) of the M.P. Excise Act. For this offence the prescribed punishment is imprisonment which may extend to one year and fine which should not be less than Rs.500/-but which may extend to Rs.5000/-.

8. Attention of this Court has been drawn towards the fact that the present applicant remained in custody for 14 days during trial and after conviction. The incident is of the year 1995 i.e. 13 years back. Considering these facts I find that in place of sending the applicant back to jail after lapse of so much time it would be in the interest of justice to reduce the jail sentence to the period which has been undergone along with fine of Rs.500/-. In case of default of payment of fine, applicant have to undergo simple imprisonment for a period of one month. Copy of this judgment be sent to CJM, Chhindwara for information and compliance.

Revision partly allowed.

I.L.R. [2008] M. P., 1817
CRIMINAL REVISION
Before Mr. Justice B.M. Gupta
3 March 2008*

SUO MOTU REVISION STATE OF M.P. ... Applicant
Vs.
VINOD MUDGAL & ors. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 311 - *Recalling of witness - Witness who was examined in-Chief and cross examined fully, cannot be recalled and re-examined to deny evidence which he had already given before Court - Jurisdiction vested in Court must be exercised judicially and not capriciously or arbitrarily.* (Para 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – साक्षी को पुनः बुलाना – जिस साक्षी का मुख्य परीक्षण एवं प्रति परीक्षण पूर्ण हो चुका हो, उसे पुनः परीक्षण के लिये नहीं बुलाया जा सकता है कि वह उसके द्वारा पूर्व में न्यायालय में दी गई साक्ष्य से इंकार करे – न्यायालय को निहित अधिकारिता का प्रयोग न्याय सम्मत करना चाहिए ना कि अनुचित या मनमाने तरीके से।

Cases referred :

(2005) 10 SCC 701, AIR 2004 SC 4209, (2006) 9 SCC 386, AIR 1991 SC 1346, AIR 2007 SC 3029, AIR 1970 SC 45, AIR 1989 SC 1933, AIR 2005 SC 4161

B.D. Mahore, for the State

Vivek Tankha assisted by *D.D. Sharma, Vishal Mishra, Arun Pateria, Atul Gupta & Amit Lahoti*, for all the respondents except respondents Shashikant & Lajjaram.

None, for respondents Shashikant & Lajjaram.

ORDER

B.M. Gupta, J. :–It is an order dated 10th July, 2007 passed by the 3rd Additional Sessions Judge, Morena in sessions case No.247/93, whereby the learned Judge has allowed an application under Section 311 of Cr.P.C. filed on behalf of the accused persons for recalling complainant Dinesh Virthare, the main eye-witness of the case, for his further cross-examination of which the correctness, legality or propriety is required to be considered in this *suo motu* revision initiated by the High Court vide order of the Chief Justice of the High Court dated 13th September, 2007. Vide the same order of Chief Justice, the aforesaid sessions case alongwith its cross-case No.87/94, has also been placed before this Bench for consideration of the transfer of both the cases from the aforesaid Court to any other competent Court in exercise of the powers of superintendence of the High Court over all subordinate Courts under Article 227 of the Constitution of India.

*Cr.R. No.767/07 (Gwalior)

2A. Brief factual history, being necessary to be known is, that with regard to an incident happened on 22nd November, 1992 at 11.05 a.m. one FIR was lodged by Dinesh Virthare, the father of the deceased, at police Station, Kotwali, Morena, alleging himself to be an eye-witness, on which crime No.805/92 was registered for the offence punishable under Section 302/34 of IPC against four accused persons namely (1) Vinod Mudgal (2) Parasram Mudgal (3) Ranglal and (4) Ramvilas, the respondents herein. On this FIR, the aforementioned four persons are facing trial for the offence of murder of Ravikant Virthare in sessions case No.247/93. The statement of Dinesh Virthare was recorded on 28th and 29th April, 1994 and also on 23rd July, 1994, contains less than two pages of examination-in-chief and 34 pages of cross-examination. Thereafter, recording the statements of all other witnesses, the prosecution closed its evidence on 6th January, 2004, on 6th February, 2004 the statements of accused were recorded under Section 313 of Cr.P.C. and fixed for defence evidence on 25th February, 2004. Before closing of the defence evidence, on 14th June, 2007 this application under Section 311 of Cr.P.C. was filed. It was opposed in writing by the prosecution. Vide impugned order, the same has been allowed. On 26th July, 2007 his further cross-examination has been completed and again the case has been fixed for defence evidence on 4th August, 2007.

2B. Before 4th August, 2007 one application dated 30th July, 2007 has been filed on behalf of Dinesh Virthare for early hearing of the case but the same has been withdrawn on 4th August, 2007. Another application has been filed on behalf of Dinesh Virthare for his further recall as a witness on the ground, that when he was cross-examined on behalf of the prosecution on 26th July, 2007, then upon a question, he replied -ये कहना गलत है कि पूर्व मे जो मेरा कथन हुआ था वो मैने पुलिस के दवाब में नही लिखाया था- while the same has been typed as -यह कहना गलत है कि पूर्व में जो मेरा कथन हुआ था वो मैने पुलिस के दवाब में दिया था. Despite oral objection by the prosecution, this application has also been allowed and thereafter he has been further called and re-examined on 9th August, 2007. It is the date when the defence side has also closed its evidence and the case has now been fixed for final argument. The arguments could not be heard, as the case has been called by the High Court under the direction of Hon. The Chief Justice for hearing of this revision.

2C. On perusal of the statement of Dinesh Virthare, it appears that during his first examination on the aforementioned three dates, he supported the prosecution case, stated against the aforementioned accused persons claiming to be an eye-witness of the case. When he was recalled in compliance of the impugned order, he has resiled from his earlier statement and has stated that he was not present at the time of incident. When he was further examined on 26th July, 2007, in para 96 he has stated - यह कहना गलत है कि पूर्व का जो मेरा कथन हुआ था वो मैने पुलिस के दवाब में दिया था-. On perusal of his third statement recorded on 9th August, 2007, he has further resiled from his statement and has stated in para 99- ये बात सही है कि 1994 में मैने न्यायालय के समक्ष जो कथन दिया था वह पुलिस के दवाब के कारण दिया था।

2D. On perusal of FIR crime No.806/92 of the cross-case registered at the same police Station based on the same incident dated 22nd November, 1992 happened at 11.05 hours, it appears that this report was lodged by one Parasram Mudgal, one of the aforementioned four accused persons of the sessions case No.247/93, on which the offence under Section 307/34 of IPC was registered against (1) Dinesh Virthare (2) Teetu @ Shashikant Virthare (3) Ravikant Virthare (since deceased) and two others (not named). It is alleged inter alia in this FIR that the aforementioned accused persons came at the office of complainant Parasram Mudgal and with intent to commit his murder, Dinesh Virthare fired from his mouser gun causing gun shot injury at right thigh of the complainant. On perusal of this record, it appears that on 26th May, 2007, the statement of Dinesh Virthare was recorded in this cross-case under Section 313 of Cr.P.C.. In this statement he has stated that he is not an eye-witness of the incident related to aforesaid sessions case No.247/93 and it is the statement given by him on which the aforementioned application under Section 311 of Cr.P.C. was filed on behalf of the four accused persons in the aforementioned sessions case No.247/93.

2E. On perusal of the order-sheets, it appears that the learned Judge, who passed the impugned order, joined the Court near about 30th June, 2005 because on the order-sheet of 30th June, 2005 her signatures are appearing. Prior to this date, another Judge was posted in the Court. On perusal of the order-sheets, it also appears that some times the case has been adjourned on account of filing of some applications at the stage of defence evidence.

3. The relevant provision of Cr.P.C., Section 311 of Cr.P.C. is as under:-

> **"311. Power to summon material witness, or examine person present.-** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine, any person already examined ; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

It appears manifestly in two parts; whereas the word used in first part is 'may' and the word used in second part is 'shall. In consequence, the first part which is permissive gives purely discretionary authority to the court and enable it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways mentioned therein. The second part being mandatory, imposes an obligation on the Court (1) to summon and examine, or (2) to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case. Undisputedly, and also on perusal, it appears that the application has been filed under second part, as in para 9 it has been written-यह कि उक्त प्रकरण के फरियादी दिनेश बिरथरे द्वारा सत्र प्रकरण कमांक 87/94 मे दिए गये कथनों में आये तथ्यों के संबंध में उक्त साक्ष्यी से पुनः कूट परीक्षण किया जाना प्रकरण के न्यायिक निराकरण व उचित न्यायदान हेतु आवश्यक

है. ताकि माननीय न्यायालय के समक्ष वास्तविक सच्चाई प्रकट हो सके- Similarly vide last paragraph, the impugned order goes-अतः प्रस्तुत न्याय दृष्टांत में प्रतिपादित सिद्धांतो एवं प्रकरण की परिस्थितियों को दृष्टिगत रखते हुए प्रकरण के न्यायोचित निराकरण हेतु आरोपीगण की ओर से प्रस्तुत आवेदनपत्र अंतर्गत धारा 311 स्वीकार किया जाता है.

4. In this light, as mentioned in the application and also in the impugned order, it is to be seen as to whether the recalling of the witness was essential for the just decision of the case ?

5. While dealing with a case having more or less similar facts, the observation of the Apex Court in the case of *Mishrilal and others Vs. State of M.P. and others,* (2005) 10 SCC 701 is to be seen. Brief facts of the case are that the incident giving rise to the case happened on 22nd July, 1990 at about 6 p.m. PW-1 Kammod, PW-2 Mokam Singh and deceased Balmukund were grazing the cattle in their fields. The appellants alongwith their accomplices came there and attacked Balmukund and PW-2 Mokam Singh. Balmukund died on account of the injuries caused by the assailants. PW-1 Kammod went to the police Station at Bajranggarh and lodged report about the incident. In this case PW-2 Mokam Singh was recalled on an application filed on behalf of the accused under Section 311 of Cr.P.C. With regard to this fact, the Hon. Apex Court has observed in para 5 and 6 as under :-

> "The learned Counsel for the appellants seriously attacked the evidence of PW 2 Mokam Singh. This witness was examined by the Sessions Judge on 6.2.1991 and cross-examined on the same day by the defence counsel. Thereafter, it seems, that on behalf of the accused persons an application was filed and PW 2 Mokam Singh was recalled. PW-2 was again examined and cross-examined on 31.7.1991. It may be noted that some of the persons who were allegedly involved in this incident were minors and their case was tried by the Juvenile Court. PW 2 Mokam Singh was also examined as a witness in the case before the Juvenile court. In the Juvenile Court, he gave evidence to the effect that he was not aware of the persons who had attacked him and on hearing the voice of the assailants, he assumed that they were some Banjaras. Upon recalling, PW-2 Mokam Singh was confronted with the evidence he had given later before the Juvenile Court on the basis of which the accused persons were acquitted of the charge under Section 307 IPC for having made an attempt on the life of this witness.
>
> In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW 2 Mokam Singh on 6 2.1991, there was no such previous statement

and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere explanation that he had given it under the pressure of the police or some other reason. Whenever the witness speaks falsehood in the court, and it is proved satisfactorily, the court should take a serious action against such witnesses.

6. Similarly the observation of the Apex Court in an another case of *Yakub Ismailbhai Patel v. State of Gujarat,* AIR 2004 SC 4209 appears on the same footing. As per the facts of this case, on 25th August, 1995 one Nazim died on account of knife injuries inflicted at his person. Complaint was lodged by one Munna @ Gheti Mohamadshafi Shaikh mentioning therein that being a friend of the deceased on 24th August, 1995 when he visited his residence, he witnessed a hot altercation between him and the petitioner with regard to dispute of a quarter. On 25th August, 1995 while this Munna was returning from the house of his friend, he saw accused No.1 and accused No.2 alongwith other persons. They were running and accused No.1 & 2 were having sharp edged weapon. When he proceeded further, he saw dead-body of his friend Nizamuddin. One Raju was also present there. On enquiry from Raju, he could gather that accused No.1 and 2 with one another inflicted injuries on the person of the deceased causing his death. Munna reported the matter mentioning the aforementioned facts. After completion of investigation, charge-sheet was filed. Prosecution examined 14 witnesses. At the time of recording of the statements of the accused under Section 313 of Cr.P.C., an application was filed on behalf of the accused to recall Munna @ Ghethi as a defence witness. It appears that an affidavit was filed by witness Munna to the effect that whatever he had deposed before the Court as PW-1 was not true and it was so done at the instance of police. Trial Court convicted all the appellants. In appeal the High Court after considering the evidence dismissed the appeal and gave liberty to the trial Court to proceed against witness Munna @ Gheti under Section 344 of Cr.P.C. Aggrieved by this order, the appellant preferred SLP before the Apex Court impugning the conviction in which leave was granted. In these facts, the Hon. Apex Court has observed in para 40 and 41 as under :-

40. Significantly this witness, later on filed an affidavit wherein he had sworn to the fact that whatever he had deposed before Court as PW-1 was not true and it was so done at the instance of Police.

41. The averments in the affidavits are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from testimony

given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in Court later he was in jail in a narcotic case and that the accused persons were also fellow inmates there.

7. The observation of the Apex Court on the point in the case of *Nisar Khan Alias Guddu and others Vs. State of Uttaranchal,* (2006) 9 SCC 386 also appears similar. In this case, the 5 appellants were convicted for the offence punishable under Sections 148, 149, 302/149 of IPC alongwith Section 25 of the Arms Act. In this case also on an application filed on behalf of the accused under Section 311 of Cr.P.C. a witness was recalled. With regard to this fact, the Hon. Apex Court in para 9 has observed as under :-

"The other contention of Mr Jaspal Singh is that all the eyewitnesses were turned hostile and the credibility of their testimonies are doubted. It is clearly apparent on the record that eyewitness PW 4 Naeem Babu had filed an application before the trial Magistrate (Ext. Kha-27) that he has been threatened and intimidated by the accused not to depose against them. So also PW 1 and PW 2 who were eyewitnesses and supported the prosecution case consistently, were turned hostile. PW 1 and PW 2, direct eyewitnesses of the occurrence were examined, cross-examined and discharged on 4.1.2001. They were recalled on 7.1.2002 and re-examined by the defence on which date all of them turned hostile and resiled from the previous statement. It clearly appears that the eyewitnesses were won over by threat or intimidation after more than one year of their examination and cross-examination and ultimately when the eyewitnesses were won over by the accused they were recalled and re-examined on 7.1.2002. Even on re-examination on 7.1.2002 the eyewitnesses consistently supported the prosecution story with regard to the date and place of incident, the car in which they came and the genesis of the incident. To that extent they supported the prosecution story. They resiled from the previous statement only with regard to the identity of the accused. It is in evidence on record that the accused and prosecution parties are at loggerheads because of business rivalry and known to each other from before. Naturally, by the time the eyewitnesses were recalled, they were won over either by money, by muscle power, by threats or intimidation. We are of the view that no reasonable person properly instructed in law would allow an application filed by the accused to recall the eyewitnesses after a lapse of more than one year that too after the witnesses were examined, cross-examined and discharged."

8A. A few more principles have been laid down by the Apex Court in the cases of *Mohanlal Shamji Soni v. Union of India & another*, AIR 1991 S. C. 1346 and *Iddar & ors.v. Aabida & anr.*, AIR 2007 SC 3029, cited on behalf of the respondents/accused. As per the facts of the case of Mohanlal Shamji, during a raid primary gold alongwith silver bricks and an amount of Rs. 79,000/- was seized

from the possession of the appellant. Assistant Collector of Customs filed two complaints (1) under the provisions of Customs Act, 1962 and (2) under the Gold Control Act, 1968. At the time of final argument, prosecution filed two applications in both the cases under Section 540 of the old Code of which the Section 311 of Cr.P.C. is corresponding , requesting the trial Court to recall Mr.Mirchandani, the seizing officer, for further examination alongwith two new witnesses K.K.Das, Assistant Collector of Customs and the Deputy Chief Officer (Assayer) of Mint Master, Bombay either as witnesses of prosecution or of the Court. Trial Court rejected, but the High Court allowed the revisions and directed to examine the aforesaid three witnesses. Feeling aggrieved, the appellant approached the Apex Court. The relevant observation of the Apex Court in para 16, 19 and 27 is as under :-

"16. .... Though any party to the proceedings points out the desirability (of) some evidence being taken, then the Court has to exercise its power under this provision either discretionary or mandatory - depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice....."

The following extract is quoted from the quoted part of the Apex Court from the case of *Jamatraj Kewalji Govani-*

"Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides.... In other words, where. the Court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is needed by it for a just decision of the case. If the Court has acted without the requirements of a just decision, the action is open to criticism but if the Court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

"18. ... Though Section 540 (Section 311 of the new Code), is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results....."

19. ....but this power has to be exercised sparingly and only when the ends of justice so demand. The higher the power the more careful should be its exercise..... The words, "Just decision of the case" would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fair play".....

27. The principle of law that 'emerges from the views expressed by this court in the above decisions is that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.

8B. The matter of *Iddar* (supra) was a case under Sections 498-A, 406, 376 and 120-B of IPC. On account of some settlement between the parties, a varied statement was given by the complainant during trial. After some time, an application under Section 311 of Cr.P.C. was filed to recall him. It was rejected, but allowed by the High Court, however, without hearing the accused/appellant. The appellant filed appeal before the Apex Court on two grounds (1) that no reasons have been mentioned by the High Court in allowing the application while setting aside the order of the trial Court (2) the order has been passed without notice to the appellant. The Hon. Apex Court allowed the appeal on the second ground as per the observation in para 14. However, prior to it, the relevant observation in para 10 to 12 is- The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is wither it is essential to the just decision of the case. .....It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. ..... Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not, must of course depend on the facts of each case and has to be determined by the Presiding Judge.

9. Arguing on behalf of the respondents/accused, Shri Vivek Tankha, learned Sr. Advocate, has also placed reliance on one more judgment of the Apex Court in the case of *Mohd. Hussain Umar Kochra etc.v. K. S. Dalipsinghji and another etc.*, AIR 1970 S. C. 45. It was an appeal against conviction of the appellant for the offence of criminal conspiracy to import and deal in gold, punishable under Section 120-B of IPC read with Section 167(81) of the Sea Customs Act, 1878, the Hon. Apex Court has framed five questions to be considered for the disposal of the appeal. The 5th question which only relates with the present dispute was, did the Court below has wrongly refused to recall

PW 50 Ali for cross-examination. With regard to this question, the following observation has been given in para 19

> "19. As to the last question, we find that examination-in-chief of P. W. 50 Ali commenced on October 7, 1960 and was concluded on October 10, 1960. His cross-examination commenced on August 21, 1961 and was concluded on September 4, 1961. On March 6, 1962 and again on June 21, 1962 the defence applied for recalling Ali for cross-examination. The learned Magistrate rejected the two applications. According to the defence Ali was repentant and wanted to say that he had given false evidence. In our opinion, no ground was made out for recalling Ali. There was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular. The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. In this case there was no material upon which the Court could be so satisfied. The learned Magistrate rightly disallowed the prayer for recalling Ali."

Shri Tankha has argued that the observation indicates that, had there been an affidavit filed, the refusal of recalling of the witness would have been observed, not justified. He has further submitted that this being an observation of three judges Division Bench and in case of any conflict with the observation of aforementioned two judges Division Benches of the Apex Court, it is required to be followed. In his support, he has drawn attention at para 29 of a judgment delivered by five judges Bench of the Apex Court in the case of *Union of India and another v. Raghubir Singh* (dead) by LRs. etc., AIR 1989 SC 1933. Para 29 of the judgment goes as under :-

> "29. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. We would, however, like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of at least three Judges unless, for compelling reasons, that is not conveniently possible."

10. It is true and also settled that in case of conflict, a law pronounced by a three judges Division Bench or a Larger Bench, is to be followed in comparison to the law pronounced by two judges Division Bench or the Bench of smaller number of Judges. Thus, two material points are to be searched for the purpose to conclude the present controversy (1) whether a law, as contended, has been pronounced by the Apex Court in this case, that in all such cases when such affidavit is on record, irrespective of absence of the other factors required, such as, that the calling or recalling of a witness must be essential for the just decision of the case, the

witness is to be recalled ? and (2) that, if such pronouncement is in existence, then whether it is in conflict with the law pronounced by the aforementioned Division Benches of the Apex Court. After a deep consideration, with respect, answer of both the questions is in negative. In reading the judgment in the case of *Mohd. Hussain* (supra), it appears that the order of rejection of the application by the Magistrate has been affirmed while mentioning -In our opinion, no ground was made out for recalling Ali, as there was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular-. It is further mentioned by the Hon. Court that -' he is prepared to give evidence which is materially different from what he had given at the trial-'. The existence of inherent powers to recall has been okayed, but it is not observed that when such requirement for invoking the inherent powers will arise or what may be the other material on which the calling of the witness may be required. There appears no observation on the legal requirement-' the evidence appears to the Court to be essential to the just decision of the case', as the same was not required in the facts because the absence of affidavit or other material was considered sufficient to affirm the order of the Magistrate. Thus, in absence of such pronouncement of law, there appears no conflict of opinion in the observation of the other Division Benches of two judges of the Apex Court, quoted hereinabove, with the observation of the Apex Court in the case of *Mohd. Hussain* (supra).

11. On perusal of the afore-quoted observations of the Apex Court while explaining the second part of the provision of Section 311 of Cr.P.C., it appears that the calling or recalling of a witness is required for the just decision of the case which is to be concluded by the presiding Judge on facts of each case. It should be for searching the truth by lawful means, not intended to give an unfair advantage to one of the rival sides. It calls for no limitation, with regard to the stage at which the powers should be exercised, but it should be with a view that the best available evidence is to be on the record before the Court. A witness ought not to be recalled and re-examine to deny or to efface the evidence, he had already given before the Court on oath. A witness can be confronted only with a previous statement made by him. The jurisdiction vested in the Court to call or recall a witness under this provision must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results.

12A. On perusal, it appears that with regard to an incident happened on 22nd November, 1992, FIR was lodged by Dinesh Virthare at 11.05 a.m. mentioning himself to be an eye-witness. During trial, the statement of Dinesh Virthare was recorded on 28th April, 1994 and remained continue on next full day. Thereafter again his cross-examination was done on 23rd July, 1994. As against less than two pages in examination-in-chief, a lengthy cross-examination in detail on every point was completed on behalf of the accused persons in thirty four pages. The prosecution closed its evidence on 6th January, 2004. Accused statements under

Section 313 of Cr.P.C. were recorded on 6th February, 2004. The case was first fixed for defence on 25th February, 2004. Thereafter, on 14th June, 2007 after near about 12 years from recording of his statement, this application under Section 311 of Cr.P.C. has been filed for recalling him for further cross-examination on the ground that in another case which has been alleged to be a cross-case, in the capacity of an accused he stated under Section 313 of Cr.P.C. and also gave statement under Section 315 of Cr.P.C. that he did not witness the incident, which has been allowed by the learned Judge vide impugned order considering the recalling of the witness as essential for the just decision of the case. In view of the aforementioned facts, this approach of the learned Judge cannot be upheld. As observed by the Apex Court in the case of *Mishrilal* (supra), after examination and cross-examination of this witness, such recalling amounts to providing an opportunity to a witness to deny or to efface the evidence, he had already given before the Court, which was not to be given, even though that witness had given an inconsistent statement before any other court or forum subsequently. It is against the observation of the Apex Court in the case of *Yakub Ismailbhai* (supra), as it amounts to permit the witness to perjure himself by resiling from his earlier testimony given on oath. It is also against the observation of the Apex Court in the case of *Nisar Khan* (supra), as the witness was not recalled within a period of one year, but recalled after more than 12 years. As observe by the Apex Court in the case of *Mohanlal Shamji* (supra), recalling of this witness does not amount to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice neither it can be said for a just decision of the case, not intended to give an unfair advantage to one of the rival sides. Neither it amounts to getting at the truth by lawful means nor appears to be based on good sense of justice or fair play. On the contrary, it appears that the learned Judge has acted without the requirements of a just decision and thus, the action is open to criticism. Thus, the jurisdiction vested in the Court cannot be said to be exercised in judicious manner. In the facts and circumstances of the case, it does not appear that the recalling of the witness was in any manner essential for the just decision of the case.

12B As argued on behalf of the respondents, it is true that all material evidence should be brought before the Court, but it does not mean that a witness ought to be recalled under the provision without following the settled principles of law, as settled by the Apex Court in aforementioned cases. Calling or recalling of a witness after flouting the aforementioned settled principles, ought not to be permitted. Bringing all material evidence before the Court also does not amount to record all irrelevant evidence. When a Judge exercises its discretion under Section 311 of Cr.P.C., he has to follow the aforementioned settled principles, to arrive at the conclusion whether calling or recalling of such witness is in real sense essential for the just decision of the case and the same is based on a fair play and good conscious and also not intended to give an unfair advantage to one of the rival

parties. Permitting a witness to resile from his earlier evidence given on oath without any proper explanation thereto, amounts to wrong exercising of the jurisdiction vested in the Court causing miscarriage of justice, instead of deciding the case in a judicious manner. In view of this, in my considered opinion the impugned order is erroneous and also amount to miscarriage of justice. Hence, the same deserves to be set aside.

13A. Shri Tankha has placed reliance on one more judgment of Apex Court in the case of *Satyajit Banerjee v. State of West Bengal*, AIR 2005 S. C. 4161: In this case, the appellants/accused were acquitted from the offence punishable under Section 498-A read with Section 306 of IPC. The High Court while hearing the appeal against acquittal observed that where prosecution lacks in bringing necessary evidence, the trial Court ought to have invoked its powers under Section 311 of Cr.P.C. and summoned for examining the father of the deceased and other additional witnesses whom it considered necessary to set aside the acquittal. With this observation, the case was remanded by the High Court with a direction for deciding afresh, as per suggested formula in the order. Feeling aggrieved, the matter was brought before the Apex Court by the appellants/accused. During pendency of the appeal and in absence of any stay order from the Apex Court, during retrial few statements were recorded in the trial Court in compliance of the aforementioned order of the High Court. It is observed by the Apex Court that the direction for retrial as per the suggested formula was wrong. The observation of the Apex Court in para 23, 26 and 27 is as under:-

> "23. Without going into the correctness of all the observations made by the High Court in the impugned judgment, we find it necessary to clarify that the High Court ought not to have directed the trial Court to hold a de novo trial and take decision on the basis of so called 'suggested formula'. The High Court in its concluding part of the judgment does state that any observation in its judgment should not influence the mind of the trial Court but, at the same time, the High Court directs the trial Court to take 'a fresh decision from stage one' and on the basis of the 'suggested formula'. Learned counsel for the accused is justified in his grievance and apprehension that the aforesaid observations and directions are likely to be mistaken by the trial Court as if there is a mandate to it to record the verdict of conviction against the accused regardless of the worth and weight of the evidence before it.----
>
> 26. So far as the position of law is concerned we are very clear that even if a retrial is directed in exercise of revisional powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The trial Judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial.

27. With the above clarification, we decline to interfere in the order of remand. To put the matter beyond any shadow of doubt we further clarify and reiterate that the trial Judge, after retrial, shall take a decision on the basis of the entire evidence on record and strictly in accordance with law, without in any manner, being influenced or inhibited by anything said on the evidence in the judgment of the High Court or this Court."

Wherever underline appears in the order, it is an emphasis which has been supplied.

13B. While citing this case, Shri Tankha has emphasized that in compliance of the impugned order, the further cross-examination of the witness has been recorded, hence, the same ought to be on record permitting the Court to decide as to which of the two statements of the witness is required to be believed. The contention of Shri Tankha, neither gets support from the aforementioned judgment of the Apex Court nor, appears appropriate to be sustained. In the aforementioned case, retrial was ordered without a direction of quashing the earlier trial and in absence of the stay order from the Apex Court, few statements were recorded in compliance of the order of the High Court conducting retrial. It is observed by the Apex Court that the evidence already recorded at the initial trial cannot be erased and the trial Judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial. The order of retrial was not set aside. Only a direction of the High Court was set aside that in suggested formula the case is to be decided and for the purpose it was directed by the Apex Court that the trial Judge shall take a decision on the basis of the entire evidence on record and strictly in accordance with law, without in any manner, being influenced or inhibited by anything said on the evidence in the judgment of the High Court or the Apex Court. But in the present case, the impugned order is being set aside. Permitting a trial Judge to read such evidence which has been recorded in compliance of such order, does not appear appropriate. The evidence recorded under such order which is not alive, cannot be said to be a valid evidence on record. Hence, this contention of Shri Tankha to read this evidence, cannot be sustained.

14. With regard to next question which requires consideration is transfer of aforementioned both the sessions cases from the Court of the learned Judge, all the parties on record have unanimously informed the Court that the learned Judge who passed the impugned order has been transferred from that Court. It is also informed by all the parties that in such circumstances, both the cases can be continued in the same Court or if at all transfer of the cases is considered necessary, the same be transferred to any senior Judge either at Morena, Gwalior or Bhind. Considering the importance of the cases, the second suggestion appears justified. The parties are resident of Morena. In case the trial continues, it may not be considered convenient to the parties that the cases be tried at Gwalior, but at present the cases are at the stage of hearing of final arguments/passing of

judgment. Trial has been concluded. Distance of Morena from Gwalior is only 35 to 40 kms. As such, Gwalior is not a distant place for the purpose. Considering all these aspects and also the facts of the cases, it appears expedient for the ends of justice that both the cases are to be heard and decided by the Sessions Judge, Gwalior.

15. Consequently, the revision is disposed of thus:

(i)The impugned order is set aside. The further cross-examination of witness Dinesh Virthare recorded in compliance of the impugned order and thereafter is directed to be considered off the record.

(ii) Both the sessions cases are transferred from the Court of 3rd Additional Sessions Judge, Morena to the Court of Sessions Judge, Gwalior. The parties will remain present before the Sessions Judge, Gwalior on 17.3.08. The original record of both the cases, which is in the High Court, be transmitted to the Court of Sessions Judge, Gwalior before the aforementioned date. It is also observed that any observation by this Court in this order will not affect, in any manner, the independent approach of the learned Sessions Judge, Gwalior while disposing of both the cases.

Revision disposed of.

I.L.R. [2008] M. P., 1830
CRIMINAL REVISION
Before Mr. Justice R.S. Garg
18 March, 2008*

BANSAL STORES .... Applicant
Vs.
STATE OF M.P & anr. ... Non-applicants

Prevention of Food Adulteration Rules, 1955 - Appendix B Item No. A.16.16 - *Pickles in Oil - Percentage of Oil - Layer of oil not less than 0.5 cm above contents or percentage of oil shall not be less than 10 percent - Samples of pickle taken by Food Inspector - Report of public analyst mentioned that percentage of oil was less than 10 percent - Report silent about layer of oil above contents - Trial Court held that prosecution cannot continue as report is incomplete - Revisional Court remanded the matter - Held - Word 'and' is ordinarily conjunctive while 'or' is disjunctive - 'Or' cannot be read as 'and' to mean that if sample fails to meet either of requirement, then it would be taken to be adulterated - Report appears to be incomplete - If prosecution does not prove all requirements to constitute an offence, then prosecution would certainly be abuse of process of law - Order of Trial Magistrate restored - Revision allowed.* (Paras 10 & 11)

खाद्य अपमिश्रण निवारण नियम, 1955 – परिशिष्ट बी, वस्तु क्रमांक ए.16.16 – अचार में तेल – तेल का प्रतिशत – सामान के ऊपर तेल की परत 0.5 से.मी. से कम न हो या

*Cr.R. No.1168/1998 (Jabalpur)

तेल का प्रतिशत 10 प्रतिशत से कम न हो – खाद्य निरीक्षक के द्वारा अचार का नमूना लिया – लोक विश्लेषक की रिपोर्ट उल्लिखित करती है कि तेल का प्रतिशत 10 से कम है – रिपोर्ट सामान के ऊपर तेल की परत के विषय में मौन – विचारण न्यायालय ने अभिनिर्धारित किया कि रिपोर्ट अपूर्ण होने से अभियोजन जारी नहीं रखा जा सकता – पुनरीक्षण न्यायालय ने मामले को प्रतिप्रेषित किया – अभिनिर्धारित – 'और' शब्द सामान्यतः संयोजक है जबकि 'या' असंयोजक – 'या' को 'और' के रूप में नहीं पढ़ा जा सकता जिससे यह तात्पर्य हो कि यदि नमूना किसी भी आवश्यकता को पूर्ण करने में असफल होता है तो उसे अपमिश्रित लिया जावेगा – रिपोर्ट अपूर्ण परिलक्षित होती है – यदि अभियोजन किसी अपराध को गठित करने वाली सभी आवश्यकताओं को साबित नहीं करता है, तब अभियोजन निश्चित रूप से अदालती कार्यवाही का दुरुपयोग होगा – विचारण दण्डाधिकारी का आदेश प्रत्यावर्तित – पुनरीक्षण मंजूर।

R.P. Agrawal with *Santosh Yadav,* for the applicant

R.S. Patel, Additional Advocate General for the non-applicants/State.

ORAL JUDGMENT

R. S. Garg, J :- The applicant being aggrieved by the order dated 17.8.1998 passed by First Additional Sessions Judge, Sidhi, in Criminal Revision No.41/1993 setting aside and reversing the order dated 24.12.1992 passed by the learned Chief Judicial Magistrate, Sidhi, in Criminal Case No.655/1992, has filed the present revision petition.

2. The facts for disposal of the present revision petition in nutshell are that one J.P. Khare, Food Inspector, Flying Squad, Sidhi, made a raid on the shop of the respondent no.2 and purchased three plastic containers containing pickle samples, after giving him proper notices under Form 6 the amount was paid and the receipt were obtained from the said respondent. On enquiry the respondent no.2 informed the Food Inspector that he had purchased the said item of food from M/s. Bansal Stores, Panjara Bazar, Singroli i.e. the present applicant. The samples were properly wrapped and sealed and one of the sample was sent for its analysis to the laboratory. The Food Laboratory submitted the report stating inter alia that the total fruits were 77.184%, the oil percentage was 8.514%. The report by the public analyst also showed that fungus growth and the added synthetic colours were absent and there was no extraneous matter in the food article. After obtaining the said report the Food Inspector sent a notice to the present applicant and filed private complaint in the Court of the Chief Judicial Magistrate, Sidhi.

3. The applicant after putting his appearance submitted before the learned trial Court that as the report was incomplete and did not say that the food article was failing in maintaining both the standards as prescribed under the Act, the prosecution could not proceed. After hearing learned counsel for the parties the learned Chief Judicial Magistrate vide its order dated 24.12.1992 held that as the report was incomplete, the prosecution could not continue. He accordingly discharged the accused persons.

4. The State being aggrieved by the said order filed the criminal revision before the learned Sessions Court, the revision came to be heard and decided by the

learned First Additional Sessions Judge, Sidhi, who set aside the order passed by the learned Chief Judicial Magistrate and directed the learned Chief Judicial Magistrate to decide the matter in accordance with law.

5. The applicant being aggrieved by the order passed by the Revisional Court is now before this Court.

6. Shri Agrawal, learned counsel for the applicant after taking this Court through item No. A.16.16(ii) submitted that the prosecution was obliged to prove that the food article failed in maintaining both the standards and unless it is so proved the complaint was not maintainable. He submitted that the learned Revisional Court did not try to understand the distinction between the word 'or' and the word 'and'.

7. On the other hand Shri R.S. Patel, learned Additional Advocate General for the respondent/State, submitted that if the food article does not match the standard as prescribed under Appendix B appended to the Prevention of Food Adulteration Rules, 1955, then the food article would be taken to be adultered. According to him if the pickle in oil were not containing 10% or more oil the food article was certainly adultered.

8. For proper appreciation of the rival contentions it would be necessary to refer to item No.A.16.16 of Appexdix B of 1955 Rules :

> "**A.16.16** - Pickle means the preparation made from sound, clean, raw or sufficiently mature fruits or vegetables or a combination of both free from insect or any combination of the three. The pickle may contain onion, garlic, ginger, sugar, jaggery, edible oils, spices, spice extract or oil of turmeric, pepper, chillies, fenugreek, mustard-seed or powder, vegetable ingredients asafoetida, Bengal gram, lime juice, lemon juice, green chillies, vinegar or acetic acid, citric acid, dry fruit including resins and fruit nuts.
>
> Combination of pickles may be ;
>
> (i). Pickles in citrus juice of brine- The percentage of salt in covering the liquid shall not be less than 10 percent, when salt is used as a major preserving agent. When packed in citrus juice, acidity of the covering liquid shall be not less than 1.2. per cent, calculated as citric acid. Soluble calcium salt and permitted preservatives may be used in such types of pickles. 1(Pickles shall be free from copper, alum.and mineral acids).
>
> (ii). Pickles in oil :- The fruit or vegetable percentage in the final product shall not be less than 60%.The pickle shall be covered with oil so as to form a layer of not less than 0.5 cm above the contents or the percentage of oil in pickle shall be no less than 10 percent. 2 (pickle shall be free from copper, alum. and mineral acids).It may contain rapeseed rai, Ajwain, saunf, black pepper and like spices etc.Permitted preservatives may be used in Pickles.

(iii) Pickles in vinegar -Pickles in a vinegar mean the preparation from sound, clean, raw or sufficiently matured fruits or vegetables free from insect damage or fungus attack, which have been cured in brine or dry salt or salted and dried stack with or without natural fermentation. It shall contain vinegar or acetic acid and the percentage of acid in the fluid portion shall not be less than 2 percent. W/w calculated as acetic acid. It may contain sugar, whole or ground or semi-ground, spices, dried fruits, green and red chillies, ginger etc., dry fruit. Citric acid may also be added in such type of pickles. Spice extract or essence may also be used. The drainage weight of the product shall be less than 60 percent. 3(Pickles shall be free from copper, mine acid, alum. synthetic colour) and shall show no sign of fermentation. The product shall be reasonably free from sediments. Permitted preservatives may be used in pickles".

9. Present is a matter which would fall within caluse (ii) which refers to pickles in oil. A fair understanding and reading of clause (ii) would show that the first requirement under the said clause is that the vegetable percentage in the final produce should not be less than 60 percent. The alternative requirement is that the pickle shall be covered with oil so as to form a layer of not less than 0.5 cm. above the contents. This requirement is not the final one because the alternative proposes that the percentage of the oil in pickle shall not be not less than 10 percent. The first requirement appears to be a visual requirement while the alternative requirement appears to be requirement for the contents. To prove the case of adulteration the prosecution in view of the language employed in clause (ii) has to prove that the pickle was not covered with oil so as to form a layer of not less than 0.5 cm. above the contents, the prosecution at the same time would also be required to prove that the percentage of oil in pickle was less than 10 percent. If both the lapses are proved, only then the pickles in oil would be deemed to be adultered. In a given case if the prosecution comes out with the case that the pickle did not have the required layer of the oil and in the said case the accused proves as a fact that the pickle contained oil which was not less than 10 percent, then in such a case in the humble opinion of this Court the pickle in oil cannot be treated to be adulterated.

10. There is a subtle distinction between the words 'and' and 'or'. The word 'and' is ordinarily conjunctive while the word 'or' is disjunctive. In the present matter the word 'or' cannot be read as 'and' to mean that if the sample fails to meet either of the requirement then it would be taken to be adulterated. The intention of the legislature in adopting the word 'or' is to provide a solace and shelter to the accused that if he proves that the oil formed a layer of not less then 0.5 cm over the contents or in the alternative he may prove that the pickle in oil contained 10% or more oil then the food article would not be treated to be

adulterated. If the accused proves one of the standard then he cannot be prosecuted.

11. If the prosecution proves only one of the defects and the accused proves one of the defence available to him then the defence would supersede the attack made by the prosecution.

12. In the present case undisputedly the report of the public analyst does not say that the pickle was covered with oil so as to form a layer of not less than 0.5 cm above the contents. The report of sample stated that the percentage of the oil was less than 10 percent. The report prima facie appears to be incomplete and if the prosecution does not prove all the requirements to constitute an offence then the prosecution would certainly be an abuse of the process of law.

13. The learned trial Court was certain justified in discharging the accused persons.

14. The order passed by the learned Revisional Court deserves to be and is accordingly set aside and the order passed by the learned Chief Judicial Magistrate, Sidhi is restored. The complaint filed by the Food Inspector is dismissed.

Order accordingly.

I.L.R. [2008] M. P., 1834
CRIMINAL REVISION
Before Mr. Justice B.M. Gupta
6 May, 2008*

MAHESH JATAV ... Applicant
Vs.
STATE OF M.P. & ors. ... Non-applicants

A. Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xii) & 3(2)(v), M.P. Dakaiti Aur Vyapharan Prabhavit Ksheshtra Adhiniyam, 1981 - *Special Judge empowered under the Act of 1989 framed charge against NA-2 to 6 for the offence u/s 302/149 IPC along with offence u/s 3(2)(v) of the Act of 1989 and against NA-2 u/s 376(1) IPC r/w Section 3(2)(v) of the Act, 1989 - Charge u/s 395 & 396 of IPC r/w Section 11/13 of the Adhiniyam, 1981 not framed on the ground that a separate special court has been established to try such offence - Order challenged in revision before High Court - Held - Prima facie offence u/s 3(1)(xii) & 3(2)(v) are not made out - Revision partly allowed with the direction that charge-sheet be returned to Police for filing before Special Court established u/s 6 of the Adhiniyam of 1981 - That Court will consider whether any charge is made out or not.* (Para 6)

क. अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989

*Cr.R. No.7/2008 (Gwalior)

का 33), धारा 3(1)(xii) व 3(2)(v), म.प्र. डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, 1981 – 1989 के अधिनियम के अधीन सशक्त विशेष न्यायाधीश ने अनावेदक क्रमांक 2 लगायत 6 के विरुद्ध भा.द.सं. की धारा 302/149 के साथ 1989 के अधिनियम की धारा 3(2)(v) के अपराध के लिए और अनावेदक क्रमांक 2 के विरुद्ध भा.द.सं. की धारा 376(1) सहपठित 1989 के अधिनियम की धारा 3(2)(v) के अपराध के लिए आरोप विरचित किये – भा.द.सं. की धारा 395 व 396 सहपठित 1981 के अधिनियम की धारा 11/13 के अधीन आरोप इस आधार पर विरचित नहीं किये गये कि एक पृथक विशेष न्यायालय ऐसे अपराध के विचारण के लिए स्थापित है – आदेश को उच्च न्यायालय के समक्ष पुनरीक्षण में चुनौती दी गई – अभिनिर्धारित – प्रथम दृष्ट्या धारा 3(1)(xii) व 3(2)(v) के अधीन अपराध नहीं बनते हैं – पुनरीक्षण अंशतः इस निदेश के साथ स्वीकार की गई कि आरोप-पत्र 1981 के अधिनियम की धारा 6 के अधीन स्थापित विशेष न्यायालय के समक्ष पेश करने के लिए पुलिस को लौटाया जाए – वह न्यायालय यह विचार करेगा कि क्या कोई आरोप बनता है या नहीं।

B. Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act (33 of 1989), Sections 3(1)(xii) & 3(2)(v) - ***Offence u/s 3(1)(xii) of Act of 1989 - When a women belonging to SC/ST if sexually exploited by such a person, who is not in a position to dominate her will and without such position that women is not expected to have otherwise agreed for such act - This offence is not made out if the rape is committed by using criminal force.*** (Para 6)

ख. अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xii) व 3(2)(v) – 1989 के अधिनियम की धारा 3(1)(xii) के अधीन अपराध – जब अनुसूचित जाति/अनुसूचित जनजाति की किसी महिला का यदि किसी ऐसे व्यक्ति द्वारा यौन शोषण किया जाता है, जो उसकी इच्छा को अधिशासित करने की स्थिति में नहीं है और इस स्थिति के बिना वह महिला इस .त्य के लिए अन्यथा सहमत होना प्रत्याशित न हो – यह अपराध नहीं बनता है यदि बलात्कार आपराधिक बल के प्रयोग द्वारा किया गया है ।

C. Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) - ***Offence u/s 3(2)(v) of the Act - Offence is not made out if the concerning offence under I.P.C. punishable with imprisonment for a term of 10 years or more against a person or property, on the ground that such person is a member of Scheduled Caste or Scheduled Tribe or such property belonging to such member.*** (Para 7)

ग. अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) – अधिनियम की धारा 3(2)(v) के अधीन अपराध – यह अपराध नहीं बनता यदि भा.द.सं. के अधीन दस वर्ष या उससे अधिक की अवधि के कारावास से दण्डनीय अपराध किसी व्यक्ति या सम्पत्ति के विरुद्ध इस आधार पर किया जाए कि ऐसा व्यक्ति अनुसूचित जाति या अनुसूचित जनजाति का सदस्य है या ऐसी सम्पत्ति ऐसे सदस्य की है।

Case referred :

AIR 2000 SC 1876.

R.K. Sharma, for the applicant.

Mukund Bhardwaj, P.P., for the non-applicant No.1.

Arun Pateria, for the non-applicant No.2 to 6.

ORDER

B.M. GUPTA, J. :–This petition is filed by the complainant Majesh Jatav for impugning the order dated 28th November, 2007 passed by Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Gwalior, whereby the learned Judge before whom the case was committed after filing of the charge-sheet against respondents no.2 to 6 for the offence punishable under Sections 302,395,396,376 of IPC read with Section 11/13 of The Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 (hereinafter referred to as the Act of 1981) and also 3(1)(xii) and 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the Act of 1989), has framed charge against all the respondents 2 to 6 for the offence punishable under Section 302/149 along with offence punishable under Section 3(2)(v) of the Act of 1989. In addition to that against respondent no.2 Ravi @ Thakurdas charge for the offence punishable under Section 376(1) of IPC read with Section 3 (2)(v) of the Act,1989. Charge under Section 395 and 396 of IPC read with Section 11/13 of the Act of 1981 has not been framed on the ground that for trial of these offences, a separate special Court has been established and the learned Judge was not empowered to try these offences. Impugning this order, vide this petition, it has been requested that the charge under Sections 395 and 396 of IPC read with Section 11/13 of the Act 1981 also ought to have been framed.

2. Undisputedly, with regard to an incident happened in the night of 1st June, 2007, FIR Crime No.194/07 was lodged by the complainant Mahesh Jatav at Police Station Jhansi Road, Gwalior, against unknown persons to the effect that his Bhabhi (elder brother's wife) Smt. Gayabai and his niece Mona, who were living in their house separately and in the night only these two ladies were there in the house, have been found dead in the morning. Their murder has been committed by strangulation. On this report, the aforesaid FIR was initially registered for the offence punishable under Section 302 of IPC. It is also not disputed that during investigation vide postmortem report of deceased Mona, it is also opined by the doctor that – evidence of sexual intercourse is evident with violence mark and her death was caused by asphyxia due to strangulation within 12 to 24 hours since postmortem. It is also admitted that during investigation as per the report dated 20th August, 2007, given by Finger Prints Bureau, Bhopal, it is opined that finger prints found at the place of incident are tallying with the finger prints of the respondent no.2 Ravi @ Thakurdas along with the other evidence. Some of the articles have been alleged to be recovered from the possession of the respondents. On this ground, the charge-sheet has been filed for the aforementioned offences in the Court or concerning Magistrate, who in turn committed the case in the Court of the learned Judge. Vide impugned order, the learned Judge has framed the aforesaid charges and on the ground that for the offence punishable under Sections 395 and 396 of IPC read with 11/13 of the Act of 1981, a separate

Special Court has been established and as such he has no jurisdiction to try the offences, he did not consider anything about these offences.

3. The impugned order has been assailed by Shri R.K. Sharma, advocate appearing for the petitioner, on the ground that as per the allegation, the offence under Sections 395 and 396 of IPC read with 11/13 of the Act of 1981 also made out primafaciely, hence, the charge ought to have been framed against the respondents no.2 to 6. If the learned Judge has no jurisdiction to try the case, in that case, a direction may be given to send the case for filing the charge-sheet to the appropriate Court having jurisdiction.

4. Shri Mukund Bharadwaj, for respondent no.1/State, has submitted that considering the definition of the offence under Sections 3(1)(xii) and 3(2)(v) of the Act of 1989 is not made out, hence, it may be directed that the charge-sheet be filed before the special Court established under the Act of 1981.

5. Shri Arun Pateria has submitted that as per the allegation, no offence punishable under Sections 395 and 396 of IPC read with Section 11/13 of the Act, 1981 is made out.

6. The charge-sheet was filed before the learned Magistrate and thereafter committed to the Court of learned Judge only because the same was filed under Section 3(1) (xii) and 3(2)(v) of the Act of 1989. The learned Judge has not rightly framed charge under Section 3(1) (xii) of the Act of 1989. Despite consideration of both the offences being necessary, are considered herein-below by this order.

The definition of both the offences are as under:-

Section 3(1)(xii)

"3. Punishments for offences of atrocities:- (1) Whoever, not being a member of Scheduled Caste or a Scheduled Tribe,-

(i) to (xi) .....

(xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;

(xiii) to (xv) .....

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

Section 3(2)(v)

3. Punishments for offences of atrocities - (2) Whoever, not being a member of Scheduled Caste or a Scheduled Tribe-

(i) to (iv) .....

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable

with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

(vi) to (vii) ..... (emphasis supplied)

Under Section 3(1)(xii), as per high lighted parts thereof, it is necessary that the person who uses that position to exploit the woman sexually to which she would not have otherwise agreed, should be in a position to dominate her will. Committing rape by force against the will of a woman, cannot amount that a person who is committing rape by force against her will, is having some dominion over that woman, to control her will or to obtain her will for such act for which she would not have otherwise agreed. Thus, as rightly conceded by Shri Bharadwaj and also rightly not framing the charge by the learned Judge, this submission of Shri Bharadwaj and act of learned Judge appears to be sustained.

7. With regard to the offence punishable under Section 3(2)(v) of the Act of 1989, the offence committed is required to be punishable for a term of ten years or more and also such offence is required to be committed against such person on the ground that he is a member of a Scheduled Caste or Scheduled Tribe. As per the facts of the case, it does not appear, that the act of rape, if any committed with the deceased Mona, the same has been committed only because she was belonging to a Scheduled Caste nor any of the parties have argued with regard to this fact.

8. With regard to these two offences none of the parties have argued countering the aforesaid observation of this Court. I seek support for this observation from a judgment of the Apex Court in the case of *Masumsha Hasanasha Musalman Vs. State of Maharashtra,* AIR 2000 S.C.1876.

9. Once the offences punishable under aforementioned two Sections of the Act of 1989 are not made out, it was not required for the investigating agency to file the charge-sheet for these two offences also and if these two offences are not made out it is not necessary that the case ought to be heard by the learned Special Judge appointed under the provisions of the Act of 1989.

10. With regard to the contention of Shri R.K. Sharma, on behalf of the petitioner and Shri Arun Pateria, on behalf of the respondents no.2 to 6, as to whether the offence punishable under Sections 395 and 396 of IPC read with Section 11/13 of the Act of 1981 are made out or not, no observation is required by this Court at this stage. At the first instance, the competent Court has to consider these contentions, if raised before it.

11. As observed herein-above, there needs a direction to the learned Judge for returning the charge-sheet/challan to the police/investigating agency to file the same in the appropriate special Court established under Section 6 of the Act of 1981. That Court being competent will also consider as to whether any other

charge including under Section 302 of IPC also is made out or not. Accordingly, the revision is partly allowed. The impugned order is set aside with aforesaid direction.

Revision partly allowed.

I.L.R. [2008] M. P., 1839
CRIMINAL REVISION
Before Mrs. Justice S.R. Waghmare
8 May, 2008*

JUMANA BAI ... Applicant
Vs.
MUSHTAQ ALI ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 125, Muslim Women (Protection of Rights on Divorce) Act, 1986 - ***Claim for maintenance by Muslim women who is not divorced*** - *Held* - *Application for maintenance by such Muslim women is maintainable* - *Revision allowed.* (Para 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125, मुस्लिम महिला (विवाह विच्छेद पर अधिकारों का संरक्षण) अधिनियम, 1986 – मुस्लिम महिला द्वारा भरण–पोषण के लिए दावा जिसका विवाह विच्छेद नहीं हुआ है – अभिनिर्धारित – ऐसी मुस्लिम महिला द्वारा भरण–पोषण का आवेदन पोषणीय है – पुनरीक्षण मंजूर।

Case referred :
(2007) 6 SCC 785.

Praveen Newalkar, for the applicant.
K.S. Tripathi, for the non-applicant.

ORDER

Mrs. S.R. WAGHMARE, J. :–This revision has been filed under Section 397 read with 401 of the Criminal Procedure Code by the petitioner Jumna Bai wife of Mushtaq Ali assailing the order dated 2.11.2007 passed by the Additional District Judge, Fast Track, Kukshi in Criminal Revision No. 49/07 dismissing the order of maintenance passed by the Trial Court.

2. Brief facts as alleged are that the petitioner Jumana Bai has filed an application under Section 125 of the Cr.P.C. before the trial court stating that she had married Mushtaq Ali in the year 1986 at Kukshi and that on 13.1.2001 Mushtaq Ali had left the petitioner wife at her parental home. The religious guru and parents of the wife had right to pacify the respondent husband however, he had abandoned the wife without any reason. Jumana Bai stating that her husband Mushtaq Ali had earning of Rs. 10,000/- per month claimed Rs.3,000/- as monthly maintenance.

*Cr.R. No.202/2008 (Indore)

3. Considering the case on its merits and evidence the trial court ordered Rs.2,000/- as maintenance to be paid to Jumana Bai. Being aggrieved Mushtaq Ali filed a revision before the Additional District Judge, Kukshi who by impugned set aside the order of the trial court stating that under the Mohammedan Law a Muslim lady is not entitled to maintenance and if at all she is aggrieved that she should seek recourse to Mohammedan Law for relief. The learned court relied on 2000 (4) MPLJ 62 for above said reasons.

4. The sole reason for setting aside the order of the Trial Court was that a Muslim woman under Section 125 of the Cr.P.C. is not entitled for maintenance. I find that the learned Judge of the revisional court is highly misconceived in his notion that Muslim woman cannot file an application under Section 125 of the Cr.P.C. for maintenance and I find support by placing reliance of (2007) 6 SCC 785 *(Iqbal Bano vs. State of U.P. and another)* whereby the Apex Court held thus:-

> "The view expressed by the First Revsional Court that no Muslim woman can maintain a petition under Section 125 Cr.P.C. is clearly unsustainable. The Muslim Women (Protection of Rights on Divorce) Act, 1986 only applies to divorced women and not to a woman who is not divorced. Furthermore, proceedings under Section 125 Cr.P.C. are civil in nature. Even if the court noticed that there was a divorced Muslim who had made an application under Section 125 Cr.P.C., it was open to the court to treat the same as a petition under the 1986 Act considering the beneficial nature of the legislation, especially since proceedings under Section 125 Cr.P.C. and claims made under the Muslim Women Act are tried by the same court."

The Apex Court after considering a Catina of cases the Muslim personal law and the famous Shah Bano case thus summed up the conclusions thus :-

> "(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and the provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.
>
> (2) Liability of a Muslim husband to his divorced wife arising under Section 3(3) (a) of the Act to pay maintenance is not confined to the iddat period.
>
> (3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay such maintenance."

5. Hence, the view expressed by the Apex Court as well as supporting judgment of the trial court render the submission by the counsel for the applicant that Muslim women cannot prefer application for maintenance under Section 125 of the Cr.P.C. otiose and it is hereby demolished.

6. Thus, under the circumstances the judgment of the revisional court is set aside and that the judgment of the trial court is restored. The maintenance awarded by the trial court amounting to Rs.2,000/- per month to the petitioner wife is reaffirmed and shall be payable to the petitioner wife as directed by the trial court by the husband Mushtaq Ali the respondent. The arrears may positively be paid within two months. In case of default the petitioner is free to carry out the execution proceedings.

With these directions, the petition is allowed.

Petition allowed

I.L.R. [2008] M. P., 1841

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

3 April, 2008*

SURESH GOEL & anr. ... Applicants

Vs.

GRASIM INDUSTRIES LTD. & anr. ... Non-applicants

Penal Code (45 of 1860), Sections 420/34, 120-B, Criminal Procedure Code, 1973, Section 482 - *Cheating - Business Transaction - Huge money due against petitioner in business transactions - Petitioners assured that all dues will be cleared after selling or mortgaging immovable properties - Cheques were issued which were dishonoured - Complaints filed under Section 138 of Negotiable Instruments Act were forced to be withdrawn by petitioner on the ground that otherwise form "C" shall not be issued - Business dealings were made to continue with promise to make payment by sale of immovable property which were subsequently found unsaleable - Held - Substantial ingredients of offence are made out in complaint - Merely on the defence of the accused prosecution cannot be terminated - At present facts are incomplete and evidence is yet to be recorded - Not a fit case to quash prosecution under Section 482 - Petition dismissed.* (Paras 5,6,11,17)

दण्ड संहिता (1860 का 45), धाराएँ 420/34, 120–बी, दण्ड प्रक्रिया संहिता, 1973, धारा 482 – छल – कारबारी संव्यवहार – याची के विरुद्ध कारबारी संव्यवहारों में बहुत बड़ी रकम बाकी – याचीगण ने विश्वास दिलाया कि सभी देय अचल सम्पत्तियाँ बेचकर या बंधक रखकर चुका दिये जावेंगे – चेक जारी किये गये जो अनादरित हो गये – परक्राम्य लिखत अधिनियम की धारा 138 के अधीन प्रस्तुत परिवाद याची द्वारा इस आधार पर वापस लेने को मजबूर किया कि अन्यथा प्रारूप 'C' जारी नहीं किया जाएगा – कारबारी व्यवहार अचल सम्पत्ति, जो बाद में विक्रय के अयोग्य पाई गई, के विक्रय

*M.Cr.C. No.1608/2005 (Indore)

द्वारा भुगतान करने के वचन के साथ चालू रखा – अभिनिर्धारित – अपराध के सारवान अवयव परिवाद में मौजूद हैं – केवल अभियुक्त के बचाव पर अभियोजन समाप्त नहीं किया जा सकता है – वर्तमान में तथ्य अधूरे हैं एवं साक्ष्य दर्ज होना शेष है – धारा 482 के अधीन अभियोजन अभिखण्डित करने लायक मामला नहीं – याचिका खारिज।

Cases referred :

(2007) 7 SCC 373, 2008 Cr.L.J. 431, AIR 2005 SC 1775, 1998 Cr.L.J. 1, (2006) 1 SCC (Cri) 746, 2001 Cr.L.J. 1246, 2001 Cr.L.J. 4765, JT 2006(7) SC 313, (2005) 1 SCC 122, AIR 2001 SC 3014, (2000) 3 SCC 269.

Ashok Arora with *Atul Shreedharan,* for the applicants.

A.M. Mathur with *S.K. Sharma,* for the non-applicant no.1.

Bhagwan Singh, P.L., for the non-applicant no.2.

ORDER

S.C. VYAS, J. :–Invoking extraordinary inherent jurisdiction of this Court, this petition has been filed under Section 482 of Cr.P.C., seeking quashment of Complaint Case No. 4717/04 and the order of taking cognizance of the offences punishable under Section 420/34 and Section 120-B of IPC against the petitioners passed on 27.5.2004, on the ground that the dispute between the parties is purely of civil nature and necessary ingredients of the offences are missing.

2. Respondent No.1 Grasim Industries Ltd., through its General Manager filed a complaint against the petitioners and four other persons with a prayer to take cognizance of the offences punishable under Sections 120-B, 420/34 and 409 of IPC. At initial stage the complaint was sent to police station Nagda under Section 156 (3) of Cr.P.C. for investigation, but police simply made an inquiry on the allegations and submitted a report that no cognizable offence is made out. Thereafter, again police was requested to file a final report after conducting investigation, but no such report was submitted, then complainant was permitted to lead evidence under Sections 200 and 202 of Cr.P.C. After recording such evidence, on 27.5.2004 cognizance against present petitioners as well as one more person Aditya Goel was taken for the offences punishable under Sections 420/34 and 120-B of IPC, holding that prima facie these offences are made out against these three accused persons and, therefore, order of issuance of process was passed. Then present petitioners appeared before trial Court and moved an application under Section 245 of Cr.P.C., claiming discharge. That application was decided by the trial Court vide order dated 11.4.2005 and the same was dismissed. Feeling aggrieved by that order present petition has been filed.

3. It has been averred in the complaint by the respondent/complainant that the respondent was having business dealings with the present petitioners for many years. Respondent having his manufacturing unit of Caustic Soda and other chemicals at Nagda, Ujjain. Caustic Soda Lai and Caustic Soda Flakes were being sold to the present petitioners for last so many years. Present petitioners were

partners of a partnership firm along with Aditya Goel and doing business in the name of a company M/s Cosco Sales & Services Ltd. Huge amount of money was due against these petitioners and other accused persons on account of the business transactions, because the goods were taken by them on credit with the assurance that payment would be made very shortly after selling the same. When present petitioners and the third accused failed to make payment in due time, then business dealings were stopped by the respondent with them. Thereafter wife of the petitioner Suresh Goel came to Nagda along with petitioner Suresh Goel and assured that all the dues of the respondent would be paid after selling or mortgaging the property belonging to them. Meetings in this regard were held between the parties. It is alleged that petitioners then started a new concern in the name of M/s Consumer Services Corporation Ltd. and the property belonging to them were handed over to the new concern. It is also alleged that 40 cheques were given by the petitioners to clear the dues, but those cheques could not be enchashed by their bank and the respondent was to suffer a huge loss, then complaints under Section 138 of Negotiable Instrument Act were filed. When those complaints were pending, then some pressure tactics were adopted by the petitioners and respondent was forced to withdraw those complaints. The respondent was to receive "C" Forms worth Rs. 9.65 crores from the petitioners and it was made a condition precedent that first criminal complaints be withdrawn then only such Forms would be delivered to the complaint/respondent. In these circumstances those complaints were withdrawn and then only "C" Forms were issued by the petitioners to the respondent. On 1.6.1998 petitioner Suresh Goel again came to Nagda and assured that petitioners will very soon sale their immovable properties situated near Delhi Airport and will make payments of all arrears. Again petitioner Suresh Goel and his wife visited Nagda on 18.2.1999 and assured that the properties of Delhi which are in the name of their son Gautam Goel will be sold and payments would be made. Documents of the properties were also pledged with the complainant to assure the payment. It was also requested that business dealings be continued and goods be supplied to the petitioners and a promise was made that immediately after selling of those goods payments would be made. Believing these promises again goods were supplied by the complainant/respondent to the petitioners, which was sold by them in the market, but no money was paid. It was also found that the properties of which documents were given to the complainant were not in salable condition and those properties cannot be sold. It has been averred that the intention of present petitioners as well as third accused was criminal, when false promises were made and complainant was induced to supply goods on the false assurance that payment would be made soon after selling those goods and by selling the properties of the petitioners. Averting all these facts complaint was filed, which has been registered and summons have been issued.

4. The contention of learned counsel for the petitioner Shri Ashok Arora is that complainant as well as petitioners were having business dealings for years

together and, therefore, simply because petitioners have failed to pay some outstanding dues, it cannot be said that they have cheated the complainant. It has also been contended that the dispute between the parties is purely of civil nature and the necessary ingredients of the offence punishable under Sections 420 and 120-B of IPC are totally missing. It has also been submitted that if the allegations made in the complaint are taken at their face value and accepted in their entirety, then also they do not prima facie constitute any offence or make out a case against the accused persons and, therefore, learned trial Magistrate was wrong in issuing process against the petitioners. It has also been submitted that the matter was inquired into by the police and a report has been submitted to the effect that the dispute between the parties is purely of civil nature and no cognizable offence is made out against the petitioners. It has been submitted that as per the settled law in this regard laid down by the Hon'ble Supreme Court in catena of decisions, when the dispute between the parties is purely of a civil nature and ingredients of the alleged offence are totally missing, then the prosecution is required to be quashed.

5. In this regard many judgments of the Supreme Court have been referred by the petitioners in their petition itself, but while arguing the matter special attention of this Court has been drawn towards the case of *Vir Prakash Sharma Vs. Anil Kumar Agarwal and another* [(2007) 7 SCC 373], wherein it has been held that "non payment or under payment of price of goods by itself does not amount to commission of offence of cheating or criminal breach of trust and when the dispute between the parties is essentially a civil dispute no offence having regard to the definition of criminal breach of trust contained in Section 405 of the Penal Code can be said to have been made out." In the facts of that case parties entered into a contract of sale and purchase and welding rods and the appellant allegedly did not pay some amount due from him and he issued two cheques for the sum of Rs. 3559/- and Rs. 3776/- in the year 1983. The said cheques were dishonoured and on the basis of these facts complaint was filed for commission of the offence under Sections 406, 409, 420 and 417 of the IPC, then in the facts of that case it was held that the offence is not made out. It was also held that what has been alleged in the complaint petition as also the statement of the complainant and his witnesses relate to the subsequent conduct of the accused. When the cheques were not encashed and the accused was contacted by the complainant, then he told that he had issued fabricated cheques knowingly with an intention of cheat him and grab his money. He would not pay his money and he is free to take any action, whatever he likes. In this regard it was held that it is really absurd to opine that any such statement would be made by the appellant before all of them at the same time and that too in his own district and it was held unnatural.

6. The facts of the present case are quite different. In the present case in fact when as per the allegations cheques were not encashed then complainant was forced to take back the complainants filed under Section 138 of Negotiable

Instrument Act, on the ground that otherwise "C" Forms of the value of Rs. 9 Crores and above will not be supplied to him and so business dealings were stopped by him and then again assurance was made to continue supply with a promise to make payment immediately after selling the goods and the property, which were ultimately found unsalable and no payment was made.

7. Learned counsel for the petitioners has also placed heavy reliance on the recent judgment of Supreme Court in the case of *B. Suresh Yadav Vs. Shareefa Bee and another* (2008 Cri.L.J. 431). In that case the allegation was that of dishonest concealment of fact. It was found in that case that different stands were taken by the complainant in a civil suit as well as in the private complaint and the fact of demolition of construction was already in the knowledge of the complainant before execution of sale deed, so no offence of cheating was found made out. Learned counsel on the basis of this citation submitted that the complainant herein has also filed a civil suit in the High Court of Delhi, wherein the cause of action has been shown under jurisdiction of Delhi High Court. It has been submitted that copy of that civil suit has been filed before trial Court along with application. Some other documents were also filed and it has been requested that those documents be also perused.

8. It is difficult to understand at this stage as to how the documents which are not part of the case of prosecution or not admitted documents or proved documents can be looked into for quashing the private complaint case. Even then a complainant may have both the remedies that of filing of civil suit as well as filing of a complaint case in suitable cases and simply because a civil suit has been filed at the place where the accused persons are residing it cannot be said that criminal Court cannot be approached by the same persons, when ingredients of the offence are available in the complaint.

9. In the facts of the present case there are allegations as to the act of inducement on the part of the petitioners and intention to cheat the complainant from the date when supply was stopped. Cheques were dishonoured, complaint was forced to take back 40 complaint cases filed under Section 138 of Cr.P.C. and then was promised for repayment, if the supply is continued.

10. For the purpose of establishing the offence of cheating the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Certain illustrations have also been given in Section 415 of IPC to demonstrate as to when the offence of cheating can be said to be made out. In this regard illustration (f) of Section 415 of IPC is pertinent to mention, which is as under :-

> "Section 415 (f)- A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money. A not intending to repay it. A cheats."

11. From this illustration it is clear that when the accused deceives the

complainant into a belief that he means to repay any money that complainant may lend to him and thereby dishonestly induced complainant to lend him money having no intention to repay it, then he cheats the complainant.

12. Some other cases have also been cited by learned counsel for the petitioner, but they are also having different facts. In the case of *Netai Dutta Vs. State of West Bengal* (AIR 2005 SC 1775), though offence punishable under Section 306 of IPC was alleged by the prosecution, but no material was found to substantiate this charge. In the case of *M/s. Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others* (1998 Cri.L.J. 1), a bottle of beverage under the brand of 'Lehar Pepsi' was sold and was found adulterated, but no material was found to show that the article was either manufactured by the petitioner of that case or he was holding license for manufacture of offending beverage, so the complaint was quashed. In the case of *Anil Mahajan Vs. Bhor Industries Ltd. and another* [(2006) 1 SCC (Cri) 746], it was found that it was a case of some failure of promise subsequently, and there was no material to presume a culpable intention right at the beginning. That was merely a case of breach of contract. Out of the amount of Rs. 3,38,62,860/- (Rs. Three Crores Thirty Eight Lacs Sixty Two Thousand Eight Hundred Sixty) only balance of Rs. 33,23,774/- (Rs. Thirty Three Lacs Twenty Three Thousand Seven Hundred and Seventy Four) was remaining to be paid which was not paid, despite repeated demands. Such are not the facts of the present case. Another case which has been cited is *Alpic Finance Ltd. Vs. P. Sadasivan and another* (2001 Cri.L.J. 1246). In that case also the respondent made substantial payment as per the the Higher Purchase Agreement and no allegation of misappropriation or cheating was found. In the case of *S. N. Palanitkar and others Vs. State of Bihar and another* (2001 Cri.L.J. 4765). Intention to deceive at the time when inducement was made was not found in existence and mere failure to keep up promise subsequently was found; therefore, it was held that ingredients of the offence of cheating are missing.

13. In this regard learned counsel for the respondent Sr. Advocate Shri A. M. Mathur has drawn attention of this Court towards a recent pronouncement of the Supreme Court in the case of *Central Bureau of Investigation V. Shri Ravi Shankar Srivastava, IAS and another* - (JT 2006 (7) SC 313), in which it has been held that though the power to quash the criminal proceedings is wide, the inherent power should not be exercised to stifle a legitimate prosecution and should refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy. In another case which has been cited by learned counsel for the respondent is *Zandu Pharmaceuticals Works Ltd. and others Vs. Mohd. Sharaful Haque and others,* [(2005) 1 SCC 122]. Hon'ble Supreme Court in Paragraph No. 8, 9 and 10 has held as under :-

> "Para 8 – Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which

the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of laws which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *"quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest"* (when the law gives a person anything, it gives him that without which it cannot exist). While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the courts has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/ continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

"Para 9 – In *R. P. Kapur V. State of Punjab* (AIR 1960 SC 866) this Court summarised some categories of cases where inherent power can and should be exercised to quash the proceedings:

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) Where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

"Para 10 – In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death."

15. It is clear that the scope of interference under Section 482 of Cr.P.C. very wide and the very plenitude of the power requires great caution in its exercise and, therefore, it is expected from this Court to be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution and this Court is expected normally to refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material.

16. In the case of *M. Krishnan Vs. Vijay Singh and another* - (AIR 2001 SC 3014) in paragraph No. 6 it has been held that "where factual foundation of the offence have been laid down in the complaint, the High Court should not hasten to quash criminal proceedings. Merely in the premise that one or two ingredients have not been stated with the details or that the facts narrated reveal the existence of commercial or money transaction between the parties." In the case of *MEDCHL Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd. and others* - [(2000) 3 SCC 269] it has been held that "to exercise powers under Section 482 of the Code, the complaint in its entirety will have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex facie on the complaint. The truth or falsity of the allegations would not be gone into by the Court at this earliest stage. Whether or not the allegations in the complaint were

true is to be decided on the basis of the evidence led at the trial. So the question is: Can it be said that the allegations in the complaint do not make out any case against the accused nor do they disclose the ingredients of an offence alleged against the accused or the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion that there is sufficient ground for proceeding against the accused ?" and ultimately it was held that considering the factual aspect of the matter, we unhesitatingly state, however, that the issue involved in the matter under consideration is not a case in which the criminal trial should have been short-circuited and with this remark the order of quashment passed by the High Court was set aside. The facts of that case were also that of some business transactions along with averments for causing wrongful loss and getting wrongful gains.

17. Thus, it is clear that if from the averments made in the complaint, necessary ingredients of the offence or at least substantial ingredients of the offence are made out, then merely on the basis of defense available to the accused, the legitimate prosecution cannot be terminated or cannot be quashed. All questions of magnitude are involved in this case and at present the facts are incomplete and hazy and evidence is yet to be recorded. The matter is pending in the trial Court for last four years. So considering the nature of the allegations, I do not find it a fit case in which jurisdiction available to this Court under Section 482 of Cr.P.C. can be exercised for quashing the prosecution.

18. Thus the petition has not force and is dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 1849

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.K. Saxena

14 May, 2008*

SAUBIR BHATTACHARYA & ors. ... Applicants

Vs.

JAI PRAKASH KORI & anr. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 200 - *Complaint - It is the duty of Magistrate to see as to whether criminal complaint is filed in proper form and whether any person has been made accused improperly or illegally.* (Para 14)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 – परिवाद – मजिस्ट्रेट का कर्तव्य है कि यह देखे कि क्या दाण्डिक परिवाद उचित प्ररूप में प्रस्तुत किया गया है और क्या किसी व्यक्ति को अनुचित या अवैध रूप से अभियुक्त बनाया गया है।

B. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 4 - *Criminal complaint filed by non-*

*M.Cr.C. No.10660/2005 (Jabalpur)

applicant discloses that atrocities began on 03.11.1987 - Act was not in force at the relevant time - Even if complaint is filed after coming into force of Act, it has got no retrospective effect - No cognizance could have been taken. (Para 22)

ख. अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 4 – अनावेदक द्वारा प्रस्तुत दाण्डिक परिवाद से प्रकट होता है कि अत्याचार दिनांक 03.11.1987 को प्रारम्भ हुआ – सुसंगत समय पर अधिनियम प्रवृत्त नहीं था – यद्यपि अधिनियम के प्रवर्तन में आने के बाद परिवाद प्रस्तुत किया गया, इसका कोई भूतलक्षी प्रभाव नहीं है – संज्ञान नहीं लिया जा सकता था।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 200 - *Statement of complainant - Statement of complainant recorded and case was adjourned for recording of statement of remaining evidence of complainant - Statement of complainant recorded for the second time on subsequent dates - Recording of second statement of complainant with an intention to fill up lacunas not proper.* (Para 30)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 – परिवादी का कथन – परिवादी के कथन अभिलिखित किये गये और मामला परिवादी के शेष साक्षियों के कथन अभिलिखित करने के लिए स्थगित किया गया – पश्चात्वर्ती तारीख को दूसरी बार परिवादी के कथन अभिलिखित किये गये – कमियों को पूरा करने के आशय से परिवादी के दुबारा कथन अभिलिखित करना उचित नहीं।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 227 - *Discharge of accused - Charge sheet was filed against complainant on a report lodged by bank officials - Complainant was discharged - Held - Mere discharge is not sufficient to make out a case - It has to be shown through oral evidence supported by documentary evidence that how the report was false - Complainant failed to establish prima facie that he was discharged by Court after coming to conclusion that report was false.* (Paras 31 & 32)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 – अभियुक्त का उन्मोचन – बैंक पदाधिकारियों द्वारा दर्ज रिपोर्ट पर परिवादी के विरुद्ध आरोप–पत्र पेश किया गया – परिवादी उन्मोचित – अभिनिर्धारित – केवल उन्मोचन मामला बनाने के लिए पर्याप्त नही – दस्तावेजी साक्ष्य से समर्थित मौखिक साक्ष्य द्वारा यह दर्शित करना होता है कि रिपोर्ट कैसे गलत थी – परिवादी प्रथम दृष्ट्या स्थापित करने में असफल रहा कि न्यायालय द्वारा इस निष्कर्ष पर पहुंचने के बाद कि रिपोर्ट झूठी थी उसे उन्मोचित किया गया।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 200 - *Complaint filed against applicants alleging that departmental enquiry was initiated against him on false allegations and he was dismissed from service - Held - Non-applicant No.1 failed to establish that how the departmental enquiry was initiated on false allegations and that too with an ulterior motive - Taking of cognizance illegal and erroneous - Petition allowed.* (Para 36)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 – आवेदकगण के विरुद्ध

यह अभिकथित करते हुए परिवाद प्रस्तुत किया गया कि उसके विरुद्ध मिथ्या अभिकथनों पर विभागीय जाँच प्रारम्भ कर दी गई और उसे सेवा से बर्खास्त कर दिया गया – अभिनिर्धारित – अनावेदक क्रमांक 1 यह स्थापित करने में असफल रहा कि कैसे विभागीय जाँच झूठे अभिकथनों और अंतरस्थ हेतु से प्रारम्भ की गई – संज्ञान लेना अवैध एवं त्रुटिपूर्ण – याचिका मंजूर।

Cases referred :

AIR 2004 SC 4711, (2005) 13 SCC 540, AIR 1992 SC 604, AIR 2005 SC 9.

Manish Datt, for the applicants.
Ramesh Shrivastava, for the non-applicant No.1.
S.K. Kashyap, Dy.G.A., for the non-applicant No.2.

ORDER

A.K. Saxena, J. :– The petitioners have preferred this petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') with a request to set aside the order dated 12.12.05 passed by the Judicial Magistrate First Class, Jabalpur in criminal complaint case No.50/05 *(Jai Prakash Kori Vs. Chief General Manager and others)* and unregistered criminal complaint case No.UR/2005 *(Jai Prakash Kori Vs. Saubir Bhattacharya and others)* to quash both the proceedings of criminal complaint cases pending against the petitioners in which the cognizance was taken and to discharge the petitioners.

2. The petitioners have preferred this petition disclosing various facts of both the cases and brief facts for the disposal of the petition are as follows:-

The petitioners are either working or retired officers of the State Bank of India. The respondent No.1 was an officer in Junior Manager Grade Scale I in the State Bank of India and he was posted at Ambikapur Branch. A departmental enquiry was initiated against the respondent No.1 and as the charges were found proved against the respondent No.1, the punishment of dismissal from service was imposed vide order annexure 3 against the respondent No.1 by the then Chief General Manager, who was the Appointing Authority. Being aggrieved by this order, the respondent No.1 preferred an appeal against the said order, but the same was rejected. Thereafter, the respondent No.1 filed a writ petition in the High Court challenging his dismissal and the punishment was converted into removal from service. The Letters Patent Appeal was preferred by both the parties against this order and the order of dismissal from service, passed against the appeal was preferred by both parties against this order and the order of dismissal from service, passed against the respondent No.1, was quashed and the case was sent back to the Disciplinary Authority to reconsider the matter after providing opportunity of hearing to respondent No.1 vide order annexure 16. The petitioner No.3 after reconsideration of the matter, found that some of the charges have been proved and two charges were partially proved and then the petitioner No.2, who was the Appointing Authority, imposed the punishment of removal from service against the respondent No.1.

3. The respondent No.1, instead of filling a departmental appeal against that

order, preferred a writ petition No.5065/05. The respondent No.1 preferred a Special Leave Petition before the Supreme Court against the order passed in Letters Patent Appeal No.691/02, but the same was dismissed holding that the respondent has remedy to challenge the order passed by the Appointing Authority. The petitioner No.2 passed the order annexure 8 on 17.12.04 and against this order, the writ petition has been filed by the respondent No.1.

4. The respondent No.1 filed a complaint on 25.2.05 in the Court of Judicial Magistrate First Class, Jabalpur against the petitioner nos.1 to 3. This complaint is still pending as unregistered complaint. The respondent No.1 filed another criminal complaint case No.50/05 which relates to the alleged incident said to have taken place in the year 1987 as the police had registered the case against respondent No.1 under Sections 409 and 420 of I.P.C. on the basis of FIR lodged by petitioner No.4. The police station, Barhi filed the charge-sheet against the respondent No.1. The respondent No.1 was ordered to be discharged vide order annexure 10. The FIR was filed in the year 1987 by the petitioner No.4, but the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Act') came into force with effect from 30.1.1990.

5. The Judicial Magistrate First Class, Jabalpur has amalgamated both the complaints observing that the facts of both the complaints are similar whereas, the facts of both the cases were not similar. The trial Court came to this conclusion that a prima-facie offence under Section 4 of the Act appears to be made out.

6. Initially, the Judicial Magistrate First Class did not take cognizance against several petitioners on the basis of complaint filed by the respondent No.1 and the Court passed the order dated 16.8.05 annexure 12. The respondent No.1 filed a revision petition and the Special Judge, Jabalpur remitted back the case, as the order of Magistrate did not contain the reasons for discharge of several accused persons. Both the cases were clubbed together vide order dated 16.8.05 passed in the complaint dated 25.2.05 and thereafter, the Magistrate took the cognizance against the petitioners vide order dated 12.12.05.

7. This petition has been filed on the grounds that the order of Magistrate of clubbing both the complaints is totally illegal, as the facts of both the cases are not identical and both the complaints relate to different period and there is a gap of about four years between both the alleged incidents. The act of lodging the report by petitioner No.4 does not amount to commission of any offence and he cannot be prosecuted for this. At the time of lodging the report by petitioner No.4, the Act was not in existence and, therefore, no offence under the Act can be said to have been committed by him. The criminal act cannot have retrospective effect. There are no allegations against the petitioner nos. 5 to 10 and, therefore, they cannot be prosecuted for the offences punishable under the Act. There was no evidence that these petitioners willfully neglected their duties required to be performed by them as public servants.

8. It has been further disclosed that the order passed by the Magistrate does not indicate as to how the provisions of the Act are attracted in relation to the petitioner nos.1 to 3. The order of the trial Court is totally against the evidence available on the record, as no offence under the Act was even prima-facie made out. The Appointing Authority and the Disciplinary Authority have passed the orders in accordance with the rules and law and, therefore, no case is made out against them. The trial Court took the cognizance and issued the warrants of arrest against the petitioners, which is an abuse of the process of Court of law, which requires exercise of inherent jurisdiction under Section 482 of the Code.

9. Before coming to the arguments of the learned counsel of both sides and the points involved in this petition, it would be proper to point out several mistakes committed by the trial Court. Though, these points may not affect the final outcome of the petition, but it is necessary to point out those mistakes in view of the various facts of the case.

10. The respondent No.1 filed two criminal complaints against several accused persons and after recording the statements of respondent No.1 (complainant of both the cases) under Section 200 of the Code and the statement of one witness under Section 202 of the Code, one criminal complaint was registered and another complaint case was amalgamated with other one. I perused the record of both the complaint cases and found that probably, the respondent No.1 filed both the complaint cases as if he is filing the writ petitions. Both the complaints suffer from repetitions of facts and also contain several unnecessary facts such as; it was prayed that proper directions may be issued to the Central Government in the ends of justice or there is a reference of various provisions of Indian Contract Act. It has been disclosed in the complaints that the accused are defendants and the complainant is plaintiff. Apart from the prayer of conviction of accused persons, there are other prayers also, which are totally irrelevant in the light of the facts of both the cases.

11. In one complaint, the complainant does not want any action of criminal nature against the Chief General Manager, State Bank of India and Government of India and in another complaint, he does not want any action against the Government of India and Arun Kumar Purwar and they have been added only as party and not as an accused. The persons who have committed the offence, could have been impleaded as accused in the criminal complaint case. The accused may be directly or indirectly involved in the case, but there cannot be proforma accused or formal accused in a criminal case. On a perusal of order passed on 16.8.2005 by Judicial Magistrate First Class, Jabalpur, I found that the Court was of the opinion that no case was made against the Chief General Manager and the Government of India and they were discharged. Thereafter, the trial Judge passed the order on 12.12.2005. It has been disclosed by the respondent/complainant that Chief General Manager of the State Bank of India has been made an accused because he may furnish the details of posting of other accused and since, no

criminal action can be taken against the Government of India, therefore, the Government of India has been impleaded as a party. This type of implication of persons or the Government of India was totally against the law.

12. On a perusal of record of the cases of the trial Court, I found that no effort has been made by the trial Judge to ask the complainant to amend both the complaints. No enquiry was made at the time of filing complaints as to why the Chief General Manager of State Bank of India, Government of India and Anil Kumar Purwar have been impleaded as accused or party and what is the meaning of a party in a criminal case. On 25.2.2005 one complaint was filed and on 5.4.2005 another complaint was filed and without going through the records of complaint cases and without considering the necessity of implication of these parties, the cases were fixed for recording of the statement of the complainant under Section 200 of the Code. No doubt, as soon as the complaint is filed, the complainant and his witnesses present on that day, should be examined under Section 200 of the Code, but it does not mean that the Courts are precluded from going through the complaints and asking the complainant as to why any of the parties have been included in the complaint.

13. It is also apparent from the order sheets of both the cases that the trial Judge made no efforts to ask the complainant to amend the complaints so that the complaints may be filed in proper form, which have actually been in the form of writ petitions. At several places, the complaint disclosed the accused persons as defendants, but their cannot be any defendant in a criminal case. It appears that probably the complainant was not knowing the difference between the accused and the defendants, but it was the duty of the trial Judge to ask the complaint to rectify the defects, but the trial Court, instead of taking pains in this respect, recorded the statements of complainant and his witness and thereafter, registered the crime.

14. Whenever a criminal complaint is filed, it is duty of the trial Magistrate to see as to whether the criminal complaint is filed in proper form and whether any person has been made accused improperly or illegally. It means the person, according to the complainant, committed the offence, can be impleaded as an accused. On a perusal of both the complaints, I found that the trial Magistrate has totally failed to perform its duties and instead, passed the orders of registration of the complaint case.

15. If both the complaints were drafted by the complainant then it can be said that he may be able to draft the writ petitions, but he is not able to draft criminal complaints and because of that, there are lot of mistakes in both the complaints, but it is not clear as to why the trial Magistrate registered the complaints and amalgamated another complaint in present form.

16. Now this matter can be considered on merits. The learned counsel for the petitioners contended that first of all, the subject matter of both the complaints is different and, therefore, it was not proper to amalgamate both the complaints. It has been further contended that the complaint filed on 25.2.05 relates to the

atrocities which began on 3.11.1987 and at that time, the Act, was not in force and, therefore, even if the complaint was filed after coming this Act into force, it has got no retrospective effect and, therefore, on the basis of that complaint, no cognizance could have been taken under the Act. It has been further contended that from a perusal of both the complaints, no *prima-facie* offence under the Act is made out and, therefore, the trial Court has wrongly taken the cognizance under various Sections of the Act and in these circumstances, it is an example of rarest of the rare cases where, the inherent powers under Section 482 of the Code may be exercised.

17. Lastly, it has been contended that the trial Magistrate discharged several accused vide order dated 16.8.2005, but the Sessions Court allowed the revision and thereafter, the cognizance was taken by the trial Magistrate vide order dated 12.12.2005 against those accused also who were discharged earlier and since the review of the order is not permissible under the Code, therefore, the cognizance taken by the Court below against those accused, was erroneous and illegal also.

18. The learned counsel for respondent No.1 argued that there is sufficient material in both the complaints for taking cognizance against the petitioners. The statements of witnesses were also recorded and if the cognizance was taken by the Court below, no illegality has been committed by the trial Magistrate. It has been further contended that the respondent submitted the written arguments and it is clear from the written arguments that a *prima-facie* case is made out against all the petitioners and the trial Court was justified in taking cognizance against all these petitioners.

19. The last argument of the learned counsel for the petitioners can be considered first. The learned counsel for the petitioners referred the order dated 16.8.2005 passed in Criminal Complaint Case No.50/05 and submitted that the accused Nos.1, 3, 5 to 11 were discharged by the Court below and the cognizance was taken against the accused Nos.2 and 4 only. It has been contended that this order was changed by the Court below and the order dated 12.12.2005 was passed by which the cognizance was taken against those accused also, who had been discharged by the trial Court. He placed reliance on the case of *Subramanium Sethuraman* vs. *State of Maharashtra* AIR 2004 SC 4711, in which it has been laid down that there is no provision under the Code to review the order.

20. It is apparent from the record of the Court below that the trial Magistrate took the cognizance against few accused and discharged the other accused vide order dated 16.8.2005. The revision was preferred against this order by the respondent No.1 and the revisional Court passed the order on 17.10.2005 in Criminal Revision No.294/05 and it was ordered that no grounds for discharge against the accused Nos.1, 2, 5 to 11 have been disclosed by the Court below and in these circumstances, the order cannot be sustained. It was also directed by the revisional Court that a clear order shall be passed in respect of the accused who had been

discharged, after hearing the arguments. The order of the revisional Court was clear and appropriate directions were issued to Court below. It appears from the order dated 12.12.2005 passed by trial Magistrate that the Magistrate could not follow the order of revisional Court and instead of giving sufficient and cogent reasons for discharge of several accused, the trial Magistrate re-appreciated the facts of the case including the evidence and took the cognizance against those accused, who were discharged earlier. On a perusal of orders dated 16.8.2005 and 12.12.2005, it is ample clear that the trial Magistrate passed a review order and took the cognizance against those accused, who were discharged earlier, which was not permissible at all under the provisions of the Code. It appears that the trial Magistrate has totally failed to follow the order of revisional Court. How the trial Magistrate came to contradictory findings in respect of those accused persons, who were discharged earlier, on the basis of similar set of facts of both the complaints and the evidence recorded under Sections 200 and 202 of the Code, it is not clear. In these circumstances, the order dated 12.12.2005 passed by the trial Magistrate, was totally illegal in respect of those accused persons, who were discharged vide order dated 16.8.2005.

21. It appears from the complaint dated 25.2.2005 that it was filed in another Court, but it was handed over back by the District Judge, Jabalpur vide order dated 25.1.2005 with a direction that it may be presented before the competent Court and thereafter, this complaint was filed in the Court of Judicial Magistrate First Class on 25.2.2005 without making any changes. In this complaint, it has been disclosed that the episode of atrocities began on 3.11.1987, when the complainant (wrongly mentioned as plaintiff) was arrested in a false case. Thereafter, in paragraph 1.2, of the complaint, no dates of various criminal acts of the accused persons have been disclosed. In paragraph 1.3, the facts of discharge of respondent No.1 and subsequent facts have been disclosed. The complaint filed on 5.4.05 also discloses various facts which have taken place in the year 1987. The order dated 16.8.05 for taking cognizance against few accused and discharging the remaining accused and the order dated 12.12.05 for taking cognizance against all the petitioners/accused passed by the trial Magistrate indicate that after considering the incidents which occurred in the year 1987, the cognizance was taken.

22. The Act came into force on 10th January, 1990 in which various offences have been provided with an object to check and deter crimes against the persons belonging to Scheduled Castes/Scheduled Tribes. Before 10th January, 1990, there was no such legislation to prevent the offences committed against the persons belonging to Scheduled Castes/Scheduled Tribes except the Protection of Civil Rights Act, 1955 and the Indian Penal Code. Therefore, the offences committed against the members of the Scheduled Castes/Scheduled Tribes before 10th January, 1990, cannot be tried under the Act even if the cases were filed before or after 10th January, 1990. Since, the provisions of the Act were not

applicable to try the criminal acts committed by the persons other than the members of Scheduled Castes or Scheduled Tribes before 10th January, 1990, therefore, no cognizance could have been taken upon the complaint in respect of criminal acts committed before 10th January, 1990 even though, the complaint was filed after the Act came into force. This aspect was not considered by the Court below and took the cognizance of those acts, which are said to have been committed prior to 10th January, 1990 and, therefore, the order of taking cognizance on the basis of those acts under the Act, was totally erroneous and illegal.

23. As far as the objection in respect of amalgamation of both the complaints is concerned, I found after persual of both the complaints that the various allegations in respect of petitioner Nos.1 to 3 have been disclosed in the complaint filed on 25.2.05 and the complaint filed on 5.4.05 and those facts are almost identical and, therefore, the order dated 16.8.05 passed by the trial Court for amalgamation of both the complaints was not erroneous.

24. The learned counsel for the petitioners referred the cases of *State of Orissa and another v. Saroj Kumar Sahoo,* (2005) 13 SCC 540, *State of Haryana and others v. Ch. Bhajan Lal and others* AIR 1992 SC 604 and *M/s. Zandu Pharamaceutical Works Ltd. and others, v. Md. Sharaful Haque and others,* AIR 2005 SC 9 and argued that this is a case where the inherent powers under Section 482 of the Code can be exercised. In these cases, it has been laid down by the Apex Court that the powers under Section 482 of the Code can be exercised in rarest of the rare cases to prevent abuse of the process of Court and to otherwise secure the ends of justice or to give effect to an order under the Code. In the case of *State of Haryana and others* (supra), several examples have been quoted in which the inherent powers can be used and it has also been laid down that the powers should be exercised sparingly.

25. On a perusal of both the complaints, this Court finds that the criminal complaints have been filed on several grounds, but main grounds are that a false report was lodged against the respondent No.1 and when the charge-sheet was filed in the Court, the respondent No.1 was discharged. There was no sufficient evidence to initiate departmental proceedings and without obtaining report of handwriting expert, the departmental enquiry was initiated. The order passed in the departmental enquiry of dismissal of the respondent No.1 was erroneous, which was set aside by the High Court and thereafter, the same order was again passed against the respondent No.1. Some of the petitioners submitted ill-intended and hypothetical opinions for the dismissal of respondent No.1. A malicious prosecution was initiated against the respondent No.1 by the petitioners. Some of the petitioners were indulged in conspiracy against the respondent No.1. The respondent No.1 is member of Scheduled Caste and the petitioners committed various criminal acts against the respondent No.1, therefore, they committed the offences punishable under the Act.

26. There are allegations against the In-charge Police Station, Barhi District Katni, who was Investigating Officer of the criminal case filed against the respondent No.I and in which he was discharged, but since this is not the petition on behalf of In-charge Police Station, Barhi, therefore, it would not be proper to state and consider various allegations made against him in both the complaints.

27. If a report is lodged before any police authority, the competent police authority will investigate the case and then register the case and if in the opinion of the police officer, there are grounds for registration of the crime, he can register the crime straightaway without recording the evidence. But, this cannot be a position where a criminal complaint has been filed before the Court. In this regard, the provisions of Section 200 of the Code runs as follows:

> "S.200. A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:
>
> Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -
>
> (a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or
>
> (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192:
>
> Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

28. According to provisions of Section 200 of the Code, where a complaint is filed, the Magistrate has to examine the complainant and the witnesses present on that day on oath and the substance of such examination shall be reduced to writing, though the exceptions have been provided under proviso (a) and (b) of this Section. The respondent No.I does not come under these provisos. It is mandatory under this Section that the complainant and witnesses shall be examined though the examination of all the witnesses is discretionary except the cases, triable by Court of Session in order to decide whether the process has to be issued under Section 204 of the Code. It means the Magistrate was empowered to take the cognizance only on the basis of statements of complainant and his witnesses.

29. The provisions of Section 200 of the Code indicate that mere allegations made in the complaint are not sufficient to take cognizance and only after recording of the statements of the complainant and witnesses, if any, the Magistrate can take the cognizance. It means the statements of complainant and witnesses can

only be the basis for taking cognizance. Though, only substance has to be recorded at the time of examination of the complainant and the witnesses, but it does not mean that the important details of the criminal acts or ingredients of the offence shall not be disclosed in the statements. On the basis of statements of complainant and the witnesses, if the Magistrate finds that a prima-facie case is made out for the issue of process, then the process can be issued under Section 204 of the Code. On a perusal of the provisions of Sections 200, 202 and 204 of the Code, it becomes clear that for the issuance of process, the evidence is required and the evidence must disclose a prima-facie case against the accused.

30. The complainant filed 15 pages long complaint on 25.2.05 and the statement of complainant was completed within 4 pages and the statement of his witness was completed within one-page. Another 45 pages long complaint was filed on 5.4.05 and the statement of respondent No.1 was completed within 5 pages and the statement of his witness ended within two pages. The statement of complainant was recorded on 1.3.05 in first complaint and his statement was recorded on 13.4.05 in second complaint, but without showing any reason in the order sheets of both the complaint cases, the complainant was re-examined on 2.4.05 and 17.5.05, respectively. Why it was done, it is not clear from the order sheets dt-2.4.05 and 17.5.05. It has been disclosed in the order sheets dated 1.3.05 of first complaint and 13.4.05 of second complaint that the statement of complainant was recorded and then both the cases were fixed for recording of remaining evidence of complainant, but the remaining evidence of the complainant does not mean that there was necessity of recording of remaining evidence of complainant himself. It means the evidence of remaining witnesses of the complainant shall have to be recorded. If the statement of the complainant was incomplete on 1.3.05 and 13.4.05, then it should have been disclosed clearly in the order sheets. The order sheets clearly show that the statement of the complainant was complete on 1.3.05 and 13.4.05. It appears that the statement of complainant was recorded for the second time with an intention to fill up the lacunas, which was not proper at all.

31. Even if both the statements of respondent No.1 recorded on different dates in both the complaint cases are taken into consideration, I found that he has stated general facts about the various incidents. It has not been disclosed specifically as to how it can be inferred that the acts of petitioners were malafide or ill-intended or they committed criminal acts with an intention to dismiss the respondent No.1 from the service because he belongs to Scheduled Caste. The Court recorded the statement of respondent No.1 for the first time in both the complaint cases and on a perusal of that part of statement, this Court finds that nothing has been specifically disclosed against the petitioners so that it can be inferred prima-facie that they committed the offences punishable under the Act or any other Act. Mere general allegations are not sufficient to make out a *prima-facie* case. It was for the respondent No.1 to disclose specific facts in his statements which have been disclosed in both the complaints. On a perusal of

second part of both the statements of the complainant recorded afterwards, I found that only different documents have been exhibited, but mere exhibition of documents is not sufficient to make out a prima-facie case in absence of disclosure of specific acts of the accused. Therefore, the second part of both the statements of the complainant are also not sufficient to make out a *prima-facie* case against the petitioners under the Act or any other Act.

32. If the report was lodged against the respondent No.1 and he was discharged in the case, the mere assertion of the fact of discharge is not sufficient to make out a case. It has to be shown through oral evidence supported by documentary evidence that how the report was false. Only this fact that the respondent No.1 was discharged, it does not mean that the report was false. The complainant also failed to establish *prima-facie* that the Court discharged the respondent No.1 after coming to the conclusion that the report was false.

33. It is not clear from both the statements of the complainant that the departmental proceedings were initiated malafidely and mere disclosing this fact in the complaint that the departmental enquiry was initiated falsely with an intention to punish the person belonging to Scheduled Castes, does not mean that the offence is *prima-facie* made out. It was for the complainant to disclose in the statement as to how the departmental proceedings were ill-intended or false.

34. If any matter is not sent to handwriting expert for examination of signature, thumb impression or handwriting, it does not mean that the case and departmental proceedings have been filed to punish the accused/delinquent for committing forgery, are false. In every case, it is not necessary to send the matter to handwriting expert and the question of sending or not sending the matter to the handwriting expert depends upon case to case. If the Disciplinary Authority, in this matter, was of the opinion that on the basis of other evidence, the charges can be proved against the respondent No.1, it was not at all necessary to send the matter to the handwriting expert. Though, the respondent No.1 was punished in the departmental enquiry, but even if a person is exonerated in the enquiry for want of report of handwriting expert, it does not mean that the enquiry was false. Therefore, it was for the complainant to state in his statement as to how the enquiry was false, but he failed to disclose all the grounds in his statement.

35. The writ petition was filed in the High Court against the order of dismissal after rejection of departmental appeal in which the order of dismissal was altered to removal from service. Both the parties preferred letters patent appeal. The matter was remitted back to the Disciplinary Authority to re-consider the case of the respondent No.1 after providing an opportunity of hearing to him. In both the orders of the High Court, there was no finding that the departmental enquiry was initiated with an ulterior motive to punish the respondent No.1 knowing fully well that he belongs to the Scheduled Castes category. In these circumstances, the order passed in letters patent appeal cannot be a ground for initiating the criminal proceedings against the petitioners.

36. The respondent No.1 could not establish prima-facie from his statements recorded in both the complaint cases under Section 200 of the Code that a false report was lodged against him or the false allegations were made against him. It could not be prima-facie established also that the departmental enquiry was initiated on the basis of false allegations and that too with an ulterior motive or the officers recommended the initiation of departmental enquiry or the order of dismissal was passed without any evidence and that too with an ulterior motive. Since, all these facts could not be established *prima-facie* by respondent No.1 through both the statements, therefore, the order of the trial Court of taking cognizance against the petitioners, was illegal and erroneous.

37. In both the complaint cases, the statement of Pramod Kumar Agrawal was recorded on different dates. On a perusal of both the statements of this witness, I found that instead of trying to support the contention of the complainant, this witness tried to disclose various facts related to him and it is a matter of surprise that in one case, the document Ex.P/27 was taken into evidence to show that this document is forged, whereas, it was not related to the case of complainant or it was not filed by the complainant in support of his complaint.

38. On a perusal of the statements of respondent No.1 and Pramod Kumar Agrawal recorded in both the complaint cases, it appears that the trial Judge was having no control over the proceedings and whatever the respondent No.1 and his witness wanted to disclose the facts, the trial Court recorded those facts. It is duty of the Magistrate to control the proceedings of its Court. The Presiding Officer of the Court cannot sit in the Court with closed mouth and without applying his mind. Both the complaints filed in the Court of Judicial Magistrate First Class and the statements of complainant and his witness recorded in both the cases, clearly disclose that from the first date of hearing till the last date of hearing, the Magistrate failed to apply her mind and at the time of recording of evidence, kept mum and it appears that the party was controlling the proceedings of the Court, which is highly objectionable. If the mind would have been applied properly by the Magistrate, both the complaints could have not been filed in present form. If the Magistrate would have controlled the proceedings, such type of statements of complainant and his witness could have not been recorded. It is a duty of the Judge to control the proceedings of the Court since beginning of the case and pass appropriate orders in accordance with the facts and law. This case is an example of non-application of mind where the trial Magistrate discharged some of the petitioners and thereafter, without going through the order of the revisional Court, took the cognizance against other petitioners also whereas, it was not directed by the revisional Court. The trial Magistrate took the cognizance on the basis of similar set of allegations, facts and evidence, therefore, committed a mistake. The Magistrate also passed the order of taking cognizance against the petitioners, was also against the law because, review of the order in criminal cases is not permissible.

39. The complaints, filed by the respondent No.1 and his statements and the statement of his witness recorded in both the complaint cases, were not sufficient to make out a *prima-facie* case against the petitioners under various Sections of the Act. There is no sufficient evidence in both the cases to take cognizance against the petitioners under the Act. It appears that the Magistrate took the cognizance against the petitioners on the basis of complaints and not on the basis of statements of complainant and his witness and this is totally against the provisions of Sections 200 and 202 of the Code.

40. It appears from the order dated 16.8.05 that the Magistrate vide order dated 16.8.05 took the cognizance against some of the accused persons under Sections 3(l)(8) and 3(l)(9) of the Act, but this order was reconsidered and the cognizance was taken against those accused under Sections 3(2)(2) and 3(2)(v) of the Act apart from above mentioned Sections. Such reconsideration of previous order was illegal.

41. This Court is of the view that even if the facts of both the complaints and the statements of the respondent No.1 and his witness are taken into consideration as it is, no offence under the above mentioned Sections and under Section 4 of the Act would be *prima-facie* made out. The trial Court also took the cognizance under Section 8(b) of the Act, but this Section does not provide punishment and it only provides presumption as to the offences.

42. There were no sufficient allegations to make out a *prima-facie* case under various Sections of the Act against the petitioners on the basis of both the complaints, statements of the complainant and his witness. Apart from this, on the basis of acts committed before the enforcement of the Act, no case can be registered on the basis of those allegations even though, the complaint is filed after the commencement of the Act. In view of all these facts, this Court is of the opinion that the order of taking cognizance against the petitioners by the trial Magistrate was erroneous and illegal. Since, no offence is made out against the petitioners on the basis of allegations made in the complaints and the statements of complainant and his witness, the case falls under the category of rarest of the rare cases and if the cognizance was taken, it would amount to abuse of the process.

43. For the aforesaid reasons, the petition filed under Section 482 of the Code is allowed and the proceedings of complaint case No.50/05 with the proceedings of amalgamated complaint case, are quashed and the order passed by the Court below of taking cognizance against the petitioners, is set aside and consequently, the petitioners are discharged.

Petition allowed.
